Court File No. M52498

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ANTHONY WHITEHOUSE and CARRIE COUCH, JASON COUCH

Plaintiffs
(Moving Parties)

and

BDO CANADA LLP

Defendant
(Responding Party)

MOVING PARTIES' FACTUM
(RE MOTION FOR LEAVE TO APPEAL)

June 10, 2021

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PART I - INTRODUCTION

1. The moving parties seek leave to appeal a decision denying certification of a class action alleging auditors' negligence on behalf of a group of investors in Crystal Wealth, a mutual fund company that was looted by fraud.

2. The issue on this proposed appeal is whether it is plain and obvious that an auditor owes no duty of care to investors in mutual funds in connection with the preparation of audited financial statements that are addressed directly to "unitholders" (*i.e.*, investors) in the mutual funds.

3. The Courts below refused to certify the class action against Crystal Wealth's auditors because they held that it is plain and obvious that an auditor owes no duty of care to investors in connection with negligently-prepared statutory audits. This is a pure question of law.

4. In reaching their conclusion, the Courts below took an overly categorical approach to determining whether an auditor owes a duty of care to investors, contrary to the Supreme Court of Canada's caution in *Livent.* They drew a firm line between audits prepared for a specific purpose, which they found give rise to a duty of care to investors, and periodic statutory audits, which they found do not. They ignored the variety of types and circumstances of periodic statutory audits.

5. This categorical approach led the Divisional Court to dismiss as conclusory the pleaded facts, including (i) that one of the purposes of the audits was to "allow investors in the Funds to assess the performance of the Funds and fairly value and/or evaluate their investments and to make investment decisions", and (ii) that BDO intended for the unitholders to rely on its audits.

6. The Divisional Court erred by failing to accept those pleaded facts as true. Those facts were not incapable of proof. To the contrary, not only were BDO's opinions addressed directly to the unitholders, but its engagement letters with Crystal Wealth provide specifically that the unitholders could rely on its audit opinions.

7. By taking an overly categorical approach and failing to engage sufficiently with the pleaded facts, the Divisional Court erred. It failed to consider all the variables necessary to determine whether BDO and the unitholders were in a relationship of sufficient proximity to ground a duty of care.

8. If the pleaded facts are accepted as true for the full duty of care analysis mandated by *Livent,* it cannot be said that it is plain and obvious that the claim discloses no cause of action.

9. If allowed to stand, the effect of the Divisional Court's decision will be that it is plain and obvious that an auditor owes no duty of care to investors in connection with a periodic statutory audit. That would be a significant development in the law of auditors' negligence that impacts the investing public in Ontario. The decisions of the Courts below should not be allowed to stand, and certainly not without review by this Court.

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.[1]

11. The moving parties, Carrie and Jason Couch, are spouses. They invested their entire life savings of nearly $600,000 in three of the Funds.[2] As of the date of their September 2019 affidavits, the Couches had received only $104,410.10 in distributions from the Receiver.[3]

12. The Couches are the proposed representative plaintiffs[4] 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**").[5]

B. Crystal Wealth

13. Crystal Wealth marketed itself as a discretionary portfolio management firm that specialized in creating and managing alternative investment strategies outside of traditional stock

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[1] Reasons for Decision, at para. 20, **Motion Record,** Tab 3, p. 17.
[2] Reasons for Decision, at para. 12, **Motion Record**, Tab 3, p. 16.
[3] Affidavit of Carrie Couch sworn September 18, 2019, at para. 10, **Motion Record,** Tab 15, p. 651. Further distributions have been made to Crystal Wealth unitholders since that date, including as a result of a settlement of an action between Crystal Wealth and BDO.
[4] Anthony Whitehouse has discontinued his claim against BDO, and no longer seeks to be appointed as a representative plaintiff in this proceeding.
[5] Amended Statement of Claim amended November 13, 2019, at para. 1(a)(i) ("**Amended Statement of Claim**"), **Motion Record**, Tab 6, p. 61.

and bond portfolios.[6] It was registered with the OSC as an: (a) Exempt Market Dealer, (b) Investment Fund Manager, (c) Portfolio Manager, and (d) Commodity Trading Manager.[7]

14. From 2007 to 2017, Crystal Wealth created, marketed and managed proprietary funds, structured as open-ended mutual fund trusts.[8] Units in the funds were distributed to unitholders on an exempt-market basis, pursuant to offering memoranda.[9]

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

16. 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**").[12]

17. 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.[13] Again, however, that amount turned out to be materially overstated.

