CITATION: Wright v. Horizons ETFS Management (Canada) Inc., 2021 ONSC 3120
COURT FILE NO.: CV-18-00597284-00CP
DATE: 20210503

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GRAHAM WRIGHT	)	*Alistair Crawley, Clarke Tedesco, Michael L. Byers* and *Alexandra Grishanova* for the Plaintiff
Plaintiff	)	
- and -	)	
	)	
HORIZONS ETFS MANAGEMENT (CANADA) INC.	)	
Defendant	)	*Seumas M. Woods, Ryan A. Morris* and *Greg Sainsbury* for the Defendant
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: April 8, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Defendant Horizons ETFS Management (Canada) Inc. ("Horizons") created and managed an "ETF" (exchange traded fund). ETFs are issued pursuant to a prospectus, which is the instrument used for primary market distributions of securities, but ETFs are purchased and sold in the secondary market for securities.

[2] The Plaintiff Graham Wright purchased Horizons' HVI-ETF. Overnight on February 5, 2018, the value of this ETF collapsed. All the investors in Horizons' HVI-ETF lost almost their investments, totaling tens of millions of dollars. Mr. Wright, who owned 15,375 units lost approximately $210,000.

[3] Pursuant to the *Class Proceedings Act, 1992,*[1] on May 4, 2018, Mr. Wright commenced a proposed class action. He advanced two causes of action; namely: (a) a common law action for negligence of the pure economic loss genre of negligence claim - but not a negligent misrepresentation claim, for which reliance would be a constituent element; and (b) a statutory

[1] S.O. 1992, c. 6.

cause of action under Part XXIII, s. 130 of the Ontario *Securities Act*[2] for misrepresentation in the primary market.

[4] Notably, Mr. Wright did not advance a statutory cause of action under Part XXIII.1 of the Ontario *Securities Act* for misrepresentations in the secondary market for securities. At the time when Mr. Wright commenced his action, the legal question of the nature of a misrepresentation claim with respect to ETFs had not been determined in the jurisprudence.

[5] In 2019, Mr. Wright moved for certification of his action as a class proceeding. I dismissed his motion and his action on the grounds that he had not pleaded a reasonable cause of action.[3] I held that: (a) there was no duty of care to support his claim in negligence; and (b) while he would have had a claim under Part XXIII.1 of the Ontario *Securities Act*, I held that he did not have a statutory claim under Part XXIII, s.130 of the *Act*.

[6] The Ontario Court of Appeal reversed my decision.[4] The Court held that Mr. Wright has a cause of action in negligence. It agreed that there was a claim under Part XXIII.1 of the Ontario *Securities Act*, but it also found that Mr. Wright could have a cause of action under Part XXIII, s. 130 of the Ontario *Securities Act,* if he pleaded that he had purchased "Creation Units" (which he has now done). The Court remitted Mr. Wright's certification motion to me for consideration of the other certification criteria.

[7] Horizons' application for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada and Mr. Wright's cross application for leave to appeal the Court of Appeal's decision were both dismissed on December 23, 2020.[5]

[8] Mr. Wright submits that all of the certification criteria have been satisfied and that his action should be certified as a class proceeding. Horizon persists in submitting that none of the certification criteria have been satisfied, including the cause of action criterion.

[9] For the reasons that follow, I certify as a class proceeding Mr. Wright's action for common law negligence. I do not certify the claim under s. 130 of the Ontario *Securities Act.*

B. Facts

1. Horizons ETFS Management (Canada) Inc.

[10] Horizons, which is headquartered in Toronto, Ontario, is registered under the Ontario *Securities Act* in the categories of Commodity Trading Adviser, Commodity Trading Manager, Exempt Market Dealer, Investment Fund Manager and Portfolio Manager. It is part of the Mirae Asset Financial Group, a global investment management enterprise headquartered in Seoul, South Korea.

[11] Horizons is the fourth largest ETF provider in the Canadian market. It markets itself as an innovator within the ETF industry bringing forward new and innovative ETFs.

[12] Horizons was the registered promoter and investment fund manager of the HVI-ETF, and it was also the trustee of the HVI-ETF pursuant to a Trust Declaration. Horizons designed,

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[2] R.S.O. 1990, c. 5.
[3] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2019 ONSC 3827.
[4] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337.
[5] *Wright v. Horizons ETFS Management (Canada) Inc.*, [2020] S.C.C.A. No. 257.

managed, and marketed the HVI-ETF. As manager, Horizons had the responsibility for investing and reinvesting the funds within the HVI-ETF portfolio in accordance with HVI-ETF investment objectives. As trustee, Horizons held the assets of the HVI-ETF in trust for its unitholders.

2. Exchange Traded Funds (ETFs)

[13] ETFs are an investment vehicle in which an underlying asset class such as a group of stocks, bonds, or commodities are pooled in an investment portfolio, which are held in trust for the unitholders. The value of an ETF generally represents the value of the underlying investments; however, the market price of the ETF's units is determined by the bid and ask of buyers and sellers on the stock exchanges on which the ETF units are listed.

[14] A defining feature of ETFs that makes them different from mutual funds is their arbitrage mechanism. Arbitrage is the simultaneous purchase and sale of the same asset in different markets in order to profit from tiny differences in the asset's listed price.

[15] Arbitrage promotes liquidity and the purpose of the arbitrage mechanism in an ETF is to bring together the price at which an ETF's shares trade on a stock exchange and the *pro rata* value of the fund's underlying assets, which is known as its net asset value ("NAV"). An ETF will have one or more "market makers;" these are brokers or dealers who purchase units from the ETF's manager at NAV. The market makers then buy or sell their ETF units on the stock exchange with the aim of making the market price close to the NAV.

[16] Through this market-making function, the Designated Brokers and Dealers help to ensure that the NAV and market price of the ETF units are closely aligned. The Designated Broker and Dealers typically hedge their exposure to the ETFs to protect themselves from significant negative changes in value.

[17] The manager of the ETF distributes ETF units to a "Designated Broker" or a "Dealer" through a continuous distribution dealer agreement. When a retail investor wishes to purchase or sell (have redeemed) ETF units, he or she does so through the broker or dealer. When a retail investor purchases an ETF, the dealer will issue a unit from its inventory of units, if any, or the broker or dealer will make a subscription order to the ETF manager, who will create a brand-new unit, a "Creation Unit".

[18] Retail investors can only buy or sell ETF units through registered brokers and dealers who buy or sell them over the stock exchanges on which the units are listed. The ETF units purchased by retail investors come from other holders or from the inventory of ETF units held by a Designated Broker or Dealer.

[19] In Canada, ETFs are regulated by Canada's securities regulatory authorities. Before an ETF can begin trading on a stock exchange, its manager must file a prospectus and the regulator must issue a receipt for the prospectus.

[20] Canadian regulators take the position that the first sale of a Creation Unit of an ETF constitutes a distribution of the unit under the securities statutes and National Instrument 41-101 and, therefore, the Designated Broker and the Dealers are subject to the prospectus delivery requirements set out in that legislation.

[21] Because Creation Units are generally comingled with other ETF units purchased by the Designated Broker and the Dealers in the secondary market, it is not practicable for the Designated

Broker or the Dealers to determine whether a particular re-sale of ETF units involved Creation Units, ETF units purchased in the secondary market, or both. Therefore, the securities regulator grants the Designated Broker and the Dealers an exemption from the obligation to deliver a prospectus with each re-sale of a Creation Unit. Instead, the Designated Broker and Dealers are required to provide a summary document to an investor purchasing units in a particular ETF for the first time. Thus, re-sales of ETF units in the secondary market that are not Creation Units would not ordinarily constitute a distribution requiring the delivery of a prospectus.

