

CITATION: Whitehouse v. BDO Canada LLP, 2020 ONSC 144
COURT FILE NO.: CV-17-579357CP
DATE: 2020/01/08

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANTHONY WHITEHOUSE, CARRIE COUCH and JASON COUCH Plaintiffs)
BDO CANADA LLP Defendant)
- and -)
)

) Simon Bieber, Nathaniel Read-Ellis and Michele Vanentini for the Plaintiffs
)

) Andrea Laing, Doug McLeod and Dan Szirmak for the Defendant
)

) **HEARD:** December 9-11, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Plaintiffs, Anthony Whitehouse, Carrie Couch, and Jason Couch, are investors in the mutual funds of Crystal Wealth Management Systems Ltd. The Plaintiffs lost their life savings and they blame BDO Canada LLP, which was the auditor of Crystal Wealth from 2007 to 2017. Crystal Wealth is now under a receivership initiated by the Ontario Securities Commission (“OSC”). Pursuant to the *Class Proceedings Act, 1992*,¹ Mr. Whitehouse and the Couchs bring an action against BDO and now they seek certification of their action as a class proceeding. They propose that Adair Goldblatt Bieber LLP be Class Counsel.

[2] The Plaintiffs allege that from 2007 to 2017, BDO provided clean audit opinions to the OSC and to the unitholders about Crystal Wealth’s mutual funds. The Plaintiffs allege that from 2007 to 2017, unknown to them and other unitholders, the management of Crystal Wealth was misappropriating assets. The Plaintiffs allege that the fraud was discovered as a result of an OSC appointing Receiver after Crystal Wealth did not deliver its audited financial statements for 2016; however, by the time the fraud was discovered, the unitholders had lost more than \$100 million. The Plaintiffs allege that had BDO done proper audits, the fraud would have been discovered sooner and before the losses mounted as they did. The Plaintiffs sue BDO for common law

¹ S.O. 1992, c. 6.

negligence in providing auditing services.

[3] BDO resists certification. It concedes that the Plaintiffs have satisfied the identifiable class and the common issues criteria of certification. BDO, however, submits that the Plaintiffs have not satisfied the other three criteria for certification; namely: (a) the cause of action criterion; (b) the preferable procedure criterion; and (c) the representative plaintiff criterion.

[4] For the reasons that follow, I refuse certification. The case at bar is governed by *Hercules Managements Ltd. v. Ernst & Young*,² and *Lavender v. Miller Bernstein LLP*,³ and while BDO has potential contractual liability to Crystal Wealth for negligent auditing, it does not have a proximate duty of care to the Plaintiffs and the putative Class Members. Thus, in the case at bar, the cause of action criterion for certification is not satisfied, and with its failure all the other certification criteria fail.

[5] Had the Plaintiffs satisfied the cause of action criterion, with some qualifications, I would have certified their action as a class proceeding.

B. Facts

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

[7] Clayton Smith was Crystal Wealth's founder, Chief Executive Officer, Chief Compliance Officer, controlling shareholder, sole officer, and director.

[8] From 2007 to 2017, Crystal Wealth created, marketed, and managed open-ended mutual fund trusts. Pursuant to the *Securities Act*,⁴ units in the mutual funds were distributed to unitholders on an exempt-market basis, pursuant to offering memoranda.

[9] A Declaration of Master Trust governed each of Crystal Wealth's mutual funds. The Declaration was incorporated by reference into each mutual fund's offering memorandum. The Declaration stipulated that Crystal Wealth is the trustee for the unitholders and stands possessed of, and holds sole legal title to, all of the property and assets of the mutual fund.

[10] The Declaration of Master Trust provides that no unitholder shall have or be deemed to have individual ownership of any property or asset of a mutual fund and the interest of a unitholder shall consist only of the right to receive payment from the Trustee of his interest in a mutual fund.

[11] The proposed Representative Plaintiff, Anthony Whitehouse, is a real estate agent who resides in Mississauga, Ontario. He invested almost \$1.0 million, his life savings, in five of Crystal Wealth's mutual funds.

[12] The proposed Representative Plaintiffs, Jason and Carrie Couch are spouses. They live in rural Alberta where they operate a beef farm. They invested almost \$600,000, their life savings, in three of Crystal Wealth's mutual funds.

[13] Mr. Whitehouse and the Couchs made their investments in Crystal Wealth's mutual funds

² [1997] 2 S.C.R. 165.

³ 2018 ONCA 729, leave to appeal to the S.C.C. refused [2018] S.C.C.A. No. 488.

⁴ R.S.O. 1990, c. S.5.

in the exempt market where under the *Securities Act*, issuers are excepted from certain disclosure requirements and permitted to distribute securities to “accredited investors”, who have a requisite net worth or investment sophistication. BDO submits that Mr. Whitehouse and the Couchs did not qualify as accredited investors, which, for reasons explored below, BDO submits disqualifies the Couchs as representative plaintiffs.

[14] Crystal Wealth grew significantly. In 2007, it operated just one mutual fund. By 2017, it was operating 15 funds. As of April 20, 2017, there were approximately 1,250 unitholders, and Crystal Wealth claimed that the mutual funds had an aggregate of approximately \$193.2 million in net asset value (“NAV”). As it turns out, the NAV of the mutual funds was materially overstated.

[15] Crystal Wealth’s 15 mutual funds were: ACM Growth Fund, ACM Income Fund, Bullion Fund, Conscious Capital Fund, Factoring Fund, Hedge Fund, High Yield Mortgage Fund, Infrastructure Fund, Media Fund, Medical Fund, Mortgage Fund, Resource Fund, Retirement Fund, Sustainable Dividend Fund, and Sustainable Property Fund.

[16] The underlying assets in the mutual funds were composed both of traditional investments such as stocks and bonds (the “on-book assets”), as well as unconventional investments, such as film loans, non-conventional residential mortgages, and factoring contracts (the “off-book assets”). 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.

[17] There was substantial inter-fund investment among the mutual funds. The inter-fund investments accounted for approximately \$22.9 million (or approximately 12 percent) of the total NAV as of April 20, 2017. The largest recipients of these inter-fund investments were Media Fund, Hedge Fund, and Factoring Fund, which held substantial off-book assets.

[18] The on-book assets were held and recorded by the National Bank Correspondent Network or by Interactive Brokers Canada Inc, both of which are independent third parties. However, the off-book assets were held and recorded by Crystal Wealth or by third parties who were not independent third parties. In many cases, these off-book asset third parties had a personal relationship with Mr. Smith. The Plaintiffs allege that these third parties were actively colluding with Mr. Smith to manipulate the reported values of the off-book assets.

[19] Pursuant to the *Securities Act*, and the OSC’s NI 81-106, Crystal Wealth and each of its mutual funds was required to file audited financial statements with the OSC. Crystal Wealth was also required to send the audited statements to every unitholder. Failure to deliver audited financial statements to the OSC and unitholders could result in the suspension of Crystal Wealth’s registrations with the OSC.

[20] BDO is a national accounting, tax, and advisory firm. It was the auditor for Crystal Wealth from 2007 to 2017. BDO’s audits of Crystal Wealth and its Funds were conducted pursuant to retainer agreements negotiated and signed by Mr. Smith. The agreements impose obligations on Crystal Wealth with respect to the disclosure of accurate and complete audit information to BDO.