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[6] Reasons for Decision, at para. 6, **Motion Record**, Tab 3, p. 16.
[7] Reasons for Decision, at para. 6, **Motion Record**, Tab 3, p. 16.
[8] Reasons for Decision, at para. 8, **Motion Record**, Tab 3, p. 16.
[9] Reasons for Decision, at para. 8, **Motion Record**, Tab 3, p. 16.
[10] Reasons for Decision, at para. 14, **Motion Record**, Tab 3, p. 17.
[11] Reasons for Decision, at para. 14, **Motion Record**, Tab 3, p. 17.
[12] Reasons for Decision, at para. 16, **Motion Record**, Tab 3, p. 17.
[13] Reasons for Decision, at para. 16, **Motion Record**, Tab 3, p. 17.

18. 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.[14]

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

19. 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.[15]

20. 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**").[16]

21. 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.[17]

22. In addition, BDO had access to a repository of unitholder data that included unitholder names, contact information, and holdings in the Funds.[18] BDO also knew that its audits would be

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[14] Reasons for Decision, at para. 17, **Motion Record**, Tab 3, p. 17.
[15] *Securities Act*, R.S.O. 1990, c. S.5, ss. 78-79; *Investment Fund Continuous Disclosure*, OSC NI 81-106, Part 2, s. 2.7(3).
[16] Reasons for Decision, at para. 22, **Motion Record**, Tab 3, pp. 17-18.
[17] See, for example: Confidential Offering Memorandum for Crystal Wealth Media Strategy dated September 27, 2015, at p. 4, **Motion Record**, Tab 8A, p. 108; Excerpts from the Transcript from the cross-examination of Anthony Whitehouse held October 31, 2019, q. 179, pp. 31-32, **Motion Record**, Tab 8, pp. 106-107.
[18] Amended Statement of Claim, at para. 67, **Motion Record**, Tab 6, p. 77.

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.[19]

23. BDO intended that the unitholders would rely on its audits. 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**."[20] Critically, the assurance reports in the financial statements were addressed directly to the "Unitholders" of the Fund in question.[21]

24. BDO's clean audit opinions were contained in all of the financial statements for the Funds that were addressed directly to unitholders.[22] In each instance, BDO opined that the annual financial statements were free from material misstatement.[23]

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

25. 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.[24]

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[19] Amended Statement of Claim, at para. 64, **Motion Record**, Tab 6, p. 76.
[20] Engagement Letter between BDO Canada LLP and Crystal Wealth Management System Ltd. dated December 21, 2016, at p. 7, **Motion Record**, Tab 17A, p. 661 (emphasis added).
[21] 2015 Financial Statement for Media Fund, **Motion Record**, Tab 12A, pp. 441.
[22] See, for example: 2015 Financial Statement for Media Fund, **Motion Record**, Tab 12A, p. 441.
[23] Reasons for Decision, at para. 22, **Motion Record**, Tab 3, pp. 17-18.
[24] Reasons for Decision, at para. 25, **Motion Record**, Tab 3, p. 18.

26. 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**").[25] 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.[26]

27. 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.[27]

28. 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".[28]

29. 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 some 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.[29]

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[25] Reasons for Decision, at para. 26, **Motion Record**, Tab 3, p. 18.
[26] Reasons for Decision, at para. 27, **Motion Record**, Tab 3, p. 18.
[27] Reasons for Decision, at para. 43, **Motion Record**, Tab 3, p. 20.
[28] Second Report of the Receiver dated November 24, 2017 (without appendices), at para. 32, **Motion Record**, Tab 8C, p. 264; Reasons for Decision, at para. 29, **Motion Record**, Tab 3, p. 18.
[29] Fourth Report of the Receiver dated July 20, 2018 (without appendices), at paras. 78(c), 101(l), **Motion Record**, Tab 14A, pp. 567, 577; Second Report of the Receiver dated November 24, 2017 (without appendices), at para. 29, **Motion Record**, Tab 10C, p. 280.