[22] As will appear from the discussion below, a contentious issue in the immediate case is whether it is provable that a purchaser of ETF units over an exchange can determine if he or she is receiving: (a) a Creation Unit, a new unit issued by the ETF manager; or (b) an ETF unit that has been in circulation previously in the secondary market.

3. The HVI-ETF

[23] Horizons' HVI-ETF is the BetaPro S&P 500 VIX Short-Term Futures Daily Inverse ETF or HVI Fund.

[24] The Ontario Securities Commission issued receipts for the HVI-ETF initial prospectuses on December 29, 2011 and March 27, 2012. Units began trading on April 3, 2012.

[25] As of December 31, 2017, the HVI-ETF had 1,140,000 units outstanding. The units were held in 1,624 different investment accounts. As 2018 began, the NAV of the HVI-ETF was $26 million.[6]

[26] HVI-ETF units continued to trade until the close of business on June 11, 2018, when Horizons elected to terminate the HVI-ETF.

[27] Horizons was the HVI-ETF's manager and trustee pursuant to an amended and restated master declaration of trust. National Bank Financial Inc. was its Designated Broker, while National Bank Financial Inc., CIBC World Markets Inc., and Société Générale Capital Canada Inc. were its Dealers. The Designated Broker and the Dealers acted as the market makers. They would facilitate trades over the TSX and would redeem or subscribe for new units depending on their perception of market demand.

[28] The HVI-ETF was not actively managed. In a passive way, the fund was designed to allow the market to determine what purchases of assets should be made. The HVI-ETF was designed to provide daily investment results, before fees, expenses and distributions, brokerage commissions, and other transaction costs that attempted to correspond to the inverse of the daily performance of the S&P 500 VIX Short-Term Futures Index (the "VIX Futures Index"). Thus, the HVI-ETF invested in securities, futures contracts and other financial instruments that were capable of providing a return substantially similar to the inverse of the VIX Futures Index.

[29] The HVI-ETF was one of three ETFs Horizons offered based on the VIX Futures Index. The BetaPro S&P 500 VIX Short-Term Futures ETF was designed to provide daily investment results that attempted to correspond to the performance of the VIX Futures Index.

[30] The VIX Futures Index seeks to offer exposure to market volatility through publicly traded

[6] By way of comparison, as of the same date, Horizons' S&P 500 Index ETF had 10.7 million units issued and outstanding with a NAV of $673 million. Horizons' S&P/TSX 60 Index ETF had 52.4 million units issued and outstanding, and a NAV of more than $1.7 billion.

futures markets. The VIX Index is known in the investment industry as the "fear gauge" of the U.S. equities market. It is a measure of implied and expected volatility of the S&P 500 over a 30-day period. The implied level of volatility of the S&P 500 typically increases in periods of market instability, increasing the level of the VIX Index. The VIX Index tends to rally quickly and decline slowly.

[31] Horizons' HVI-ETF was an inverse ETF, which is to say that it was designed so that when the VIX Futures Index declined by a certain percentage on a given day, the NAV of the assets in HVI-ETF went up by that same percentage. Conversely, when the VIX Futures Index increased on a given day, the NAV of the assets in the HVI-ETF went down by that same percentage.

[32] To achieve its performance objective, HVI-ETF was required to rebalance its exposure to VIX futures contracts on a daily basis. HVI-ETF obtained exposure by selling longer-term VIX futures contracts and subsequently rebalanced by repurchasing shorter-term VIX futures contracts at the end of the trading day to match the weighted average maturity of the VIX futures contracts underlying the Reference Index. Horizons' counterparty for these contracts was the National Bank of Canada.

[33] The investment strategy underlying HVI-ETF is known as "shorting volatility" by selling VIX futures contracts. This "volatility shorting" strategy is an income strategy, known as "risk-premium harvesting". In exchange for the gains that accumulate during periods of low volatility, investors who take short positions in VIX Index Futures take on the risk of a spike in volatility. The HVI-ETF was a high-risk speculative investment that was marketed for diversification or as a partial hedge against certain market conditions such as declining market volatility.

a. The concept behind shorting volatility is to generate revenue by collecting premium from selling (shorting) longer term VIX futures contracts, which, during periods of low volatility, trade at a premium in relation to nearer term VIX futures contracts. The return generated from the difference between the selling and buying of the futures contracts is known as "roll yield". The difference in value is referred to as "contango" and "rolling" refers to the process whereby futures contracts that are close to expiration are sold and futures contracts with a farther expiration date are purchased to avoid having to settle the contracts on their expiration date.

b. A notable feature of a short volatility strategy is the lack of symmetry between the way in which gains are realized - by way of an incremental accumulation of risk premium during a sustained period of low market volatility - and how losses are experienced, which are sudden, unexpected, and typically catastrophic.

c. Selling volatility is a strategy to gradually accumulate income. However, volatility can increase extremely rapidly, reflected in a spike in the VIX Index, with the result that a trader who is short volatility futures can lose all of their investment, including all accrued gains (and potentially more as the exposure is unlimited) within hours or even less.

[34] In the December 22, 2017 prospectus, in bold type in a box on its first page, investors are cautioned about all three of Horizons' VIX Futures Index ETFs, as follows:

> The ETFs are speculative investment tools, are very different from other Canadian exchange traded funds, and can be used for diversification or as a partial hedge against market conditions.

> These are not conventional investments. The ETFs are designed to provide investment results that endeavour to correspond to: (i) the performance of; (ii) two times the daily performance of; or (iii) one times the inverse (opposite) multiple of, the daily performance of the S&P 500 VIX Short-Term Futures Index™ (the "Underlying Index"). The Underlying Index tracks market volatility, not market returns and has tended to have a low to negative correlation to equity market returns. The Underlying Index is highly volatile. As a result, it is not generally viewed as a stand-alone investment.
>
> Historically, the Underlying Index has tended to revert to a historical mean. As a result, the performance of the Underlying Index is expected to be negative over the longer term and none of HUV, HVU or the Underlying Index are expected to have positive long-term performance.
>
> Historically, the Underlying Index has experienced significant one day increases when equity markets have had large negative returns which, if repeated, could cause HVI to suffer substantial losses.
>
> Investors should monitor their investment in an ETF daily.

[35] The second page of the December 2017 Prospectus reinforced the warnings about the risks associated with the VIX-related ETFs, stating:

> Each investor should carefully consider whether their financial condition and/or retirement savings objectives permit them to buy Units of an ETF. Units of the ETFs are highly speculative and involve a high degree of risk, some not traditionally associated with mutual funds. No ETF by itself constitutes a balanced investment plan. An investor may lose a portion or even all of the money that they place in an ETF.
>
> The risk of loss in investing through derivatives can be substantial. In considering whether to buy Units of an ETF the investor should be aware that investing through derivatives can quickly lead to large losses as well as large gains. Such losses can sharply reduce the net asset value of an ETF and consequently the value of an investor's Units in the ETF. Market conditions may also make it difficult or impossible for an ETF to liquidate a position.

[36] These warnings were repeated in the December 2017 Prospectus, including a twelve-page section of the prospectus entitled "Risk Factors," which describes the risks associated with purchasing units in the three ETFs. The HVI-ETF Fact document contained a similar warning, stating in bold print:

> This ETF is a commodity pool and is highly speculative and involves a high degree of risk. It is intended for use in daily or short-term trading strategies by sophisticated investors. You should carefully consider whether your financial condition permits you to participate in this investment. You may lose a substantial portion or even all of the money you place in the commodity pool.