[21] During the BDO audit period, management representation letters were delivered to BDO affirming that Crystal Wealth had discharged its responsibility to make the requisite disclosures to BDO, including those relating to the existence of fraud and related-party transactions. The retainer agreements also contained certain indemnities in favour of BDO and terms limiting BDO’s liability.

[22] BDO provided clean audit opinions in respect of the 10 mutual funds that were in existence

by 2015. In each instance, BDO's opinion stated that the annual financial statements were free from material misstatement.

[23] BDO's auditor's report explained that BDO had conducted an audit of the mutual funds' financial statements in accordance with GAAS (generally accepted auditing standards). BDO's audit report explained that BDO selected its audit procedures based, in part, on the risk of material misstatement due to both error and fraud. BDO expressed the unqualified opinion that the financial statements present fairly, in all material respects, the financial position of the mutual funds.

[24] Crystal Wealth created five more mutual funds in 2016. BDO did not prepare audited statements for these mutual funds.

[25] As a result of Mr. Smith's failure to provide information and documents requested by BDO, Crystal Wealth did not file or deliver audited 2016 financial statements with the OSC for any of the Crystal Wealth Funds by the applicable March 31, 2017 deadline.

[26] On April 7, 2017, the OSC issued a temporary order that prohibited trading in the mutual funds' units and in the securities held by the mutual funds.

[27] On April 26, 2017, on application by the OSC, Grant Thornton LLP was appointed as the Receiver over all assets of Crystal Wealth and of its mutual funds. As a result of the temporary Order and the appointment of the Receiver, unitholders have been prohibited from redeeming their investments in the mutual funds since April 7, 2017.

[28] BDO disputes the Plaintiffs' contention that BDO's refusal to issue audit opinions in respect of the mutual funds' 2016 financial statements triggered the receivership.

[29] In the receivership, in the report to the Court, the Receiver stated that Crystal Wealth disclosed false or manipulated the NAVs of the mutual funds, causing the NAVs of certain mutual funds to be materially overstated. The report indicates that the inter-fund investments may have been used to falsely create liquidity to meet investor distributions and/or redemptions.

[30] The evidence of fraud related primarily to the Media Fund, which was the largest of the mutual funds. The Media Fund invested in loans to finance motion picture film productions. The loans were purchased from Media House Capital (Canada) Corp. and were to be repaid from the revenue of the films.

[31] All but six of the mutual funds held, directly or indirectly, inter-fund investments in the Media Fund, which was the largest recipient of inter-fund investment. The inter-fund investments in the Media Fund accounted for up to 61.4 percent of the NAVs of the other Funds that held direct inter-fund investments in the Media Fund.

[32] Unitholders of virtually every mutual fund suffered impairment in the value of their investments in the mutual funds. In its Second Report to the Court, the Receiver noted that the quality and collectability of investments held by six of the mutual funds (Mortgage Fund, Factoring Fund, Bullion Fund, Media Fund, Infrastructure Fund and Hedge Fund) may be grossly impaired.

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

[34] Following the receivership, Mr. Smith reached a settlement with the OSC. The settlement was approved by the OSC in May 2018. As part of the settlement, Mr. Smith admitted to committing fraud. He admitted to misappropriating millions of dollars of investor money from the Mortgage Fund and the Media Fund, both of which had substantial off-book assets. He misappropriated approximately \$11 million in assets held by the Media Fund and Mortgage Fund. He also admitted to having misled both BDO and the OSC.

[35] BDO submits that the Plaintiffs have exaggerated the extent of Mr. Smith's fraud. BDO suggests that Mr. Smith's settlement agreement and the OSC's evidence in support of its receivership application indicate that the amount of Crystal Wealth assets subject to fraud was in the range of \$9-11 million (representing approximately 5% of the \$193 million in assets under management as of April 2017) and that the misappropriations were restricted to investments in only two mutual funds, the Media Fund and Mortgage Fund.

[36] As part of the OSC's investigation, Marcel Tillie, a Senior Forensic Accountant with staff of the Enforcement Branch of the OSC, reviewed documents relating to BDO's audit of the 2015 financial statements for the Media Fund. Based on this review of those materials, he had concerns about the existence and valuation of the Media Loans. Mr. Tillie was very critical of BDO's audit.

[37] In the receivership proceedings, the Receiver commenced proceedings against BDO for making the false representation in its opinions in the 2014 and 2015 financial statements for the Mortgage Fund and the Media Fund that the audits were conducted in accordance with GAAS.

[38] In the case at bar, the proposed Representative Plaintiffs retained Barry Myers, a former auditor, to provide an expert opinion in respect of the standard of care of auditors in the circumstances of the immediate case.

[39] Mr. Myers opined that that BDO could not have obtained sufficient audit evidence in light of deficiencies in Crystal Wealth's records. Mr. Myers opined that BDO could not have obtained reasonable assurance about whether the financial statements of each of the mutual funds as a whole were free from material misstatement, whether due to fraud or error.

[40] Mr. Myers's view was that in the absence of having obtained sufficient audit evidence, BDO expressed inappropriate opinions in respect of the financial statements. Mr. Myers also opined that the conflicts of interest noted in the Receiver's Reports and in the OSC's application materials for a receivership suggest that BDO did not exercise healthy skepticism, as required by the applicable Canadian audit standards.

C. Procedural Background: the Receivership, the Receiver's Action against BDO, and the Proposed Class Action against BDO

[41] As a registered investment fund manager, Crystal Wealth was required by March 31, 2017 to file audited annual financial statements for the year ended December 31, 2016. By March 31, 2017, the Crystal Wealth mutual funds were required to deliver their audited annual financial statements for the year ended December 31, 2016. In 2017, Crystal Wealth failed to file its financial statements are required and this default attracted the attention of the enforcement branch of the OSC.

[42] As noted above, BDO, Crystal Wealth's auditor, was unable to assist Crystal Wealth to meet the deadline for providing audited financial statements because it was unable to obtain the

information it required from Crystal Wealth to finish the audits.

[43] Also, as noted above, on April 7, 2017, pursuant to the *Securities Act*,⁵ the OSC issued a temporary order that prohibited trading in the mutual funds of Crystal Wealth and prohibited trading in the securities held by the mutual funds. As a result of the temporary Order and the subsequent appointment of a Receiver, unitholders have been prohibited from redeeming their investments in the mutual funds since April 7, 2017.

[44] On April 27, 2017, on the application of the OSC, Grant Thornton Limited was appointed Receiver pursuant to section 129 of the *Securities Act*. The appointment was based on the OSC's concerns that the *Securities Act* had been breached by Crystal Wealth and by its principal, Clayton Smith.

[45] Pursuant to the Order of Justice Newbould, the Receiver was granted the power to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings pending or instituted with respect to Crystal Wealth Group.

[46] On June 22, 2017, the Receiver provided the Court with its First Report, and it served a motion record in support of a motion to, among other things, approve a sales process to be conducted by the Receiver, by which prospective purchasers and managers could submit bids to the Receiver to either purchase the assets of certain Crystal Wealth mutual funds, or to take over the management of certain funds.

[47] On June 30, 2017, in the receivership proceedings, Justice Hainey issued an Order approving a creditor claims procedure. The Order, among other things, approved a sales process and a procedure for non-investor claims against Crystal Wealth.

[48] In the summer of 2017, in the Receivership proceeding, the law firm of Crawley Meredith Brush brought a motion seeking to be appointed as representative counsel to the approximately 3,000 unitholders of Crystal Wealth's mutual funds (BDO submits that this motion is relevant to the analysis of whether the Plaintiffs' action is the preferable procedure for the circumstances of the immediate case).