30. The directing mind of Crystal Wealth ultimately 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.[30]

31. 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.[31]

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

32. 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**").[32] In an affidavit filed in support of the application, the OSC's investigator identified numerous, significant issues with BDO's auditing.[33]

33. 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 generally accepted auditing standards ("**GAAS**").[34] After the Receiver was appointed, it obtained access to the books and records of Crystal Wealth and the Funds. The

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[30] Settlement Agreement between the Ontario Securities Commission and Clayton Smith dated May 28, 2018, at paras. 22, 28-29, 32-33, **Motion Record**, Tab 11A, pp. 415-418; Reasons for Decision, at para. 34, **Motion Record**, Tab 3, p. 19.
[31] Reasons for Decision, at para. 31, **Motion Record**, Tab 3, p. 19.
[32] Affidavit of Marcel Tillie sworn April 17, 2017, at paras. 26-28, **Motion Record**, Tab 10A, pp. 165-166.
[33] Affidavit of Marcel Tillie sworn April 17, 2017, at paras. 40-46, **Motion Record**, Tab 10A, pp. 169-171.
[34] Statement of Allegations in the Matter of BDO Canada LLP dated October 12, 2018, **Motion Record**, Tab 13A, pp. 466.

Receiver quickly discovered that the documentation of Crystal Wealth was insufficient to support the reported NAVs of the Funds. [35]

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

34. 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.[36] However, the amounts recovered (including from a settlement of a claim brought by the Receiver against BDO) leave a shortfall of tens of millions of dollars, as compared to the reported NAVs of the Funds.[37] 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."[38]

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

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[35] First Report of the Receiver dated June 22, 2017 (without appendices), at paras. 25, 94, **Motion Record**, Tab 10B, pp. 277, 303.
[36] Reasons for Decision, at paras. 70-71, **Motion Record**, Tab 3, p. 23.
[37] Reasons for Decision, at para. 71, **Motion Record**, Tab 3, p. 23.
[38] Fourth Report of the Receiver dated July 20, 2018 (without appendices), at paras. 4-5, **Motion Record**, Tab 14A, p. 527. 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), **Motion Record**, Tab 18A, p. 680. To date, amounts that the Receiver has distributed to unitholders is exclusive of any amounts from BDO.

36. Without BDO's negligent audits, unitholder losses would have been limited and, in some cases, prevented.

G. The Pleading

37. The Amended Statement of Claim pleads 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;[39]
- BDO specifically addressed each of its audit reports to the "Unitholders" of the particular Fund that it was auditing;[40]
- BDO knew and intended that the unitholders receive each audit report and rely on it in making investment decisions;[41]
- 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;[42]
- BDO knew or ought to have known the identities and contact information of Unitholders;[43]
- BDO knew or ought to have known that some or all Class Members knew that BDO was the auditor of the Funds;[44]
- 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;[45]
- 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

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[39] Amended Statement of Claim, at paras. 64, 68(c), **Motion Record**, Tab 6, pp. 76-77.
[40] Amended Statement of Claim, at para. 64, **Motion Record**, Tab 6, p. 76.
[41] Amended Statement of Claim, at paras. 64, 67, **Motion Record**, Tab 6, pp. 76-77.
[42] Amended Statement of Claim, at paras. 63, 67, 68(a), 68(d), **Motion Record**, Tab 6, pp. 76-77.
[43] Amended Statement of Claim, at para. 68, **Motion Record**, Tab 6, p. 77.
[44] Amended Statement of Claim, at para. 68(b), **Motion Record**, Tab 6, p. 77.
[45] Amended Statement of Claim, at para. 68(e), **Motion Record**, Tab 6, p. 78.

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.[46]

H. The Motion Judge's Decision

38. 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 it was "plain and obvious" that BDO did not owe a duty of care to the unitholders of the Funds.[47]

39. 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.

40. 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."[48]

41. In short, the motion judge determined that the *Hercules* and *Lavender* decisions establish that there is no duty of care owed to investors arising from a statutory audit. That conclusion, however, was erroneously overbroad. Neither *Hercules* nor *Lavender* considered statutory audits, addressed to investors/unitholders, who (as will be discussed in more detail below) had no role in supervising management.

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[46] Amended Statement of Claim, at paras. 77-79, **Motion Record**, Tab 6, p. 83.
[47] Reasons for Decision, at paras. 4, 94, **Motion Record**, Tab 3, pp. 17, 27; *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("***CPA***").
[48] Reasons for Decision, at para. 130, **Motion Record**, Tab 3, p. 34.

I. The Divisional Court's Decision

42. The Divisional Court upheld the motion judge's decision to deny certification. The Divisional Court accepted the motion judge's finding that the alleged undertaking of BDO "arises out of the requirement for annual audit reports under the *Securities Act*", with the result that BDO did not owe a duty of care to investors.[49]

43. The Divisional Court reached that conclusion by parsing the specific wording in the Amended Statement of Claim. In particular, the Divisional Court focused heavily on the use of the word "[a]ccordingly" at the beginning of paragraph 62 of the Amended Statement of claim, which pleads that BDO undertook its audits for two purposes, including "to allow investors in the Funds to assess the performance of the Funds and fairly value and/or evaluate their investments and to make investment decisions."