4. Graham Wright

[37] Mr. Wright is a 35-year-old high school graduate with a financial advisor's licence which he obtained in the last five years. During his working life, he was employed mainly as a salesperson for radio stations. For six months, he worked at Edward Jones, a financial advisory firm, where he sold investments. He was trained so that he could obtain a financial advisor's license. The training included training on mutual funds, stocks, and insurance.

[38] In May 2017, Mr. Wright began trading in HVI-ETF units among other Horizons' ETFs. He made his trades through his broker Interactive Brokers Canada Inc.

[39] Mr. Wright traded in HVI-ETF units on February 5, 2018. As of the close of the stock

market on February 5, 2018, Mr. Wright held 15,375 HVI-ETF units. He sold the units on February 6, 2018 at prices in the range of $2.20 per unit. Mr. Wright estimates that he lost approximately $210,000 on his investment.

5. The Collapse of HVI-ETF

[40] Throughout 2016 and 2017, volatility – and the VIX Index – remained historically low. As a result, short-volatility funds like HVI-ETF were very profitable as they accumulated assets incrementally through roll yield. This had a compounding (positive) effect on the net asset value of HVI-ETF. The fund gained 72.60 % in 2016.

[41] However, a prolonged period of low volatility left the VIX Index susceptible to a large and rapid increase in percentage terms. Market analysts expressed concerns that a one-day market decline of 3% or 4% could cause a significant spike in the VIX Index (in percentage terms) and trigger catastrophic losses for volatility-contingent strategies such as that employed by HVI-ETF.

[42] There were particular concerns that the daily rebalancing that short volatility funds needed to undertake could lead to very limited liquidity in periods of market stress, which would rapidly drive up the price of VIX futures contracts. This presented a significant risk for HVI-ETF. A significant spike in the VIX Index, causing a corresponding increase in the price of VIX Index futures contracts, could force HVI-ETF to use all or substantially all of its accumulated asset base to close its position on rebalancing.

[43] The value of HVI-ETF continued on a generally upward trajectory through late 2017 (the average daily increase was 0.27% in the six months ending February 1, 2018), during which time the VIX stayed at historically low levels.

[44] The number of units in HVI-ETF grew by 1,675,000 (approximately 147%) between January 1 and February 5, 2018, as the Designated Broker and the Dealers subscribed for additional units during this period of elevated risk. Mr. Wright alleges that Horizons took no steps to address the increasing risk to HVI-ETF and its unitholders.

[45] On February 1, 2018, HVI-ETF closed at a value of $21.64. It declined in price to $18.76 by the close of business on Friday, February 2, 2018. On Monday, February 5, 2018, the S&P 500 declined by 4.1%, causing a spike in volatility – the VIX Index increased by 115% – during the course of the trading day.

[46] An unprecedented volume of 4,481,010 HVI-ETF Units traded over the TSX on February 5, 2018. Mr. Wright submits that it would have been apparent to Horizons during the day on February 5, 2018 that the nearer term VIX futures contracts were going to be priced at a much higher level and that the net asset value of HVI-ETF would need to be marked significantly downwards from the net asset value struck by Horizons at 4:00 pm. He submits that sophisticated market participants who understood the volatility futures market, would have known that HVI-ETF was obligated to buy a significant number of VIX futures contracts to implement the required daily rebalance.

[47] On February 5, 2018, HVI-ETF suffered dramatic losses in the aftermarket (between 4:00 and 4:15 pm), when HVI-ETF and other short volatility funds had to complete their rebalancing, as the prices of the near term VIX futures contract continued to rise after 4:00 pm. When the unitholders who held HVI-ETF's units overnight woke up the next day, the value of their units was $2.49 – a decline of 81.42% from the previous night's close and nearly 87% less from its price

at the close on February 2, 2018.

[48] The extreme and unexpected volatility in the VIX-futures market after markets closed impaired the trading of the derivatives used to provide inverse exposure to the VIX Futures Index. As a result, although Horizons had struck a NAV of $12.68 for units in HVI as of February 5, 2018, the units opened at a price of $2.49 on February 6, 2018. To address this situation, on February 6, 2018, Horizons requested and received a temporary halt in trading of the units. Trading resumed later that same day.

[49] HVI-ETF investors were not able to trade their units on February 6, 2018 until approximately 2:00 pm as Horizons had halted trading of HVI-ETF. After trading was resumed, the price of HVI-ETF never recovered.

6. Horizons Closes HVI-ETF

[50] On March 1, 2018, Horizons published an amendment to the prospectus, pursuant to which it amended HVI-ETF's investment objective so that it was expected to deliver only one half of the inverse of the Underlying Index. Horizons did not explain why it materially lowered HVI-ETF's exposure to volatility in response to the losses of February 5, 2018.

[51] On April 10, 2018, Horizons announced that it would be closing HVI-ETF. In its press release, Horizons offered the following explanation for its decision to close HVI-ETF:

> After reassessing the performance of HVU and HVI-ETF, particularly their respective performance following the first week of February, when volatility futures contracts spiked by more than 100% during one 24-hour trading period, we have come to the conclusion that these ETFs no longer offer an acceptable risk/reward trade-off for investors," said Steve Hawkins, President and Co-CEO of Horizons ETFs. "…Ultimately, we do not want to be offering investment products that have the potential to lose the majority of an investor's capital in such a short period of time.

[52] On April 17, 2018 Horizons published a second amended Prospectus for HVI-ETF and HVU, announcing that the two ETFs were being terminated effective June 11, 2018.

[53] HVI-ETF ceased trading on June 6, 2018. On June 11, 2018, Horizons shut down HVI-ETF permanently, when it paid out investors a net asset value of $2.41 per unit – approximately 11% of the value of a unit of HVI-ETF on February 1, 2018.

7. The Identification of Creation Units and of Traded Units

[54] As noted above, only the Designated Broker or a Dealer can purchase ETF units directly from Horizons. Retail investors cannot purchase ETF units directly from Horizons. In theory, retail investors can redeem ETF units directly with Horizons but, in practice, no retail investor has ever done so.

[55] The subscription process for a Creation Unit of Horizons' HVI ETF is as follows:

a. The Designated Broker submits an electronic subscription order by 9:30 a.m. EST.

b. Horizon does not hold ETFs in inventory and issues a new ETF unit by instructing AST Trust Company (Canada) and TSX Trust Company, its registrar and transfer agent to create the new unit(s).

c. Horizon advises its custodian CIBC Mellon Trust that new ETF units will be forthcoming and CIBC Mellon: (i) includes the Creation Units in its net asset value report for the ETF for that trading day; (ii) calculates the value of the Creation Units at that day's closing NAV; and (iii) adjusts the ETF's exposure to the underlying index in accordance with its investment objectives at the end of the applicable trading day, to reflect the increased number of ETF units.

d. Horizon instructs CIBC Mellon to settle the subscription for the applicable Dealer or Designated Broker in exchange for payment on the settlement date.

e. Within one trading day of a subscription order the Registrar and Transfer Agent deposits the Creation Units to CIBC Mellon's account with the Canadian Depository for Securities.

f. CIBC Mellon delivers the Creation Units to the account of the subscribing Designated Broker or Dealer in return for payment in cash for the ETF units.

g. By the second trading day after Horizons' receipt of a subscription order, the Designated Broker or Dealer holds the Creation Units in inventory and may sell them over the Exchanges on which the ETF is listed for trading or use them to settle trades that the Designated Broker or Dealer has previously executed.