[49] The Receiver, the OSC, and certain investors, including Mr. Whitehouse, who was represented by Adair Goldblatt Bieber LLP appeared at the hearing of the motion. They opposed the appointment of representative counsel for the unitholders. The respondents to the motion asserted that a representative of the unitholders in the receivership proceeding was duplicative and unnecessary given the role played by the Receiver in recovering assets on behalf of the creditors and for the unitholders.

[50] In a July 5, 2017 endorsement, Justice Hainey concluded that the investors' interests were being protected by the Receiver. He dismissed Crawley Meredith Brush's motion. Justice Hainey reasoned that the appointment of a representative counsel for the unitholder investors would add unnecessary expense. In his endorsement, Justice Hainey stated at paragraph 5:⁶

5. The Receiver, as a court-appointed officer, has as its primary objective the interests and needs of the Investors. I am satisfied, based upon the Receiver's actions to date, that it has and will continue to advance the interests of the Investors in an objective and impartial manner with a view

⁵ R.S.O. 1990, c. S.5.

⁶ *Ontario (Securities Commission) v. Crystal Wealth Management System Ltd.*, 2017 ONSC 4160.

to recognizing the unique interests of the Investors in each of Crystal Wealth's different and unique funds.

[51] On July 20, 2017, the Plaintiffs commenced their proposed class action against BDO for negligence in the preparation of the audit reports for Crystal Wealth. Adair Goldblatt Bieber LLP is the lawyer of record and the proposed Class Counsel.

[52] The Statement of Claim seeks a declaration that BDO had a duty of care to the Class Members which it breached by negligently performing its professional services, causing damages for negligence in the sum of \$150 million and punitive damages of \$25 million.

[53] The proposed Class Definition is:

[E]very person who:

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

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

[54] The proposed common issues are:

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

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

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

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

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

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

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

(6) Should BDO pay punitive damages? If so, in what amount?

[55] On November 24, 2017, in the receivership proceeding, the Receiver provided the Court with its Second Report and brought a motion to authorize the Receiver to make an interim distribution. The Second Report detailed the Receiver's significant concerns over the quality and ultimate collectability of many of the recorded investments of the Crystal Wealth mutual funds.

[56] On December 11, 2017, Justice Myers issued an Order and approved, among other things,

the proposed interim distribution.

[57] On April 3, 2018, the Receiver commenced an action brought in the name of Crystal Wealth against BDO seeking damages. The Receiver advances claims for negligence, negligent misrepresentation, breach of contract, and gross negligence.

[58] On May 3, 2018, the Receiver delivered its Third Report to the Court.

[59] On June 15, 2018, in the proposed class action, the Plaintiffs served BDO with the motion record in support of the motion to certify action as a class proceeding. In the event that the Plaintiffs' proposed class action for negligence against BDO is certified, it is anticipated that the Class Action and the Receiver's action against BDO will be tried together or consolidated.

[60] On July 20, 2018, the Receiver delivered its Fourth Report to the Court. The Receiver, amongst other things, sought approval to make a further interim distribution to the investors of the Crystal Wealth funds.

[61] In its Fourth Report, the Receiver also sought approval of the engagement of Adair Goldblatt Bieber LLP as its lawyer of record in the Receiver's action brought in the name of Crystal Wealth against BDO. The Receiver recommended the engagement, and in its report to the Court at paragraph 331, the Receiver noted that:

331. The Receiver recommends that this Honourable Court approve the Receiver's engagement of [Adair Goldblatt Bieber LLP] pursuant to [Adair Goldblatt Bieber LLP's] Engagement Letter given that: (i) the Receiver's counsel, [Aird & Berlis], is unable to act for the Receiver in the Receiver's Action; (ii) the [Adair Goldblatt Bieber LLP] team, led by Simon Bieber, who will be involved in representing the Receiver, are qualified and accomplished litigators ... ; (iii) the Proposed Class Action and the Receiver's Action have questions of law and fact in common, and both claim relief arising out of the same transaction or occurrence or series of transactions; (iv) [Adair Goldblatt Bieber LLP] is already counsel to Whitehouse in the Proposed Class Action, and accordingly, can minimize the current legal costs to the estate of the Company and Crystal Wealth Funds by similarly acting for the Receiver on a contingency fee basis, and as a result of having access to the Class Proceeding Fund in the Proposed Class Action with respect to certain costs and disbursements which may be duplicative in both proceedings; and (v) the Receiver will be considered to fulfill the role as the administrator of the claims process in the Proposed Class Action, and would consequently be tasked with issuing distributions to investors arising from any recovery in the Proposed Class Action, in addition to any recovery obtained in the Receiver's Action.

[62] On August 20, 2018, Justice Conway granted an Order approving the retainer of Adair Goldblatt Bieber LLP to act for the Receiver in an action on behalf of Crystal Wealth against BDO for negligence, negligent misrepresentation, breach of contract, and gross negligence.

[63] It is common ground between the parties that the Receiver's action against BDO and the proposed class action are for the same alleged investor losses caused by BDO's alleged professional negligence. The Receiver's primary allegation is that BDO was negligent because it did not conduct its audits of the mutual funds in accordance with GAAS or ensure that Crystal Wealth's financial statements were prepared in accordance with the relevant accounting framework.

[64] On September 13, 2019, BDO delivered its Statement of Defence in the Receiver's action.

[65] On November 13, 2019, the Plaintiffs delivered a Fresh as Amended Statement of Claim in their proposed class action against BDO.

[66] On September 13, 2019 BDO delivered its Statement of Defence in the proposed class

action. It pleads that it owed no duty of care to individual unitholders and that the unitholders do not have capacity to sue BDO directly as a matter of corporate law and the principle from *Foss v. Harbottle*⁷ that holds that the assets of a corporation (including causes of action) are its assets and not the assets of the shareholders.

[67] The Class Proceedings Fund provides financial support for the Plaintiffs in this proposed class action.

[68] The Receiver's action against BDO is ready to proceed to document production and discovery, which is the next stage of the proposed class action should it be certified.

[69] While BDO submits that the Representative Plaintiffs' litigation plan in the proposed class action is vague, it is clear that the class action against BDO and the Receiver's action against BDO would proceed together and be tried together and may be consolidated for this purpose if necessary.

[70] As noted earlier in these Reasons for Decision, the Receiver took steps to monetize the mutual funds' assets and to distribute those assets to unitholders. In the receivership proceeding, the Receiver has already recovered \$65 million. Of this sum, the Receiver has held back \$7.6 million for creditors who filed proof of claims and \$1.3 million for receiver fees and legal fees. The creditor claims program sets a bar date (a deadline) for claims after which the claims are extinguished, but the court may grant leave for late claims.

[71] To date, the Receiver has distributed approximately \$56 million to unitholders, or less than 30 percent of the NAV falsely reported by Crystal Wealth as of April 20, 2017. The Receiver has made two interim distributions to unitholders, who rank behind the creditors in priority. The distributions were for \$31.4 million and \$25.3 million, representing 87% of the amounts recovered by the Receiver. Any recovery in the action against BDO will be distributed to the unitholders after paying the balance, if any, of the creditors' claims. The Receiver acknowledges the possibility that creditors may have claims in priority to the claims of the unitholders.

D. Discussion and Analysis

[72] As mentioned at the outset, my ultimate conclusion is that this action should not be certified as a class proceeding. To explain my conclusion, I shall in the immediately next part of these Reasons for Decision discuss the general principles of certification and I shall quickly address the class definition and common issues criteria for which there is no dispute.