44. Rather than accepting as true the pleaded purpose of the audits, the Divisional Court concluded that the pleaded purpose was conclusory because of the use of the word "accordingly" at the beginning of paragraph 62 of the Statement. The Divisional Court similarly rejected as conclusory the pleading that BDO intended for unitholders to rely on its audits to make investment decisions, even though it acknowledged that such an intention could "found a basis from which an undertaking might be inferred".[50]

45. The Divisional Court then held that the law has been well-settled since *Hercules* that a statutory requirement to provide annual audits was (on its own) insufficient to ground a duty of care owed by an auditor to investors, and upheld the motion judge's decision on this basis.

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[49] Reasons of Decision, at para. 46, **Motion Record**, Tab 3, p. 20.
[50] Reasons of Decision, at paras. 46, 48 and 51, **Motion Record**, Tab 3, p. 20-21.

46. *Hercules*, however, does not say that a statutory audit requirement negates such a duty of care where there are other circumstances that could be sufficient to ground such a duty. The Divisional Court failed to acknowledge this, as well as the impact of the pleaded facts that it expressly held could be sufficient establish the requisite undertaking in this case.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

47. The sole issue on this motion is whether leave should be granted to appeal the Order of the Divisional Court, which upheld the decision of the motion judge to deny certification the proposed class action.

48. Leave to appeal from a final decision of the Divisional Court may be granted in cases that present an arguable question of law on the interpretation, clarification or propounding of a general rule or principle of law. This Court may also grant leave where special circumstances make the matter one of public importance, or where it appears to be in the interest of justice for leave to be granted.[51]

49. Leave to appeal should be granted, both (a) because there is an arguable question of law relating to the clarification or propounding of a general rule or principal of law; and (b) because the proposed appeal involves a question of public importance.

50. The proposed appeal raises a pure question of law relating to the existence (or not) of a duty of care owed by auditors to investors in mutual funds in connection with statutory audits. As the motions judge held in a separate case (after releasing his decision in this matter), the "matter of an auditor's duty of care and the scope of that duty of care to investors as distinct from the

[51] *Sault Dock Co. v. Sault Ste. Marie (City)*, 1972 CanLII 572 (CanLII).

auditor's duty of care to the audit client is a contentious legal issue that depends on whether a proximate relationship has been established in the circumstances of the particular case."[52]

51. Despite the fact that an auditor's duty of care to investors remains a "contentious legal issue", the Courts below found that it was plain and obvious that no such duty exists in this case. In so doing, they committed a legal error that will have a profound impact on the investing public in Ontario. If allowed to stand, that decision will mean that auditors do not owe investors a duty of care in connection with statutory audits. That would be a significant development in the law of auditors' liability, and it should not be allowed to stand without review by this Court.

A. The Divisional Court Committed an Arguable Error of Law by Denying Certification

52. The Courts below denied certification solely under section 5(1)(a) of the *Class Proceedings Act* because they found that the Statement of Claim disclosed no cause of action. They held that it was plain and obvious that BDO owes no duty of care to the proposed Class.

53. Whether a pleading discloses a viable cause of action is purely a question of law, reviewable on the standard of correctness.[53]

54. The Divisional Court erred in at least two respects. First, it erred by failing both to read the pleadings generously and to accept the pleaded facts as true. Second, it erred in its duty of care analysis.

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[52] *Excalibur Special Opportunities LP v. SLF LLP*, 2020 ONSC 2793 at para. 38 (S.C.J.).
[53] *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at para. 30.

(a) *The Divisional Court Failed to Accept the Pleading Facts as True and to Read the Pleadings Generously*

55. The first criterion for certification is that the 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*.[54]

56. In this case, the Divisional Court erred in law by failing to apply the "plain and obvious" test. More particularly, the Divisional Court did *not* accept pleaded facts as true, and it did *not* read the pleadings generously in accordance with the objectives of the *CPA*.