[56] When a Designated Broker or a Dealer wants to redeem ETF units, Horizons generally reverses the above process. The Designated Broker may redeem ETF units it acquired directly or units it purchased over the secondary market.

[57] Operationally, the redemption and creation of ETF units are netted out on each trading day.

[58] The following point is key. ETF units are not individually identifiable. The ETF units purchased by retail investors come from other holders or from the inventory of ETF units held by a Designated Broker or Dealer. No one who purchases ETF units over an Exchange can determine if they are receiving a Creation Unit, or an ETF unit that has been in circulation previously.

[59] A purchaser from a Designated Broker or Dealer may be receiving an ETF unit from inventory. The inventory of the Designated Broker or Dealer includes ETF units bought in the market.

[60] When Mr. Wright's certification motion was before the court, he swore that he did not know whether or not he had purchased Creation Units and the evidence was that it was not possible to determine whether any particular class members received or sold Creation Units. As mentioned above, I dismissed Mr. Wright's claim pursuant to s. 130 of the Ontario *Securities Act*. However, the Court of Appeal ruled that if Mr. Wright pleaded that he and the class members were dealing with Creation Units, then there was a legally viable claim under s. 130 of the Act. Before the Court of Appeal was a pleading motion and the Court of Appeal apparently understood that the problems could be solved by Mr. Wright amending his pleading.

[61] Mr. Wright amended his Statement of Claim accordingly, and he proffered additional evidence that it would be possible to identify purchasers of Creation Units. This additional evidence turns out on analysis to be based on speculation.

[62] Horizons cross-examined Mr. Wright's deponents on the matter of the identification of Creation Units and lead evidence for the resumption of the certification hearing. Horizons submits that the evidence establishes that: (a) units of HVI are not individually identifiable or traceable;

(b) it cannot be determined whether HVI units involved in a particular transaction are Creation Units or units that were previously traded on the secondary market; (c) although HVI units traded by a Designated Broker or Dealer could theoretically be Creation Units, there is no way to tell; (d) there is no evidence that identifies the "anonymous broker" in the TSX records filed by Mr. Wright; and (e) there is no evidence that HVI units acquired by Mr. Wright's broker went to Mr. Wright's account.

C. Procedural Background

[63] The action was commenced by Statement of Claim dated May 4, 2018.

[64] Mr. Wright delivered an Amended Statement of Claim dated February 11, 2021.

[65] On behalf of the proposed class, Mr. Wright seeks damages of $38 million or such other sum as the Court finds appropriate, $5.0 million in punitive, aggravated and exemplary damages, an accounting and disgorgement of all fees or commissions paid to or received by Horizons in respect of HVI, interest and substantial indemnity costs.

[66] The proposed class definition is:

> All persons and entities, wherever they may reside, who held units in BetaPro S&P 500 VIX Short-Term Futures Daily Inverse ETF ("HVI") on the Toronto Stock Exchange ("TSX") as at the close of business on February 5, 2018, excluding the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of an individual defendant.

[67] Mr. Wright's common law negligence claim is set out in paragraphs 67 to 70 in the Amended Statement of Claim as follows:

> *Horizons' Breaches of The Duty of Care*
>
> 67. Pursuant to section 9.7 of the Trust Declaration, section 116 of the OSA, OSC Rule 31-505 – Conditions of Registration, and the common law, at all material times Horizons owed the following duties to HVI and to the Unitholders, including the Class Members:
>
> a. a duty to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of HVI and its Unitholders;
>
> b. a duty to act fairly, honestly and in good faith with its clients, which included the Unitholders;
>
> c. a duty to exercise the degree of care, diligence and skill that a reasonably prudent trustee, investment fund manager and investment manager would exercise in comparable circumstances; and
>
> d. duties to ensure that:
>
> i. HVI was appropriately designed, developed and manufactured so that it could be owned and traded by Unitholders;
>
> ii. HVI was appropriately tested so that it could be owned and traded by Unitholders;

iii. HVI was appropriately marketed and distributed to Unitholders;

iv. the risk/reward ratio of HVI was appropriate for Unitholders; and

v. Unitholders were appropriately warned of the risks of owning HVI.

68. Contrary to its obligations, by its acts and omissions, Horizons has failed to:

a. act fairly, honestly, in good faith and in the best interests of Unitholders, including the Class Members;

b. exercise the degree of care, diligence and skill that a reasonably prudent manager, investment manager, promoter and trustee would exercise in comparable circumstances;

c. properly design, develop, manufacture, test, market, or distribute HVI; and/or warn investors of the risks of owning HVI.

69. Specifically, and by virtue of the actions of Horizons particularized in paragraphs 29-65 above, Horizons breached its duties to Unitholders and the Class by:

a. developing the underlying strategy of HVI into an ETF when it knew or ought to have known that an ETF structure would put Class Members at a disproportionate risk of loss;

b. designing a product that was too complex to be marketed to retail investors;

c. failing to employ a robust distribution and pricing mechanism that would ensure that HVI tracked its net asset value during intra-day trading in periods of market volatility (which is when HVI was most likely to be actively traded);

d. failing to structure HVI in a manner that would avoid significant changes in its net asset value after the close of markets;

e. structuring HVI with an inflexible investment mandate that required HVI to close out its positions in VIX Futures Contracts after 4:00 pm each day regardless of the cost of doing so;

f. failing to address the dislocation of HVI from its net asset value on February 5, 2018, including failing to warn investors that this had occurred;

g. failing to conduct proper or adequate testing of HVI prior to launching it;

h. failing to ensure that HVI could withstand significant increases in market volatility without a significant drop in value or, in the alternative, failing to warn investors of that risk;

i. failing to ensure that HVI would not lose a majority of its value in a single day or, in the alternative, failing to warn investors of that risk;

j. promoting, marketing and selling HVI, which it knew or should have known was based on an excessively complex and risky strategy, organized into an unsuitable retail investment product;

k. failing to disclose in the Prospectus the material facts necessary to understand HVI, including the rationale for the investment strategy of HVI and the manner in which HVI would increase or decrease in value;

l. failing to adequately warn Unitholders of the nature and extent of the risks of investing in HVI;

m. simultaneously marketing HVI as a short-term and a long-term investment;

n. failing to foresee the ways in which Unitholders might buy, sell or hold HVI;

o. implying through the Prospectus and other disclosure that HVI could generate shortterm profits commensurate with the potential for short-term losses;

p. failing to diligently perform its duties as manager of HVI;

p.1 failing to monitor the trading of NBF to ensure that it did not use its position to unreasonably profit at the expense of investors;

p.2 for any sales made by NBF on February 5, 2018, allowing NBF to settle trades with units at a subscription price of only $2.20, rather than at the NAV of $12.68 announced at the close of trading on February 5, 2018;

q. failing to conclude that HVI did not have an "acceptable risk/reward trade-off" for investors prior to February 5, 2018;

r. failing to continuously monitor or update HVI's investment strategy to reflect the risks disclosed by academic, scholarly and industry research;

s. continuing the operation of HVI when it knew or should have known that the downside risk of the investment was becoming more extreme and potentially more imminent;

t. failing to warn investors when it knew or should have known that the downside risk of the investment was becoming more extreme and potentially more imminent; and/or

u. engaging in a continuous offering of HVI in light of the above.