[73] Then, in the immediate next part, I shall describe BDO's position with respect to the criteria for certification that it does contest. As foreshadowed above, BDO submits that three certification criteria are not satisfied.

[74] In the later parts of my Reasons for Decision, I shall discuss the merits of BDO's submissions. Thus, I shall discuss *seriatim* the common issues criterion, the preferable procedure criterion, and the representative plaintiff criterion.

⁷ (1843), 2 Hare 461, 67 E.R. 189 (Ch.); *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 59; *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 276.

E. Certification: General Principles and the Position of the Parties

[75] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) 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 (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[76] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.⁸ On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.⁹ The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources.¹⁰

[77] In the immediate case, BDO does not dispute that the identifiable class and the common issues criteria have been satisfied. With the exception of question 6 (aggregate damages), I agree that these criteria have been satisfied. In the circumstances of the immediate case, where the Class Members' damages are individual issues, the test for when aggregate damages can be certified as a common issue is not satisfied. I would not certify question 6.

[78] BDO submits that whether or not individual unitholders have capacity to sue BDO directly is a threshold common issue that would need to be determined in a common issue trial if this case were certified. I agree with this submission, and I would have added this issue as a common issue had the cause of action criterion been satisfied.

[79] Moving on to the contested certification criteria, BDO argues that the cause of action criterion is not satisfied. It denies that it has a duty of care to the unitholders. As I shall explain below, I agree with BDO's argument.

[80] BDO argues that the preferable procedure criterion is not satisfied because the receivership proceeding (which includes the Receiver's action against BDO) is the preferable alternative procedure.

[81] With respect to the preferable procedure criterion, BDO submits that the class proceeding

⁸ *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

⁹ *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.

¹⁰ *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.

is redundant, and BDO submits that the Receiver's action against BDO is comprehensive as to BDO's liability for professional negligence, which can be founded in breach of contract and without the uncertainty of whether BDO's relationship is within the scope of an auditor's duty of care. BDO submits that resolving the issue of duty of care in negligence will substantially prolong a trial that could otherwise focus on whether there was a breach of contract in circumstances where BDO's potential liability in contract is conceded.

[82] Further, BDO submits that in the receivership proceeding, the Receiver is pursuing claims that will inure to the benefit of the Class Members and the Receiver has already recovered substantial funds and has started making payments to unitholders. BDO submits that the receivership proceedings provides equal or better procedural safeguards for stakeholders when compared with a class action, including oversight of the court, rights to information, participation and objection, sharing of legal fees, and an efficient claims administration process.

[83] Moreover, BDO asserts that certification should be denied because it would be a collateral attack on both the Receiver's appointment Order and the decision of Justice Hainey refusing independent counsel and representation for the unitholders.

[84] With respect to the representative plaintiff criterion, BDO alleges that Mr. Whitehouse is not a suitable class representative because he is pursuing an individual action against the Media House Defendants, who have not been sued by the Receiver and who are not defendants in the proposed class action. In Mr. Whitehouse' action against the Media House Defendants, he alleges that there were deceits and forgeries that deceived BDO. BDO submits that by being both a representative and in pursuing his own claim against the Media House Defendants, Mr. Whitehouse has a disqualifying conflict of interest.

[85] With respect to the representative plaintiff criterion, BDO submits that the Couchs, who may join Mr. Whitehouse's action as a co-plaintiff, are also not suitable representative plaintiffs not only because they will share Mr. Whitehouse's conflict but because they may have a claim against, Gary Froats, their investment advisor and a Class Member, who placed them as Crystal Wealth mutual fund investors, notwithstanding that they do not appear to have met the criteria to qualify as accredited investors under the *Securities Act*.

[86] Moreover, with respect to the representative plaintiff, BDO submits that Adair Goldblatt Bieber LLP has disqualifying conflicts of interest making them unsuitable Class Counsel because of their roles as Class Counsel, counsel in the Receiver's action against BDO, and counsel for Mr. Whitehouse in his action against the Media House Defendants. In this last regard, in the Media House action it is also proposed to add Mr. Froats as a plaintiff.

F. Cause of Action Criterion

1. General Principles: Cause of Action Criterion

[87] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*,¹¹ is used

¹¹ [1990] 2 S.C.R. 959.

to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[88] To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.¹²

[89] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,¹³ and the court's power to strike a claim is exercised only in the clearest cases.¹⁴ The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.¹⁵ However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.¹⁶

[90] In *R. v. Imperial Tobacco Canada Ltd.*,¹⁷ the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[91] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.¹⁸

[92] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.¹⁹

[93] The failure to establish a cause of action usually arises in one of two ways: (1) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action; or, (2) the allegations in the statement of claim do not come within a recognized cause

¹² *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.

¹³ *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

¹⁴ *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

¹⁵ *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.

¹⁶ *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

¹⁷ 2011 SCC 42 at paras. 17-25.

¹⁸ *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'd, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).

¹⁹ *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39-40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34.

of action.²⁰

2. Analysis: Cause of Action Criterion

[94] There is no dispute that the allegations in the Amended Statement of Claim plead all the elements necessary for a recognized cause of action in negligence.

[95] The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law.²¹ In the immediate case, the constituent elements of the tort of negligence are pleaded in the Amended Statement of Claim, but the critical question remains whether the BDO has a duty of care to the Class Members.

[96] The pleading of a duty of care is set out in paragraphs 60 to 72 of the Amended Statement of Claim, which state:

The Claim

60. BDO was engaged by Crystal Wealth to audit each of the Funds.

61. Crystal Wealth was required to file audited financial statements with the OSC pursuant to s. 21.10(3) of the *Securities Act*, National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (ss. 12.10, 12.14, 12.3 and 12.14), and National Instrument 81-106 - *Investment Fund Continuous Disclosure* (ss. 2.1 and 2.2).

62. Accordingly, BDO was conducting its audits for two purposes: (i) to ensure that Crystal Wealth complied with Ontario's securities laws such that it could continue to offer and redeem units in the Funds; and (ii) 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.

63. BDO knew that the OSC would rely on its audits in making decisions about Crystal Wealth and its ability to offer securities to the public.

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

65. While BDO never delivered audit reports for the 2016 Funds, its clean audit reports for the BDO-Audited Funds allowed Crystal Wealth to continue to operate as an Exempt Market Dealer, Investment Fund Manager, Portfolio Manager, and Commodity Trading Manager registered with the OSC, to create the 2016 Funds, and to solicit investments in them from members of the Class.

66. In other words, had BDO not released clean audit reports for the BDO-Audited Funds, the 2016 Funds would never have come into existence and members of the Class would not have lost money by investing in them.

²⁰2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd., 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (C.A.).

²¹ *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

The Duty to the Class

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

68. At all material times BDO knew or ought to have known:

- (a) the identities and contact information of Crystal Wealth's investors;
- (b) that some or all of the members of the Class knew that BDO was the auditor of the Funds;
- (c) that its audits would be relied upon by members of the Class;
- (d) the holdings in some or all of the accounts of members of the Class; and
- (e) that the purpose of its audits was, in part, to enable Crystal Wealth to receive and hold cash and securities owned by the members of the Class.