57. There is a very low burden to show a cause of action.[55] 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.[56]

58. The "plain and obvious" test requires the court to accept the material facts pleaded as true and to read the statement of claim generously.[57] The allegations in a statement of claim will be accepted as true unless they are patently ridiculous or incapable of proof.[58] Bald allegations, speculation, or legal conclusions unsupported by relevant pleadings of fact are incapable of proof.[59] 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.[60]

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[54] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *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.
[55] *Adamson v. Ontario*, 2014 ONSC 3787, 16 C.C.E.L. (4th) 67, at para. 17.
[56] *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158., at para. 25. *Adamson*, para. 17.
[57] *Hollick*, at para. 25; *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118, at para. 26.
[58] *Adamson*, at para. 18; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22; *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273, at para. 2.
[59] *Deluca v. Canada (Attorney General)*, 2016 ONSC 3865, at para. 5; *Imperial Tobacco*, at para. 22.
[60] *Adamson*, at para. 17; see also *Paton Estate*, at para. 12.

59. Novel claims must be a logical and arguable extension of established law, but the law must also be allowed to evolve.[61] The court should err on the side of permitting an arguable claim to proceed to trial.[62]

60. On certification, courts must avoid taking an overly restrictive approach to 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.[63]

61. Significantly in this case, the purpose of an audit is a question of fact based on the evidence adduced at trial.[64] The Divisional Court, however, erred in failing to read the pleading generously, and by failing to accept the pleaded facts as true.

62. In particular, the Divisional Court erred in failing to accept as true the pleaded purpose of the audit and the pleaded intention of BDO in preparing its audits. The Amended Statement of Claim pleads specifically:

(a) that BDO was conducting its audit for the purpose of, among other things, "allow[ing] investors in the Funds to assess the performance of the Funds and/or evaluate their investments and to make investment decisions";[65] and

(b) that "BDO knew and intended for the Class to receive and rely on its audit reports".[66]

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[61] *Adamson*, at para. 17.
[62] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337 at para. 58.
[63] *Hollick*, at para. 15.
[64] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 (CanLII), [2017] 2 SCR 855, at para. 150 (per McLachlin C.J., dissenting in part); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, at para. 71 ("*CIBC v. Deloitte*").
[65] Amended Statement of Claim at para. 62, **Motion Record**, Tab 6, p. 76.

63. These are pleadings of material facts that the Divisional Court was bound to accept as true. Contrary to the holding of the Divisional Court, they are not conclusory statements that are incapable of proof. To the contrary, as noted above, BDO's engagement letters with Crystal Wealth provide specifically that the unitholders may rely on BDO's assurance reports. [67]

64. Indeed, BDO's purpose and intention are supported by other facts pleaded in the Statement of Claim, which the Divisional court ignored. In particular, the Amended Statement of Claim pleads that the "BDO specifically addressed each of its audit reports to the 'Unitholders' of the particular Fund that it was auditing. Accordingly, BDO intended that the Unitholders receive each audit report and rely on it in making investment decisions."[68]

65. The Divisional Court rejected those pleaded facts as "conclusory" based on an overly technical reading of the pleading. Indeed, the Divisional Court dismissed the pleaded purpose of the audit as conclusory based on the placement of a single word ("accordingly") in the Amended Statement of Claim:

> In my view, **the motion judge was correct in his conclusion that the alleged undertaking of the auditor to the unitholders arises out of the requirement for annual audit reports under the Securities Act, as pleaded in paras. 60-61 of the Claim. This is clear from the use of the word "[a]ccordingly" at the beginning of para. 62**, which goes on to plead two alleged "purposes" for the audit. The pleading in para. 62 is conclusory in nature. There are no material facts pleaded to connect the allegation in para. 61, that Crystal Wealth was required by the Securities Act to provide audit reports, to the alleged purposes for these reports in para. 62.

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[66] Amended Statement of Claim at para. 67, **Motion Record**, Tab 6, p. 77.
[67] Engagement Letter between BDO Canada LLP and Crystal Wealth Management System Ltd. dated December 21, 2016, at p. 7, **Motion Record**, Tab 17A, p. 667 (emphasis added).
[68] Amended Statement of Claim at para. 64, **Motion Record**, Tab 6, p. 76.

…

> **There is merely a conclusory allegation, logically unconnected to the premise: Crystal Wealth was required by the Securities Act to prepare audit reports; accordingly, the purpose was to enable unitholders to make investment decisions.** There is no pleading of any material facts which might establish an undertaking by the auditor to the unitholders that the reports should be used for the investor's individual investment decisions.[69] [emphasis added]

66. This laser focus on the word "accordingly" reveals the Divisional Court's overly narrow and restrictive reading of the pleading. While Crystal Wealth was required to file audits under securities laws, that statutory requirement was clearly not pleaded as the sum total of the unitholders' relationship with BDO. Rather, the Amended Statement of Claim pleads other material facts that establish a direct and proximate relationship between BDO and the Class, grounded in BDO's knowledge, intention, and express statement in its engagement letter that the Class Members would (or could) rely on its audits.[70]

67. The Divisional Court's error in applying an improper standard under section 5(1)(a) permeated its reasons. The rest of its analysis was tainted by this error, leading it to conclude erroneously that *Hercules* was a determinative case that robbed the moving parties' claim of any reasonable prospect of success.