70. HVI was introduced into the market for the sole or primary purpose of generating fees and income for Horizons.

[68] Mr. Wright advances a statutory cause of action pursuant to s. 130 of the Ontario *Securities Act*, which states:

130. (1) Where a prospectus, […] contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

(a) the issuer or a selling security on whose behalf the distribution is made;

[…]

[69] Mr. Wright's claim pursuant to s. 130 of the Ontario *Securities Act* is set out in paragraphs 71 to 78.1 of this Amended Statement of Claim as follows:

Prospectus Misrepresentations

71. The Plaintiff asserts against Horizons the right of action for prospectus misrepresentation in section 130 of the OSA (and, if necessary, the equivalent provisions contained in the securities law of the other provinces of Canada).

72. Horizons has prepared, filed and disseminated the Prospectus to permit the continuous offering of HVI Units to the public.

73. Pursuant to section 56(1) of the OSA (and, if necessary, the equivalent provisions contained in the securities law of the other provinces of Canada), the Prospectus is and was required to provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed under the Prospectus.

74. The Prospectus is a prospectus for the purposes of section 130 of the OSA (and, if necessary, the equivalent provisions contained in the securities law of the other provinces of Canada).

75. At all times, the Prospectus contained misrepresentations within the meaning of the OSA (and, if necessary, the equivalent provisions contained in the securities law of the other provinces of Canada) by omitting to state material facts necessary to make the Prospectus not misleading, including that it failed to disclose, or in the alternative fully or adequately disclose:

a. the fundamental strategy of HVI – the accumulation of assets through an income strategy by selling VIX Futures Contracts;

b. the risks of investing in HVI as compared to the potential rewards;

c. that the intra-day trading value of HVI might be inflated or inaccurate;

d. the potential for HVI's assets to drop rapidly in value after the close of the trading day;

e. the fact that HVI could lose all or substantially all of its value in a single day in volatile markets; and/or

f. the valuation methodologies for the calculation of the net asset value.

76. In totality, Horizons' disclosure was misleading. Horizons failed to represent the material elements of the product so that investors would understand the rationale for investing in HVI or the trade-off between the potential risks and rewards of the product. Investors were not provided the material facts necessary for them to make an informed decision about whether HVI was suitable for their investment objectives or risk tolerance.

77. Horizons certified and signed the Prospectuses as required by National Instrument 81-101 – Mutual Funds Prospectus Disclosure and Form 81-101F2 and is liable pursuant to section 130(1)(e) of the OSA (and, if necessary, the equivalent provisions contained in the securities law of the other provinces of Canada).

78. The offering of Units of HVI and, in particular, the offering and sale of Creation Units to which the Prospectuses related, constituted distributions of the Units in Ontario and/or distributions of the Units from Ontario to persons outside Ontario. The offering was governed by the OSA and its subsidiary instruments and regulations and was carried out under Ontario securities laws.

78.1 As a result of purchasing and owning Creation Units at the close of business on February 5, 2018, Wright and the Class Members are entitled to damages pursuant to Part XXIII and s. 130 of the OSA.

[70] Mr. Wright's allegations of causation and damages are set out in paragraphs 79-83 of the Amended Statement of Claim as follows:

79. But for the negligence and negligent misrepresentations of Horizons, described above, the Plaintiff and the other Class Members would not have suffered loss and damage on investments in HVI.

80. As stated above, the Plaintiff and the Class Members have suffered the following damages and losses:

> a. the loss of the capital invested in HVI, totalling approximately $38,000,000, between February 2, 2018 and February 6, 2018; and
>
> b. the loss of the market returns on the capital lost from February 6, 2018 to the date of trial.
>
> 81. The Plaintiff and the Class Members are also entitled to recover costs in accordance with the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action, plus reasonable legal fees.
>
> 82. The Plaintiff and the Class Members are entitled to an accounting of all fees or commissions and other payments made to or received by Horizons in relation to HVI as well as disgorgement of those sums.
>
> 83. The conduct of Horizons pleaded above demonstrates a calculated disregard of Horizons' duties to the Plaintiff and the Class Members such that an award of punitive, aggravated and exemplary damages is warranted.

[71] Mr. Wright supported his motion for certification with the following evidentiary record:

a. Affidavits of **Alexandra Grishanova** dated October 2, 2018, February 5, 2021, and March 5, 2021. Ms. Grishanova is a lawyer with the law firm of Crawley MacKewn Brush LLP, Mr. Wright's lawyers of record and proposed Class Counsel. She was cross-examined.

b. Affidavit of **Graham Wright** dated October 2, 2018. He was cross-examined.

[72] Horizons resisted the motion for certification with the following evidentiary record:

a. Affidavits of **Kevin S. Beason** dated January 11, 2019, March 1, 2019, and February 26, 2021. Mr. Beason is Horizons' Chief Operating Officer ("COO") and Chief Compliance Officer ("CCO"). He was cross-examined.

D. Certification: General Principles

[73] 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.

[74] 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.[7] On a certification motion, the

[7] *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.).

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.[8] 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.[9]

[75] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[10]

[76] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[11] In particular, there must be a basis in the evidence to establish the existence of common issues.[12] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[13]

[77] The some-basis-in-fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[14]

[78] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.[15] The evidence on a motion for certification must meet the usual standards for admissibility.[16] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible,

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[8] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[9] *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.
[10] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[11] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[12] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[13] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[14] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[15] *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[16] *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744; *Williams v. Canon Canada Inc.,* 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd*., 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.

the scrutiny of it is modest.[17]

E. The Cause of Action Criterion

1. General Principles

[79] 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*,[18] is used 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*.[19]

[80] 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.[20]

[81] 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.[21]

[82] 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 of action.[22]

[83] 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.[23]

[84] 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,[24] and the court's power to strike a claim is

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[17] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).
[18] [1990] 2 S.C.R. 959.
[19] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.
[20] *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'g, (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.).
[21] *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.
[22] *2106701 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.).
[23] *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.
[24] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

exercised only in the clearest cases.[25] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[26] 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.[27]

[85] In *R. v. Imperial Tobacco Canada Ltd.*,[28] 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. Chief Justice McLachlin stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[86] In *Atlantic Lottery Corp. Inc. v. Babstock*,[29] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial.

2. Discussion and Analysis: Cause of Action Criterion

[87] I am satisfied that Mr. Wright has satisfied the cause of action criterion for both his common law claim and also for his claim pursuant to s. 130 of the Ontario *Securities Act.*

[88] The Court of Appeal held that it was not plain and obvious that Mr. Wright's pure economic loss negligence claim would fail.

[89] Horizons argues that the holding of the Court of Appeal went only so far as Mr. Wright's pleading of design negligence and of a failure to disclose material facts. Horizons submits that the Court of Appeal ruling did not encompass a holding that Mr. Wright had a common law negligence claim associated with how Horizons administered or managed the passively managed ETF.

[90] I disagree with Horizons' argument. The Court of Appeal held - comprehensively - that

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[25] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[26] *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.
[27] *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.).
[28] 2011 SCC 42 at paras. 17-25.
[29] 2020 SCC 19 at para. 87–88.

Mr. Wright had satisfied the cause of action criterion for his novel negligence cause of action. It may be that after a trial, a court will rule that there is no duty of care or that the duty of care is shaped in a particular way. The court will also have to address the other elements of a negligence cause of action, but all that is for another day.