69. At all material times, BDO owed a duty of care to the Class to:

- (i) audit the financial statements of each Fund in accordance with generally accepted auditing standards ("GAAS");
- (ii) ensure that the financial statements of each Fund presented fairly, in all material respects, the financial position of the Fund and its financial performance and its cash flows for the year in question in accordance with Generally Accepted Accounting Principles ("GAAP") or International Financial Reporting Standards ("IFRS") as applicable;
- (iii) issue audit reports on Crystal Wealth's financial statements for delivery to, *inter alia*, the OSC; and
- (iv) identify any material misstatements in Crystal Wealth's financial reporting or material weaknesses in Crystal Wealth's internal controls.

70. To the extent that the Fund held Off-Book Assets or non-traditional/illiquid assets, a GAAS-compliant audit required BDO to:

- (a) Obtain substantial evidence that the assets (i) actually existed; and (ii) were fairly valued;
- (b) Employ measures to obtain evidence and reasonable assurance that the loans in the Media Funds were (i) legitimate; (ii) enforceable; (iii) collectible; and (iv) did not constitute related party transactions; and
- (c) Employ measures to obtain reasonable assurances that Smith was not misappropriating investor money from the Funds.

71. The Plaintiffs plead and rely upon the Ontario Business Corporations Act (the "OBCA") and in particular sections 149, 151, 152, 153, 155, 158 and 159. In addition the Plaintiffs plead and rely upon the regulations promulgated under the OBCA and, in particular Regulation 62, sections 40, 41 and 42. The Plaintiffs further plead and rely upon sections 19, 21.10, 122 and 142 of the *Securities Act* and National Instruments 31-103 and 81-106.

72. BDO knew or ought to have known, the requirements of the *Securities Act* and the associated regulations and National Instruments applicable to the conduct of Crystal Wealth business. BDO

has obligation conduct a competent and thorough audit in accordance with GAAS. BDO was required to report any material misrepresentations or omissions contained in any material filed with the OSC.

[97] In analyzing paragraphs 60 to 72 of the Amended Statement of Claim it is important to note not only what is pleaded but what is not pleaded. What is not pleaded is any direct relationship, undertaking, or representation by BDO to the unitholders. There is no contract between the unitholders and BDO. What is pleaded is that the relationship between BDO and the unitholders finds its source through the medium of the *Securities Act*, National Instrument 31-103, and National Instrument 81-106.

[98] As described in paragraph 61 of the Amended Statement of Claim, the statutory regime under the *Securities Act* is the basis of the relationship between the plaintiff Class Members and the defendant BDO.

[99] Everything that follows in paragraphs 62 to 72 is an emanation, deduction, inference, argument, conclusion, or product of the statutory regime as being the source of the Class Members' reliance or of BDO's liability. Thus, the Plaintiffs submit that BDO had a duty of care to investors because the OSC permitted Crystal Wealth to continue offering its mutual funds and the OSC did so because it relied on receiving properly audited financial statements from BDO.

[100] Reliance and legal responsibility and what the parties knew or ought to have known or what the parties could rely on is based on statutory provisions of the *Securities Act*. Thus, for example, the Plaintiffs plead in paragraph 62 that "accordingly" BDO conducted its audits for two purposes associated with the *Securities Act*.

[101] The Plaintiffs do not plead that the two purposes of BDO's audits arise from any directly proximate relationship between the unitholders and BDO. The only direct relationship in the immediate case is between BDO and Crystal Wealth. The relationship between the Class Members and BDO is a conceit of the *Securities Act* and involves the interposition of the OSC.

[102] As pleaded in the Amended Statement of Claim, the two purposes of BDO's statutory audits are: (a) to assist the investors in making investment decisions; and (b) to ensure that Crystal Wealth was compliant with Ontario securities laws. In the Amended Statement of Claim, the Plaintiffs plead that BDO breached the duty of care it owed the unitholders based on the duty of care that is grounded on these two purposes of the statutory audits.

[103] For the purposes of the certification motion, the precise question that needs to be addressed is whether it is plain and obvious that the Plaintiffs are incorrect in asserting BDO had a duty of care to the Class Members through the medium of the *Securities Act* and the National Instruments.

[104] To begin to answer this question, the starting point is that the Plaintiffs' and the Class Members' claim in negligence is a claim for pure economic loss. The circumstances in which Canadian courts have allowed recovery in negligence for pure economic loss are limited. As the Supreme Court of Canada noted in *Martel Building Ltd. v. R.*²² at paragraphs 36 and 37:

36. An historical review of the common law treatment of recovery for economic loss has been undertaken by this Court on several occasions. See *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; and *D'Amato, supra*. Rather than re-canvassing the jurisprudential genealogy reviewed

²² *Martel Building Ltd. v. R.*, 2000 SCC 60.

in these cases, it is enough to say that the common law traditionally did not allow recovery of economic loss where a plaintiff had suffered neither physical harm nor property damage. See *Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453.

37. Over time, the traditional rule was reconsidered. In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits.

[105] As the law has developed in Canada, the Supreme Court has recognized that there are categorical exemptions to the general principle that purely economic losses are not compensable in negligence.

[106] In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,²³ the Court recognized five established categories where recovery for pure economic losses was permitted; namely: (1) negligent misrepresentation; (2) negligence of public authorities; (3) negligent performance of a service; (4) supply of shoddy goods or structures; and (5) relational economic losses. Further, the Supreme Court recognized that the categories were not closed, and new exceptions were possible. And, the Court envisioned that a duty of care analysis and principled approach could be used to identify new exceptions to the general principle that pure economic losses are not recoverable in negligence.

[107] Thus, where there is a pure economic loss, if the relationship between the plaintiff and the defendant does not fall within a recognized class where the defendants have a duty of care, then whether a duty of care exists involves satisfying the requirements of a three-step analysis of: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficiently close *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity. Thus, in a new category of case whether a relationship giving rise to a duty of care exists depends on foreseeability and proximity, moderated by policy concerns.²⁴

[108] In the immediate case, in my opinion, the Plaintiffs' pure economic loss negligence claim is not a novel or new category of negligence claim for pure economic loss. It falls within the category of liability for the negligent performance of a service. Within this category there is a genre of cases that have considered the liability of auditors for negligent misrepresentation and for the negligent performance of a service.

[109] In 1997, in *Hercules Managements Ltd. v. Ernst & Young*,²⁵ the Supreme Court considered

²³ [1992] 1 S.C.R. 1021.

²⁴ *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 4.

²⁵ [1997] 2 S.C.R. 165.

the circumstances in which an auditor, in performing a statutory audit, owes a duty of care to the investors. The Supreme Court held that an auditor just providing a statutory audit does not owe a duty to shareholders or to investors in relation to their personal investment decisions. In the case of shareholders, a claim against an auditor for a negligently performed statutory audit must proceed derivatively as the claim of the corporation against its auditor.

[110] In *Hercules*, Hercules Management, Guardian Finance, and Max Freed were shareholders in Northguard Acceptance and Northguard Holdings, which corporations went into receivership in 1984. In 1988, Hercules, Guardian, and Mr. Freed sued Ernst & Young, which had been Northguards' auditors since 1971. Hercules, Guardian, and Mr. Freed alleged that Ernst & Young's audit reports for the years 1980, 1981, and 1982 were negligently prepared and that in reliance on these reports, they had suffered financial losses by investing more money in Northguard and by the diminishment in value of their shareholdings, which could have been avoided if Northguard had been properly informed about the state of its business. Ernst & Young brought a summary judgment motion to have the action dismissed. It argued that while it had a duty of care to Northguard, it did not have a duty of care to Hercules, Guardian, and Mr. Freed. Affirming the judgments of the Manitoba courts, the Supreme Court of Canada agreed with Ernst & Young that the auditors did not have a duty of care to those who had invested in Northguard in reliance on the auditor's reports. The case at bar is similar to the *Hercules* case.