68. Had the Divisional Court applied the proper test – accepting the pleaded facts as true and reading the pleading generously – it 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.

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[69] Reasons of Decision at paras. 46 and 48, **Motion Record**, Tab 3, p. 20.
[70] See, for example: Amended Statement of Claim, at paras. 64-68, 77-79, **Motion Record**, Tab 6, pp. 76-77, 83.

B. The Divisional Court Erred in its Duty of Care Analysis

69. In cases of auditors' liability, the existence of a *prima facie* duty of care requires an analysis of both proximity and reasonable foreseeability.[71]

70. *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."[72] 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.[73]

71. The Supreme Court of Canada has cautioned against taking an overly categorical approach to this analysis.[74] 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.[75] The proximity 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".[76]

72. For cases of negligent performance of a service, the defendant's undertaking and the plaintiff's reliance are determinative in the proximity analysis.[77] Any reliance by the plaintiff on

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[71] *Livent*, at paras. 20, 22.
[72] *Livent*, at para. 25, citing *Cooper v. Hobart*, [2001] 3 S.C.R. 537, at paras. 32, 34.
[73] *Livent*, at para. 29; *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729 (CanLII), at para. 60.
[74] *Livent*, at para. 28.
[75] *Livent*, at para. 29; *Lavender*, at para. 61.
[76] *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 24.
[77] *Livent*, at para. 30.

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.[78]

73. *Reasonable foreseeability* exists when an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence.[79] 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.[80] 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.[81]

74. For the purposes of section 5(1)(a) of the *CPA*, in the absence of a full evidentiary record, the court must avoid describing the defendant's undertaking in overly narrow way. This Court recently overturned Perell J.'s decision to deny certification in *Wright v. Horions ETFS Management (Canada) Inc.* because the defendants' undertaking was broader than that found by Perell J.[82] The Courts below committed the same error in this case.

75. 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.

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[78] *Livent*, at para. 31.
[79] *Livent*, at para. 32.
[80] *Livent*, at para. 35.
[81] *Livent*, at para. 35.
[82] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337 at paras. 112 and 117.

76. The appellants pleaded that BDO undertook to conduct its audits specifically to assist investors in making investment decisions.[83]

77. The purpose of the audit is a question of fact.[84] Accordingly, the Divisional Court was required to accept the alleged purpose of BDO's audits as true, unless they were patently ridiculous or incapable of proof. The Divisional Court did not find that the pleaded facts were incapable of proof. It simply found they were conclusory.

78. The Divisional Court narrowly focused on the fact that BDO's audits were statutory audits. It held that the law has been "well settled" since *Hercules* that an annual statutory audit is insufficient to establish a duty of care to investors.[85] In so doing, it took an overly categorical approach to the duty of care analysis, contrary to the Supreme Court of Canada's warning in *Livent*, and it misconstrued the decision in *Hercules*.

79. The statutory audits in *Hercules* were prepared for the purpose of allowing shareholders as a collective to oversee company management and affairs. In the context of the specific facts of that case, the Supreme Court held that the statutory audit was insufficient to establish a duty of care. But the Supreme Court of Canada did *not* foreclose that an audit could have more than one purpose, and that those purposes could support the existence of a duty of care owed by auditors to investors.

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[83] Amended Statement of Claim, at para. 62, **Motion Record**, Tab 4, p. 76.
[84] *Livent*, at para. 150 (per McLachlin C.J., dissenting in part).; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, at para. 71 ("*CIBC v. Deloitte*").
[85] Reasons of Divisional Court at para. 47, **Motion Record**, Tab 3, p. 20.

80. 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".[86] Courts have thus left open the possibility that a statutory audit can have more than one purpose that could ground a duty of care. That is precisely what the moving parties have pleaded, and it is precisely what the motion judge and the Divisional Court ignored.