[91] The Court of Appeal also held that purchasers of HVI could pursue a claim under section 130 of the Ontario *Securities Act*, if Mr. Wright amended his claim to plead that he and the Class Members were holders of Creation Units. Mr. Wright amended his Statement of Claim to plead in paragraph 78.1 the material fact that: "As a result of purchasing and owning Creation Units at the close of business on February 5, 2018, Wright and the Class Members are entitled to damages pursuant to Part XXIII and s. 130 of the OSA." Mr. Wright has thus pleaded his s. 130 claim.

[92] Horizons submits that it is plain and obvious that this allegation of a material fact is incapable of proof and therefore does not have to be assumed to be true for the purposes of analyzing whether Mr. Wright has pleaded a reasonable cause of action.

[93] I disagree. Once again, I am bound by the holding of the Court of Appeal. While the matter of identifying Creation Units is a matter that I shall revisit when considering the other certification criteria, for the purposes of a pleadings analysis, it is not an allegation that can be disregarded or dismissed out of hand as incapable of proof.

[94] Mr. Wright has properly and adequately pleaded a cause of action pursuant to s. 130 of the Ontario *Securities Act*.

[95] I conclude that Mr. Wright has satisfied the cause of action criterion for both causes of action.

F. Identifiable Class Criterion

1. General Principles

[96] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[30]

[97] In *Western Canadian Shopping Centres v. Dutton*,[31] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[98] In defining the persons who have a potential claim against the defendant, there must be a

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[30] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[31] 2001 SCC 46 at para. 38.

rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[32] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[33] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[34] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[35] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[36]

2. Analysis and Discussion: Identifiable Class Criterion

[99] The proposed class definition is:

> All persons and entities, wherever they may reside, who held units in BetaPro S&P 500 VIX Short-Term Futures Daily Inverse ETF ("HVI") on the Toronto Stock Exchange ("TSX") as at the close of business on February 5, 2018, excluding the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of an individual defendant.

[100] In the immediate case, on its face, the class definition is satisfactory. It uses objective criteria. It does not turn on the merits of the claim. It is neither over nor underinclusive. It cannot be narrowed without excluding members who may have a valid claim.

[101] The problem in the immediate case insofar as the s. 130 of the Ontario *Securities Act* claim is concerned is that there is no basis in fact to show that two or more persons will be able to determine if they are in fact a member of the class with a claim based on a Creation Unit.

[102] To be clear, the class definition criterion is satisfied with respect to the negligence claim. The problem in the immediate case is associated with the statutory cause of action of s. 130 of the Ontario *Securities Act.*

[103] The problem in the immediate case is closely analogous to the problem that arose in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*.[37]

[104] In the *Sun-Rype* case, on behalf of direct and indirect purchasers of corn-syrup used in various food products, the plaintiff commenced a proposed class action against the leading

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[32] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).
[33] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[34] *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[35] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.
[36] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.).
[37] 2013 SCC 58.

producers of corn-syrup in North America for anti-competitive conduct.

[105] In the Supreme Court of Canada, all of the justices agreed that the indirect purchasers had a cause of action. However, in a judgment written by Justice Rothstein (Chief Justice McLachlin and Justices LeBel, Fish, Abella, Moldaver and Wagner concurring; Justices Cromwell and Karakatsanis dissenting), the Court held that the identifiable class criterion was not satisfied. While it could be said that some of the class members had indirectly purchased the price-fixed corn starch, there was no basis in fact in the evidence to establish that at least two class members could prove that they had purchased a product that contained corn-starch rather than an alternative sweetener.

[106] The following paragraphs of Justice Rothstein's decision are applicable to the circumstances of the immediate case where it can also be said that while there undoubtedly are far more than two Class Members who indirectly acquired Creation Units, there is no basis in fact for establishing that at least two Class Members can prove that they purchased Creation Units. Indeed, such evidence as there is proves that there is no basis in fact for establishing that at least two Class Members can prove that they purchased Creation Units. The following paragraphs from Justice Rothstein's decision could be applied *mutatis mutandis* to the immediate case:

> 61. […] That is not the situation in this case. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified. Here, they have not met even this relatively low evidentiary standard.
>
> 62. This is not a case of mere difficulty in proving membership in a defined class. That is what distinguishes this case from *Pro-Sys*. In *Pro-Sys*, even if class membership is not immediately evident to potential class members based on the class definition, records of purchase or the presence of the application software or operating systems that form the subject of the appeal on the computers of the putative class members would serve to identify them as part of the identifiable class. […]
>
> 63. Conversely, in this case, the respondents' evidence is that HFCS and liquid sugar had been used interchangeably by direct purchasers during the class period. […] The result is that a consumer who purchased such a product during the class period would have had no way of determining whether that product contained HFCS, even if they had bothered to check the label.
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> […]
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> 65. […] The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.
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> […]
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> 67. […] While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs who have suffered harm but for whom it would be impractical or unaffordable to bring a claim individually. In this case, class membership is not determinable.
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> […]
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> 69. In this case, the appellants argue that denying that there is an identifiable class is to confuse the ability to identify a class with the ability to identify each individual member of that class (response factum, at para. 72). I agree that it is not necessary for each individual class member to be identified

> at the outset of the litigation in order for the class to be certified. However, as set out in the legislation, the matter will only be certified if, *inter alia*, "there is an identifiable class of 2 or more persons" (s. 4(1)(b)). In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.
>
> 70. Justice Karakatsanis says that there is some basis in fact to conclude that some indirect purchasers could prove that they probably purchased products containing HFCS (para. 115). With respect, no evidence was provided to establish some basis in fact that any individual indirect purchasers could do so. Allowing the class to be certified in such circumstances would be to lower the evidentiary standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.
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> 71. Justice Karakatsanis also states that "expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis" (para. 108). However, even if expert evidence satisfies the certification judge that the class as a whole was harmed, that does not obviate the need for the certification judge to be satisfied that there is some basis in fact indicating that at least two persons can prove they incurred a loss.
>
> […]
>
> 77. The goal of the certification stage, as indicated by McLachlin C.J. in *Hollick*, is to determine if, procedurally, the action is best brought in the form of a class action (para. 16). In this case, given that the appellants did not show that there was some basis in fact to believe that at least two persons can establish they are members of the class, I am unable to answer that question in the affirmative.

[107] The analysis from *Sun-Rype* applies to the immediate case with respect to Mr. Wright's statutory claim under s. 130 of the Ontario *Securities Act*. Indeed, it applies *a fortiori* because the evidence contradicts the proposition that there are two or more Class Members who can establish that they purchased Creation Units. The evidence shows that evidence for self-referential identification does not exist. I repeat what I said above. ETF units are not individually identifiable. The ETF units purchased by retail investors come from other holders or from the inventory of ETF units held by a Designated Broker or Dealer. No one who purchases ETF units over an Exchange can determine if they are receiving a Creation Unit, or an ETF unit that has been in circulation previously.

[108] The failure in the immediate case for the Ontario *Securities Act* Part XXIII claim failing to satisfy the identifiable class criterion can be illustrated by the following slight variation of the facts of the immediate case. The variation is that it is precisely known that half of the class of purchasers of Horizons' ETF purchased Creation Units. In this circumstance, the class definition would be overinclusive in including the purchasers of units in the secondary market but that overinclusiveness is not the problem because to exclude these purchasers at the outset would be based on a merits-based definition which is forbidden. The real problem is that (like the indirect purchasers in *Sun-Rype*), no two purchasers of Horizons' ETF can prove that they purchased Creation Units. That is a problem of indeterminacy not a problem of overinclusiveness.