[111] In *Deloitte & Touche v. Livent Inc. (Receiver of)*,²⁶ which involved a claim in contract and in negligence by a corporation against its auditor and not a claim by investors or others that might have relied on the audit, the Supreme Court revisited the analytical approach for cases of auditor's negligence and pure economic losses. In *Livent*, the Supreme Court did not overturn or disavow *Hercules* and rather the Court adopted a refined approach that still kept tight the scope of an auditor's liability for pure economic losses and that moved much of the analysis to the examination of the proximity of the relationship between the plaintiff and the defendant which analysis would usually resolve the matter of indeterminacy.

[112] In *Livent*, Justices Gascon and Brown (Brown and Rowe concurring) stated that it does not follow that because a proximate relationship and a duty of care has been found to exist for some purposes that a proximate relationship and a duty of care will exist for other purposes. Justice Gascon and Brown observed that rights to rely on audit reports and an auditor's duties or care are not limitless. At paragraphs 30-31, they stated:

30. In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so. These corollary rights and obligations create a relationship of proximity.

31. Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility -- that is, of the purpose for which the representation was made or the service was undertaken -- necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care. This principle, also referred to as the "end and aim" rule, properly limits liability on the basis that the defendant cannot be liable for a risk of injury against which he did not undertake to protect. By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only

²⁶ 2017 SCC 63.

determines the existence of a relationship of proximity, but also delineates the scope of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Followka*, at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence.

[113] In the immediate case it is not necessary to do a three-stage duty of care analysis. In the immediate case, BDO's relationship to the Class Members with respect to their investment decisions is indistinguishable from the duty of care relationship alleged and analyzed in *Hercules* and alleged and analyzed in *Lavender v. Miller Bernstein LLP*,²⁷ discussed below. While the legal analysis has morphed over time because of the *Livent* decision, in these decisions the Supreme Court of Canada and the Ontario Court of Appeal, respectively, have concluded that there is no duty of care owed to the investors arising from a statutory audit similar to the situation in the immediate case.

[114] The analysis of the duty of care in the immediate case is the same as in *Lavender*, which is the most recent analysis. In my opinion, for want of proximity, it is plain and obvious that the Plaintiffs do not have a legally viable cause of action against BDO for auditor's negligence in performing a statutory audit based on an alleged duty of care to the unitholders with respect to their investment decisions.

[115] Before turning to the other alleged duty of care, on the matter of a duty of care with respect to the unitholders for investment decisions, the case at bar is distinguishable from *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*,²⁸ which was relied upon by the Plaintiffs. *Excalibur* was a case where there was also a claim for negligent misrepresentation and where the audit work was not a periodic statutory audit but was prepared for the purpose of promoting an investment and there were other circumstances that established that it was not plain and obvious that there was not a proximate relationship and duty of care between plaintiff and defendant.

[116] I turn now to the duty of care alleged to be based on the purpose of BDO's audit being 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. At first blush, this would appear to base a novel negligence claim for pure economic losses. However, upon analysis the case at bar is indistinguishable from the Ontario Court of Appeal's analysis and decision in *Lavender*.²⁹

[117] In *Lavender*, which was a certified class action, Mr. Lavender and the Class Members had invested in the securities of Buckingham Securities, a securities dealer. Under the regulations of the *Securities Act*, Buckingham was required to segregate investor assets and maintain a minimum level of net free capital. The OSC pulled Buckingham's licence and placed it in receivership for non-compliance with the regulatory requirements of the *Securities Act*. The investors lost their investments.

[118] In his class action, Mr. Lavender sued Buckingham's auditor, Miller Bernstein LLP. He

²⁷ 2018 ONCA 729, leave to appeal to the S.C.C. refused [2018] S.C.C.A. No. 488.

²⁸ 2016 ONCA 916, which reversed 2015 ONSC 1634 (Div. Ct) and 2014 ONSC 4118, leave to appeal to the S.C.C. ref'd [2017] S.C.C.A. No. 54.

²⁹ 2018 ONCA 729, rev'g 2017 ONSC 3958, leave to appeal to the S.C.C. refused [2018] S.C.C.A. No. 488.

alleged that Miller Bernstein LLP negligently audited Buckingham's annual registration renewal form, which was known as a Form 9 Report. Buckingham's Form 9 Reports in 1998, 1999, and 2000 falsely stated that Buckingham was in compliance with the regulatory segregation and minimum capital requirements of the *Securities Act*.

[119] In *Lavender*, on a summary judgment motion, the motions judge held that Miller Bernstein LLP had breached its duty of care to the class members. On appeal, in a judgment written by Justice Epstein (Justices van Rensburg and Brown concurring), the Court of Appeal reversed the summary judgment decision and held that Miller Bernstein LLP did not owe the class members a duty of care. The case at bar is similar to the *Lavender* case, and I am bound by the *Lavender* decision.

[120] In *Lavender*, Justice Epstein held that proximity was not established between the auditor and the class members in relation to the Form 9 Reports. The parties were not in such a close and direct relationship that it would be just and fair having regard to that relationship to impose a duty of care in law.

[121] In *Lavender*, Justice Epstein observed that the relationship between the auditor and the class members did not fit within a previously established category of proximity. She conducted a duty of care analysis in light of the Supreme Court's refinements of that analysis in *Livent*.³⁰ She observed that in cases of pure economic loss arising from negligent performance of a service, two factors are determinative of the proximity analysis: (a) the defendant's undertaking; and (b) the plaintiff's reliance sourced within the scope of that undertaking.³¹

[122] Justice Epstein concluded that in the circumstances of the *Lavender* case, a finding a proximity stretched the legal principle beyond its permissible bounds. She provided five reasons why proximity had not been established.

[123] First and foremost, having regard to the loss claimed by the class members and Miller Bernstein LLP's retainer from Buckingham, which was to audit Buckingham's Form 9 Reports, which were used by the OSC to regulate securities dealers and to protect investors, it did not necessarily follow that the audit of the reports created proximity between Miller Bernstein LLP and the class members.

[124] In this regard, Miller Bernstein LLP did not undertake to assist the class members in making investment decisions. Miller Bernstein LLP made no representations to the class members, and the class members were not given copies of the Form 9 reports and most of them would not have known of Miller Bernstein LLP's involvement for Buckingham. The limited scope of the auditor's undertaking and lack of direct connection between the auditor and the class militated against finding proximity in this case.³² At paragraph 66 of her judgment, Justice Epstein stated:

66, In my view, the interposition of the OSC and Buckingham between the Auditors and the Class rendered the relationship between the parties too remote to ground a duty of care. The Auditor may well have owed a duty of care to Buckingham to properly conduct the audit. Perhaps an argument could be made that a duty was also owed to the OSC (which provided regulatory oversight and received the audit reports). This, however, is an issue I need not determine. In this case, the Auditor's

³⁰ 2017 SCC 63.

³¹ 2018 ONCA 729 at paras. 35, 61, leave to appeal to the S.C.C. refused [2018] S.C.C.A. No. 488; *Deloitte & Touche v. Livent Inc. (Receiver of)* 2017 SCC 63 at para. 30

³² *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729 at para. 65, leave to appeal to the S.C.C. refused [2018] S.C.C.A. No. 488.

undertaking did not extend to assisting the Class members -- who, as mentioned earlier and as the motion judge noted, never saw the Form 9 Reports and did not even know of their existence -- with supervising Buckingham and making investment decisions. As a result, I am of the view that the Auditor's undertaking in this case strongly militates against a finding of proximity.