81. According to *Livent*, the purpose of the defendant's undertaking – *i.e.*, the representation given or the service undertaken – is critical.[87] In the present case, the moving parties pleaded that BDO undertook to provide auditing services, the purposes of which were to allow investors to make informed decisions (about whether to buy, hold, or sell their units), 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.[88]

82. The moving parties further pleaded that they relied – with BDO's knowledge and intention for them to do so – on the precise purpose for which the audits were undertaken.[89] Accordingly, on the facts as pleaded, the appellants' reliance on the audit reports to make their investment decisions was *within* the scope of proximity between BDO and the Class Members.

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[86] *CIBC v. Deloitte*, at para. 68, citing *Hercules*, at paras. 48-51. The *CIBC v. Deloitte* case was an appeal from a partial summary judgment motion decided by Justice Perell in an auditor's negligence case.
[87] *Livent*, at para. 15; *Darmar Farms*, at paras. 65-66.
[88] Amended Statement of Claim, at paras. 64-68, 77-79, **Motion Record**, Tab 6, pp. 76-77, 83, and see also para. 37 of this Factum.
[89] Amended Statement of Claim, at para. 64, **Motion Record**, Tab 6, p. 76.

83. Turning to reasonable foreseeability, the moving parties properly pleaded that BDO knew and intended that investors would rely on it and its audits of the Funds.[90] BDO addressed its assurance reports directly to the "Unitholders" of each Fund, and 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 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.

84. 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.

85. The Couches 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 reviewed the audited financial statements when making investment decisions.[91] There is no evidence that they are unique among unitholders in that regard.

86. 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.

87. Had the Divisional Court read the pleading generously and applied the proper test, it would have accepted as true the pleaded facts in support of a "close and direct" relationship between

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[90] Amended Statement of Claim, at paras. 64, 67, **Motion Record**, Tab 6, pp. 76-77.
[91] Affidavit of Anthony Whitehouse sworn June 15, 20018, at paras. 18, 20, **Motion Record**, Tab 12, p. 435; Affidavit of Carrie Couch sworn September 18, 2019, at paras. 6-7, **Motion Record**, Tab 15, pp. 650-651; see also Amended Statement of Claim, at para. 22, **Motion Record**, Tab 6, p. 69.

BDO and the unitholders, and the unitholders' reliance on BDO's audits for the precise purpose for which they were made.

(a) *The Divisional Court Placed Too Much Emphasis on Hercules*

88. The Divisional Court further erred by relying on *Hercules* for the proposition that an annual statutory audit is insufficient to ground a duty of care. The Divisional Court treated *Hercules* 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.[92]

89. *Hercules* is distinguishable. It was decided on the merits, on a summary judgment motion, in which the parties furnished evidentiary records in order for the court to determine whether the auditor owed a duty of care to shareholders and investors with respect to their investment decisions.[93] Accordingly, *Hercules* did not find that it was "plain and obvious" that no duty of care existed.

90. The Divisional Court, however, relied on *Hercules* as authority that the moving parties had not pleaded a viable cause of action. In doing so, the Divisional Court imposed a more onerous burden on the appellants than they ought to have under section 5(1)(a).[94] This is itself a reversible error.

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[92] Reasons for Decision, at para. 113, **Motion Record**, Tab 3, p. 32.
[93] See *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 SCR 165, at para. 50, and *Lavender*, at paras. 56-57. It is worth noting that *Lavender* was certified as a class proceeding.
[94] See: *Darmar Farms*, at para. 38.

91. In any event, the analysis and holding in *Hercules* does not preclude the appellants' negligence claim against BDO.[95]

92. In *Hercules*, the Supreme Court of Canada concluded that the auditor's purpose in preparing the statutory audits in that case was "to assist the collectivity of shareholders of the audited companies in their task of overseeing management."[96] The Court considered the appellant shareholders' submission that there was an additional purpose for the audits – namely, to provide shareholders "with information on the basis of which they could make personal investment decisions."[97] After considering the evidentiary record, the Court concluded that there was no other purpose for the audits beyond the statutorily-mandated one of oversight.[98]

93. 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. The Class Members were unitholders, not shareholders, and they had no role in supervising management. Therefore, the purpose of BDO's audits could not have been the same one as in *Hercules*. It was an error for the Divisional Court to rely on *Hercules* without considering this critical distinction.

94. In addressing the audit reports directly to "Unitholders" and agreeing to allow unitholders to rely on them, BDO's purpose could only have been to assist unitholders in making investment decisions.

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[95] 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.).
[96] *Hercules*, at para. 49.
[97] *Hercules*, at para. 50.
[98] *Hercules*, at para. 51.

95. In addition, the Divisional Court 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.[99] 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.[100] [emphasis added]

96. 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.[101] Those are precisely the circumstances that the Supreme Court of Canada found could ground a duty of care.