[109] In its factum and during oral argument Mr. Wright's counsel submitted that it would be possible to deduce from trading records what portion of Horizons' ETFs traded on February 5, 2018 was Creation Units. That may be provable, but the problem is that the logical reasoning still does not allow the identification of which Class Members were holding Creation Units. Those units may have been acquired and held any time between April 3, 2012, when Units began trading, and February 5, 2018.

[110] In its factum and during oral argument, Mr. Wright's counsel submitted that the some-basis-in-fact standard is lower than the balance of probabilities standard of proof that will be used later to determine disputed issues of fact. Mr. Wright's counsel submitted that after discoveries it may be determinable on the balance of probabilities standard that there is an identifiable class. This argument, however, does not work. Given the nature of ETFs, there is a paradoxical problem of self-reference akin to mathematician and philosopher Bertrand Russell's "Barber Paradox."[38] This problem is built in and it cannot be avoided by any standard of empirical proof.

[111] I, therefore, conclude that Mr. Wright satisfies the identifiable class criterion only for his negligence cause of action but not for the statutory cause of action that he has pleaded.

G. Common Issues Criterion

1. General Principles

[112] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[39] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[40] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[41] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[113] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[42]

[114] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[43] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions

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[38] If the barber is the "one who shaves the class of those, and those only, who do not shave themselves," does the barber shave himself? The barber cannot shave himself as he only shaves those who do not shave themselves. However, if he shaves himself, he ceases to be the barber. Conversely, if the barber does not shave himself, then he is in the class who would be shaved by the barber, and thus, as the barber, he must shave himself.

[39] *Hollick v. Toronto (City),* 2001 SCC 68 at para. 18.

[40] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.

[41] 2013 SCC 57 at para. 106.

[42] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2015 ONCA 572 at para. 48; *McCracken v. CNR,* 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 40.

[43] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

that circumvent the necessity for individual inquiries.[44]

[115] The common issue criterion presents a low bar.[45] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[46] Even a significant level of individuality does not preclude a finding of commonality.[47]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[48]

[116] From a factual perspective, the Plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists, and (2) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class Members and the proposed common issues.[49]

2. The Proposed Common Issues

[117] Mr. Wright proposes the following common issues:

Negligence

1. Did Horizons owe the Class Members a duty of care?
2. If the answer to question 1 is 'yes', what is applicable standard of care?
3. If the answer to question 1 is 'yes', did Horizons' acts and/or omissions breach the applicable standard of care?

Civil Liability under s. 130 of the OSA

4. Did the Prospectus and the documents incorporated into it by reference contain misrepresentations within the meaning of the *OSA* (and, as applicable, the other Canadian securities legislation)?
5. If the answer to question 4 is 'yes', is Horizons liable to Class Members or some of them pursuant to s. 130 of the *OSA* (and, as applicable, the other Canadian securities legislation)?

Causation and Damages

6. If the answer to questions 3 is yes, did Horizons' breaches of the standard of care cause the Class Members to suffer damages?

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[44] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

[45] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *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'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

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

[47] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[48] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[49] *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.).

7. If Horizons is found liable for any claims asserted by the Class Members, as set out above, how should damages that the Class Members are entitled to receive under each claim be measured?
8. Does the conduct of Horizons justify an award of punitive and/or exemplary damages? If so, in what amount?
9. Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that among the Class Members?

Administration and Distribution

10. Should Horizons pay the costs of administering and distributing the recovery? If so, what amount should the Defendant pay?

3. Common Issues Criterion: Discussion and Analysis

[118] For the reasons that follow, I find the following four questions satisfy the common issues criterion:

1. Did Horizons owe the Class Members a duty of care?
2. If the answer to question 1 is 'yes', did Horizons' acts and/or omissions breach the applicable standard of care?
3. If the answers to questions 1 and 2 are yes, did Horizons' breaches of the standard of care cause every Class Member to suffer damages equal to the total amount of capital that he or she invested from time to time less the total amount of capital recovered from time to time less any deduction for contributory negligence?
4. Would the conduct of Horizons to the class justify an award of punitive and/or exemplary damages?

[119] Notwithstanding Horizons' arguments to the contrary, original question 1 is a common issue for this class proceeding.

[120] Original questions 2 and 3 have been merged into the new question 2, and notwithstanding Horizons' arguments to the contrary, these questions are a common issue for this class proceeding.

[121] Because of my conclusion about the identifiable class criterion for the s. 130 of the Ontario *Securities Act,* original questions 4 and 5 should be struck from the list of common issues.

[122] The original causation and damages issues 6 and 7 have been recast and merged into new question 3. This is a common issue of law about what is the legal formula for the calculation of damages for each and every individual Class Member. The legal formula would be for the calculation of damages for the tort of negligence. How the legal formula applies to the facts will be a matter to be determined at individual issues trials.

[123] There is no prospect of an aggregate damages award and indeed in the immediate case, liability for negligence will not be determined until it is determined whether a Class Member actually suffered a financial loss from his or her investment. The capital loss suffered by Horizons' ETF does not necessarily equate to the class-wide loss of capital. Thus, the preconditions for an aggregated damages award under s. 24 (1) of the *Class Proceedings Act, 1992* are not satisfied.

[124] In his Amended Statement of Claim, Mr. Wright submitted that the Class Members have

suffered the $38 million loss of the capital invested in HVI that occurred between February 2, 2018 and February 6, 2018. The fund never recovered. However, while it may be true that $38 million of Horizons' ETF value was lost, it does not follow that Horizons' aggregate liability to the class equals $38 million.

[125] Horizons' liability to the class ultimately depends on individual issues trials and there is the matter of contributory negligence which undoubtedly will be pleaded.

[126] An example derived from the factual record will demonstrate the point that individual issues trials are required in the immediate case. The evidence for the certification motion was that Horizons introduced the HVI-ETF in April 2012 and that the average individual investment was $16,000. The fund gained 72.60 % in 2016 alone. The upward trajectory continued through 2017 at an average daily increase of 0.27% per day (which is 98.5% annually) until the catastrophic collapse occurred overnight on February 5, 2018.

[127] Using these facts and assuming that a Class Member invested in a $16,000 purchase at the beginning of 2016, the value of the Class Member's investment would be approximately $55,000 at the beginning of 2018. If the Class Member redeemed half of his or her investment in January 2018 ($27,500), then he or she would recover 11% ($3,025) of the balance of the investment after the collapse of the fund. Thus, when the dust settled, this Class Member would have recovered his or her capital of $16,000 from the 2016 investment plus a profit of $14,525, a not bad return of approximately 45% *per annum* in these times when the Bank of Canada interest rate was 2% in 2016 and 2017.

[128] It seems that Mr. Wright's case may be an example of a Class Member who lost his capital and there may have been no offsetting profits from his investment. However, that just demonstrates that individual issues trials are required in the immediate case to determine liability and that an aggregate assessment is not available on a class-wide basis. In this regard, it is wise to recall that the *Class Proceedings Act, 1992* is a procedural statute and it does not change the law of damages.

[129] While, strictly speaking, it is not necessary for me to comment about whether Mr. Wright's statutory cause of action, which I am not certifying, would have supported a common issue for an aggregate damages assessment of damages, for completeness, I add that it would not. In this regard, I agree with Horizons' submission at paragraph 39 of its first factum, where it states:

> 39. There is a further flaw in the proposed methodology that exemplifies how section 130 of the OSA is ill-suited to resolving ETF disputes. Units of an ETF are purchased by the public at market prices. Whereas section 130 of the OSA is designed to resolve disclosure disputes in the circumstances of issuer-set pricing, Part XXIII.1 of the OSA is designed to resolving disclosure disputes in the circumstances of market-set pricing. Among other things, Part XXIII.1 of the OSA (at section 138.5) bases damages calculations on market pricing in contrast to section 130 of the OSA (at section 130(9)) which bases damages on "the price at which the securities were offered to the public." In this case, the specific Creation Units would need to be identified to determine "the price at which the securities were offered to the public" and the evidence is that this identification is not possible.