[125] In the immediate case, there is the same interposition of Crystal Wealth and the OSC between the Class Members and BDO, and this degree of separation makes the relationship between the parties too remote to ground a duty of care. In the immediate case, although the Class Members were provided with BDO's reports to the OSC, 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*. In the immediate case, connecting the dots of proximity from the investors in Crystal Wealth's mutual funds are analogous to connecting the dots of proximity in the *Lavender* case.

[126] The second reason that Justice Epstein had for concluding that there was no proximity in the *Lavender* case does not fully apply to the circumstances of the immediate case. In *Lavender*, it was conceded that the class members did not rely on or review the Form 9 Reports, which were submitted confidentially to the OSC. That said the Form 9 Reports, like the audits in the immediate case, were submitted to the OSC for its regulatory purposes and not for the purpose of informing or inducing the class members in making investment decisions. Thus, the absence of actual reliance just supported Justice Epstein's view that there was no proximity in relation to the reports.

[127] The third reason that Justice Epstein had for concluding that there was no proximity in the *Lavender* case was that in finding proximity, the motions judge had mistakenly believed that Miller Bernstein LLP was obliged to file the Form 9 Reports and that it had access to the names and accounts of every member of the Class. Justice Epstein, however, concluded that the truth rather distanced the auditor from the class and undermined the motion judge's proximity analysis.

[128] In the immediate case, it was Crystal Wealth's obligation pursuant to the *Securities Act*, to file audited financial statements with the OSC and so there is the same distancing of proximity and whether or not BDO had access to the names and accounts of every member of the Class does not change that it gave no undertaking to the class members to assist them in their investment decisions or to protect them from Crystal Wealth's breaches of the *Securities Act*.

[129] In *Lavender*, the fourth factor weighing against a finding of proximity was the statutory scheme. The statutory scheme required Buckingham to segregate assets, maintain net free capital and file an audited Form 9 that confirmed that it met those obligations. Justice Epstein was of the view that these provisions were not sufficient to ground a relationship of proximity to the class members for the purpose of their investment decisions in relation to forms that were audited by Miller Bernstein LLP but that the class members never saw.

[130] In my opinion, while in the immediate case, the audited statements were seen by the class members, such as was not the case in *Lavender* where the reports were confidential, for the reasons expressed above in relation to *Hercules Managements Ltd. v. Ernst & Young*, the statutory scheme cannot be seen as the basis of a duty of care to the investors in making investment decisions and, more to the point, as was the case in *Lavender*, the statutory scheme cannot be seen as the basis for a duty or 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.

[131] In the immediate case, it should be kept in mind that the asserted cause of action for pure economic losses is not a claim for negligent misrepresentation; rather, it is a claim for the negligent

provision of a service that allegedly made it foreseeable that the OSC would not be aware sooner of circumstances that it should stop Crystal Wealth from selling mutual funds. In the immediate case, the Plaintiffs' theory of the case is based on a duty of care to ensure that Crystal Wealth complied with Ontario's securities laws and this theory does not depend upon whether the unitholders saw the audited financial statements. If there is any reliance by the investors in the immediate case, it is to be found in the derivative less proximate reliance that the OSC would police Crystal Wealth for compliance with the *Securities Act*; in the immediate case, reliance is not to be found in the Class Members receiving and reviewing audited statements that complied with GAAS, GAAP or IFRS.

[132] Once the nature of the undertaking and the nature of the reliance in the immediate case is recognized, the case at bar is on all fours with *Lavender*, where the Court of Appeal concluded that the statutory scheme did not give rise to a duty of care on the auditors.

[133] The fifth reason that Justice Epstein did not find a duty of care, and another reason that applies in the immediate case is that she was conscious of the Supreme Court's admonition that the recognition of a duty of care in a claim for pure economic loss required more rigorous scrutiny than other claims for negligence.³³ In the immediate case, in my opinion, the rigorous analysis leads to the conclusion that it is plain and obvious that based on the material facts pleaded, BDO does not owe a duty of care to the Plaintiffs and the putative Class Members.

[134] In *Hercules*, the problem confronted by the Supreme Court was that it was foreseeable that many persons who had no direct relationship with auditors could foreseeably be seen to reasonably rely on the auditors carefully preparing a client's financial statements, and thus the test for a duty of care could too readily be satisfied. In *Hercules*, the Supreme Court used public policy notions associated with indeterminacy to put boundaries on the scope of an auditor's liability. The notion of indeterminacy was used to rigorously scrutinize any exception to the general principle that pure economic losses are not recoverable for the tort of negligence. With the refinements of the analysis over the years that culminated most recently with the Supreme Court of Canada's decision in *Livent*, the boundaries are set no longer set by indeterminacy, but the boundaries are set as an aspect of a proximity analysis.

[135] In my opinion, there is not a proximate relationship between the investors and BDO that would support a negligence claim by the Class Members for their pure economic losses in the case at bar. As was the case in *Hercules* and in *Lavender*, the parties are not in such a close and direct relationship that it would be just and fair having regard to that relationship to impose a duty of care in law on BDO. BDO, however, remains exposed to liability in the causes of action advanced by the Receiver in the name of Crystal Wealth.

[136] I, therefore, conclude that the cause of action criterion is not satisfied.

[137] On the assumption that this conclusion is wrong, I shall next consider whether the preferable procedure criterion is satisfied in the case at bar.

³³ *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729 at para. 72, leave to appeal to the S.C.C. refused [2018] S.C.C.A. No. 488; *Mandeville v. The Manufacturers Life Insurance Company*, 2014 ONCA 417 at paras. 148-50, leave to appeal refused [2014] S.C.C.A. No. 390; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 42; *Martel Building Ltd. v. R.* 2000 SCC 60 at para. 35.

G. Preferable Procedure Criterion

1. General Principles

[138] Under the *Class Proceedings Act*, 1992, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.³⁴

[139] In *AIC Limited v. Fischer*,³⁵ the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[140] Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.³⁶ Arguments that no litigation is preferable to a class proceeding cannot be given effect.³⁷ Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.³⁸

[141] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.³⁹

[142] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification

³⁴ *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.

³⁵ 2013 SCC 69 at paras. 24-38.

³⁶ *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'd (2003), 65 O.R. (3d) 492 (Div. Ct.).

³⁷ *1176560 Ontario Ltd. v. The Great Atlantic and Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 45 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

³⁸ *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.

³⁹ *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

further the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).⁴⁰

[143] The court must identify alternatives to the proposed class proceeding.⁴¹ The proposed representative plaintiff bears the onus of showing that there is some basis-in-fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.⁴² It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.⁴³

[144] In *AIC Limited v. Fischer*, Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case? (2) What is the potential of the class proceeding to address those barriers? (3) What are the alternatives to class proceedings? (4) To what extent do the alternatives address the relevant barriers? and (5) How do the two proceedings compare?⁴⁴

2. Analysis: Preferable Procedure

[145] For the purposes of the discussion that follows, I will assume that the Plaintiffs have satisfied the cause of action, identifiable class, common issues, and representative plaintiff criteria.

[146] Based on these assumptions, I agree with the fulsome arguments of the Plaintiffs that their proposed class action satisfies the preferable procedure criterion, and I disagree with the excessive arguments of BDO that the proposed class action does not satisfy this criterion.