97. 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.[102]

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[99] *Hercules*, at para. 36.
[100] *Hercules*, at para. 37; see also *Haig v. Bamford*, [1977] 1 S.C.R. 466. 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 that arise from the *relationship* between the parties" and fall under the first stage proximity and reasonably foreseeability analysis: *Livent*, at para. 39.
[101] Amended Statement of Claim, at paras. 67-68, **Motion Record**, Tab 6, pp. 77.
[102] Amended Statement of Claim, at paras. 64, 67, **Motion Record**, Tab 6, pp. 76-77.

C. The Proposed Appeal Raises Issues of Public Importance

98. The proposed appeal raises broad issues of public importance, both to members of the proposed class and to the investing public generally.

99. First, the proposed appeal addresses an issue of broad public importance to a large number of individual members of the proposed class. It is estimated that the proposed class is composed of 1,250 unitholders.[103] This is a significant issue for the affected individuals, who have lost substantial amounts of money. The proposed representative plaintiffs have lost much of their life savings. Undoubtedly, a large number of the proposed class members are in the same situation.

100. In addition, recent amendments to the *CPA* provide that appeals from an order certifying or refusing to certify a class proceeding lie directly to this Court. Although the amended provisions are not applicable to this proceeding (which was commenced before the amendments came into force), the amendments represent an acknowledgment by the Legislature that this Court should consider appeals from certification decisions.[104]

101. Second, the proposed appeal raises broad issues of public importance to the investing public generally and to auditors. If allowed to stand, the jurisprudential result of the Divisional Court's decision will be that it is plain and obvious that auditors do not owe a duty of care to investors in respect of statutory audits. Both Courts below focused heavily on the fact that the audits at issue were periodic, statutory audits in order to distinguish this case from those that have found that an auditor owes a duty of care to investors.

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[103] Reasons for Decision, at para. 14, **Motion Record**, Tab 3, p. 17.
[104] *Class Proceedings Act*, S.O. 1992, c. 6 as amended, ss. 30 and 39.

102. Such a holding would be a major development in the law of auditor's liability and negligence. The decision in this case will have a significant impact on the investing public (*i.e.*, everyone that invests in mutual funds and other securities for which there is a requirement for a statutory audit, but no ability to supervise management) and auditors in Ontario.

103. The decisions below should not be allowed to stand without this Court's review.

PART IV - ORDER REQUESTED

104. The Moving Parties request an Order granting leave to appeal from the Order of the Divisional Court dated April 20, 2021.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2021.

Nathaniel Read-Ellis

June 10, 2021

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SCHEDULE "A"

LIST OF AUTHORITIES

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

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

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

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

5. *Cooper v. Hobart*, [2001] 3 S.C.R. 537

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

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

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

9. *Excalibur Special Opportunities LP v. SLF LLP*, 2020 ONSC 2793

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

11. *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 SCR

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 (CanLII)

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

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

19. *Sault Dock Co. v. Sault Ste. Marie (City)*, 1972 CanLII 572 (CanLII)

20. *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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. R.S.O. 1990, c. S.5, s. 78 (1).

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. R.S.O. 1990, c. S.5, s. 78 (2).

Auditor's examination

(3) The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make the report required by subsection (2). R.S.O. 1990, c. S.5, s. 78 (3).

"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. R.S.O. 1990, c. S.5, s. 78 (4); 2004, c. 8, s. 47 (1).

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. 2002, c. 18, Sched. H, s. 10.

Deadline

(2) The reporting issuer or mutual fund in Ontario shall send the true copy of the financial statement no later than the end of the period during which it is required to file the financial statement under section 77 or 78. 2002, c. 18, Sched. H, s. 10.

Exception

(3) Despite subsection (1), a reporting issuer or mutual fund in Ontario is not required to send a copy of the financial statement to a security holder who holds its evidence of indebtedness only. 2002, c. 18, Sched. H, s. 10.

Deemed compliance

(4) If the laws of a reporting issuer's jurisdiction of incorporation, organization or continuance impose requirements corresponding to the requirements in subsections (1) and (2), compliance with the requirements imposed by that jurisdiction shall be deemed to be compliance with the requirements in subsections (1) and (2). 2002, c. 18, Sched. H, s. 10.

…

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

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, 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;

CARRIE COUCH et al.
Plaintiffs
(Moving Parties)

-and-

BDO CANADA LLP
Defendant
(Responding Party)

Court File No. M52498

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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