[130] With respect to original question 8, only one factual element of the legal prerequisites for an award of punitive or exemplary damages presents a common question in the immediate case. In the immediate case, it can be determined on a class-wide basis whether Horizons' conduct to the class was so egregious as to justify a punitive award. It is for this reason that I am prepared to certify the fourth question in the revised list of questions.

[131] However, liability for negligence, which would be a prerequisite for any remedy, and assuming liability for negligence the quantum of damages and the quantum of any punitive damages are matters for the individual issues trials.

[132] Original question 10 with respect to a distribution plan is not certifiable. In the immediate case, unless there is a settlement, there will be no distribution plan. Damages awards would follow success at the common issues trial and success at individual issues trials.

[133] In the result, the common issues criterion is satisfied for the above four questions.

H. Preferable Procedure Criterion

1. General Principles

[134] 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.[50]

[135] In *AIC Limited v. Fischer*,[51] 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.

[136] 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.[52] 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.[53]

[137] 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.[54]

[138] Original question 10 with respect to a distribution plan is not certifiable. In the immediate

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[50] *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.
[51] 2013 SCC 69 at paras. 24-38.
[52] *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'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[53] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[54] *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.

case, unless there is a settlement, there will be no distribution plan. Assuming that Mr. Wright is successful at the common issues trial and assuming that the individual Class Members are successful at their common issues trials, damage awards will follow the individual issues trials.

2. Analysis and Discussion: Preferable Procedure Criterion

[139] Because of my conclusion above that there is no identifiable class for the statutory claim pursuant to s. 130 Ontario *Securities Act*, it follows that this claim fails to satisfy the common issues criterion and also the preferable procedure criterion.

[140] Turning to Mr. Wright's common law negligence claim, Horizons argued that the preferable procedure for any claim with respect to ETFs is Part XXIII.1 and not Part XXIII of the Ontario *Securities Act*. In any event, Horizons submitted that the preferable procedure is not a common law negligence claim.

[141] In the immediate case, a Part XXIII.1 statutory cause of action under the Ontario *Securities Act* was never advanced and for the above reasons the statutory cause of action that was advanced under Part XXIII is not certifiable. Thus, the only question is whether Mr. Wright's common law negligence satisfies the preferable procedure criterion. In my opinion it does.

[142] Mr. Wright's common law negligence cause of action, which emerged after the Court of Appeal's decision, satisfies the other criteria for certification. Whatever the resolution of the four certified common issues, the outcome will be significant to the development of the law about the regulation of ETFs and about the law that governs those who create, distribute, and manage, this important and growing sector of the financial marketplace.

[143] Even if it ultimately turns out that there will be approximately a 1,000 individual issues trials, the common issues trial will substantially advance the claim of the Class Members.

[144] As it turns out, because of the absence of any statutory claims under either Part XXIII or Part XXIII.1 of the Ontario *Securities Act*, the only way to achieve access to justice and behaviour modification in the immediate case, is by the common law negligence claim. The circumstances that there may be individual issues trials is never a reason to deny certification.

[145] I do not agree with Horizons' arguments that the negligence claim is unmanageable. That some common law negligence claims involving securities have been found to be unmanageable because of individual issues just demonstrates that manageability has to be decided on a case-by-case basis.

[146] I do not agree with Horizons' argument that a statutory claim would be the better way to litigate the Class Members' grievances and the better way to achieve the access to justice, behaviour modification, and judicial economy goals of the class action regime and hence the better type of claim is the preferable procedure.

[147] In circumstances in which there is no statutory claim and where Horizons did not volunteer to consent to the certification of such a statutory claim, and where there are serious doubts about whether the Part XXIII.1 claim would be untimely and statute-barred this is just a pernicious argument. It is also a misconceived argument. Many class actions advance multiple causes of action and the preferable procedure test is not used to separate the weeds from the roses.

[148] In short, in my opinion, Mr. Wright's common law negligence claim satisfies the preferable procedure criterion.

I. Representative Plaintiff Criterion

1. General Principles

[149] 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.[55]

2. Analysis and Discussion: Representative Plaintiff Criterion

[150] In the immediate case, the representative plaintiff criterion is satisfied.

[151] With respect to the representative plaintiff criterion, Horizons' major challenge was that Mr. Wright cannot show that he has a claim pursuant to s. 130 of the Ontario *Securities Act*. This claim is not being certified, so the argument is moot.

[152] The case is being supported by the Class Proceedings Fund, and Horizon did not seriously challenge Mr. Wright's qualifications as a representative plaintiff to prosecute the negligence claim. Crawley MacKewn Brush LLP's competence as proposed Class Counsel has been battle-tested in this hard-fought certification litigation, and it is still standing tall.

[153] The litigation plan, which is always a work in progress, will need to be amended in accordance with these Reasons for Decision, but the plan is adequate for the purposes of satisfying the representative plaintiff criterion.

J. Conclusion

[154] For the above reasons, I certify the action as a class proceeding.

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

K. Postface

[156] Mr. Wright's certified class action leaves the law about the Ontario *Securities Act's* statutory causes of action about the distribution of ETFs in a problematic and uncertain state. The problems may require legislative initiative to resolve.

[157] When Mr. Wright first moved for certification, his proposition was that ETFs should be exclusively regulated under Part XXIII of the Ontario *Securities Act*. Conversely, Horizons' categorical proposition was that ETFs should be exclusively regulated under Part XXIII.1. I agreed

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[55] *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.).

with Horizons' categorical proposition. On Mr. Wright's appeal, the Court of Appeal disagreed with all of me, Horizons, and Mr. Wright. The Court of Appeal effectively ruled that ETFs are a hybrid.

[158] The Court of Appeal held that ETFs were regulated by both Part XXIII for Creation Units and also by Part XXIII.1 for non-Creation Units. This was not the outcome sought by any of the parties and both Mr. Wright and Horizons sought leave to appeal the Court of Appeal's decision, The Supreme Court of Canada was apparently not satisfied that the matter deserved its attention and denied leave without reasons.

[159] The Court of Appeal's approach of a hybrid regulation of ETFs, which must now be taken to be settled law, exacerbates the problem of the identifiable class criterion. The paradox is that for purchasers of ETFs, it cannot be determined whether or not their ETF unit is a Creation Unit. To be fair, this was a criterion not addressed by the Court of Appeal.

[160] Thus, the problem in the immediate case is that no two Class Members can identify themselves as subject to either Part XXIII or Part XXIII.1. The problem for the regulation of ETFs is that this paradox is not confined to the immediate case. The Class Members must thus rely on a common law negligence claim which takes the matter outside the Ontario *Securities Act*. This is a problem worth the attention of the Ontario Securities Commission or the Legislature.

Perell, J.

Released: May 3, 2021

CITATION: Wright v. Horizons ETFS Management (Canada) Inc., 2021 ONSC 3120
COURT FILE NO.: CV-18-00597284-00CP
DATE: 20210503

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GRAHAM WRIGHT

Plaintiff

- and -

HORIZONS ETFS MANAGEMENT (CANADA) INC.

Defendant

REASONS FOR DECISION

PERELL J.

Released: May 3, 2021.