[147] However, for present purposes, as I shall now explain, there is a short and largely factual explanation for why the preferable procedure criterion is satisfied. In the circumstances of the immediate case, I need not analyze in any great detail the elaborate and complex competing arguments of the parties about the preferable procedure criterion.

[148] The essence of BDO's argument was that the receivership and the Receivers' action against BDO was preferable in every aspect of a preferable procedure analysis. Thus, BDO submitted that the proposed class action should not be certified, and the investors should be left with the recoveries to be made by the Receiver in the receivership and in its action against BDO.

[149] This lack of preferability of the proposed class action in contrast to the Receiver's action against BDO was disputed by the Plaintiffs, whose essential argument was that their claims in

⁴⁰ *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'd (2003), 65 O.R. (3d) 492 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.

⁴¹ *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 28.

⁴² *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 48-49.

⁴³ *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 62-67 (S.C.J.).

⁴⁴ *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 at para. 125; *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 27-38.

negligence against BDO were more potent than the Receiver's claim in contract.

[150] The Plaintiffs argued that the class action was more potent because in the Receiver's action for breach of contract, BDO had protected itself with contractual exculpatory provisions and other defences that it could not assert against a negligence claim. Thus, the Plaintiffs' negligence claim provided excellent procedural justice and had the potential of delivering more substantive justice and to come closer to perfect compensation for the investment losses.

[151] The Plaintiffs accused BDO of not understanding that the unitholders' cause of action in negligence was an independent cause of action that was not a derivative of the Receiver's action on behalf of Crystal Wealth against its auditor.

[152] As already noted, I, however, for present purposes, need not explore the voluminous competing arguments because BDO's essential argument was based on the false premise that the Receiver's action against BDO was an "alternative" to the proposed class proceeding.

[153] A preferable procedure analysis of alternative procedures will arise in a situation where there are mutually exclusive choices of procedure and the choice is one is preferable to the other. However, in the factual circumstances of the immediate case, with: (a) the factual issues being identical; (b) the legal issues being virtually identical; and (c) Adair Goldblatt Bieber LLP being the counsel for the Receiver and also the proposed Class Counsel, the Receiver's action and the proposed class action are not mutually exclusive choices; in the immediate case, the Receiver's action and the proposed class action are not "alternatives". They are complementary or supplementary procedures that fit together when prosecuted by the same counsel.

[154] With consolidation, the Receiver's action and the proposed class action actions would become one choice, and without consolidation, the actions might be said to be "alternates" but in the circumstances of the immediate case, the actions are not rival proceedings and they are not "alternatives".

[155] Typically, a defendant in a proposed class action will point to a true alternative to a class proceeding of a joinder action, a test case, a proceeding in another jurisdiction, a quasi-judicial or administrative proceeding, or an available remedial scheme. In the immediate case, BDO cannot point to a true alternative. The proposed class action and the Receiver's action are to be prosecuted as one case with one set of costs and a singular contingency fee arrangement with Class Counsel.

[156] In the immediate case, BDO's argument that the Class Members' negligence claim based on the same factual footprint as the breach of contract claim will lead to unmanageability or bog down the Receiver's claim in contract is a bogus argument, as is BDO's arguments that there is a risk of double jeopardy or inconsistent findings of fact and law. Consolidated or tried together, only one judge will decide the cases and there will be no double counting of damages. Tried together, the cases are manageable and the aims of access to justice, behaviour modification, and judicial economy will be best achieved.

[157] In short, notwithstanding the huffing and puffing of BDO to blow the class proceeding down as not the preferable procedure, there is no meaningful preferable procedure debate in the immediate case.

[158] But for the failure of the Plaintiffs to satisfy the cause of action criterion, I would have concluded that the preferable procedure criterion is satisfied.

H. Representative Plaintiff Criterion

1. General Principles

[159] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.⁴⁵

[160] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.⁴⁶

[161] In the context of class proceedings, there are three types of conflict of interest that require examination:⁴⁷ (1) conflicts of interest arising from a lawyer's direct financial interest in the class proceedings, which are an inherent conflict allowed by the entrepreneurial model of the class proceedings legislation; (2) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding; and (3) conflicts arising from a divergence of interest between the representative plaintiff and class members.

[162] While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial.⁴⁸ The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed.⁴⁹

2. Analysis

[163] During the course of the oral argument, without withdrawing its argument that Adair Goldblatt Bieber LLP, Mr. Whitehouse, and the Couchs had disqualifying conflicts of interest, BDO conceded that if all the other certification criteria were satisfied, then any problems associated with the representative plaintiffs were solvable by subtraction or substitution.

[164] By acting for Mr. Whitehouse, the Couchs, and Mr. Froats in both the class action and in the Media House action, then there were conflicts of interest of the kind I discussed in *Vaeth v.*

⁴⁵ *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

⁴⁶ *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41.

⁴⁷ P. Perell, "Class Proceedings and Lawyers' Conflict of Interest" (2009), 35 *Advocates' Quarterly* 202.

⁴⁸ *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 95 (C.A.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 76 (S.C.J.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 100 (S.C.J.).

⁴⁹ *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at paras. 62-67 (S.C.J.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.).

*North American Palladium Ltd.*⁵⁰ and *Persaud v. Talon International Inc.*⁵¹ However, these conflicts could be avoided by replacing Mr. Whitehouse and the Couchs as representative plaintiffs and by a change of lawyers for the plaintiffs in the Media House action.

[165] In other words, Mr. Whitehouse and the Couchs could continue as - class members - in the proposed class action and they could retain new counsel in the *Media House* action. Adair Goldblatt Bieber LLP would continue as counsel for the Receiver's action and as Class Counsel in the class action with replacement Representative Plaintiffs.

[166] As it is the case that I am not certifying the class action and because of BDO's concession that the representative plaintiff criterion could be solved as could any infelicities in the litigation plan, I do not propose to say more about the representative plaintiff criterion.

[167] I simply conclude that I would have treated the representative plaintiff criterion as conditionally satisfied in the circumstances of the immediate case if the cause of action criterion had been satisfied.

I. Conclusion

[168] For the above reasons, I dismiss the certification motion.

[169] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of BDO within twenty days of the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further twenty days.



Perell, J.

Released: January 8, 2020

⁵⁰ 2016 ONSC 5015.

⁵¹ 2018 ONSC 5377.

CITATION: Whitehouse v. BDO Canada LLP, 2020 ONSC 144
COURT FILE NO.: CV-17-579357CP
DATE: 2020/01/08

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**ANTHONY WHITEHOUSE, CARRIE COUCH and
JASON COUCH**

Plaintiffs

- and -

BDO CANADA LLP

Defendant

REASONS FOR DECISION

PERELL J.

Released: January 8, 2020

ANTHONY WHITEHOUSE et al.
Plaintiffs

-and-
BDO CANADA LLP
Defendant

Court File No. CV-17-579357-00CP

January 8, 2020
Order to issue an order in this
Recoveries for Plaintiff recorded today
Paul T.

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

AMENDED MOTION RECORD OF THE PLAINTIFF
VOLUME 1 OF 20

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830
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

Michele Valentini (74846L)

Tel: 416.238.7274

Email: mvalentini@agblp.com

Tel: 416.499.9940

Fax: 647.689.2059

Lawyers for the Plaintiffs
Anthony Whitehouse, Carrie Couch and Jason Couch