IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McCorquodale v RBC Global Asset Management Inc.,* 2026 BCSC 2142

Date: 20261103
Docket: S193820
Registry: Vancouver

Between:

Annabelle McCorquodale and Robert Cummings

Plaintiffs

And

RBC Global Asset Management Inc. and The Royal Trust Company

Defendants

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiffs:	P.J. Bates J.R.E. Archibald
Counsel for the Defendants:	A. Liang J.R. Green J. Underwood
Place and Dates of Hearing:	Vancouver, B.C. July 8-9, 2026 August 21, 26, 2026
Place and Date of Judgment:	Vancouver, B.C. November 3, 2026

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I. INTRODUCTION

[1] This certified class proceeding concerns an investment strategy the plaintiffs refer to as “closet indexing”. In broad strokes, the plaintiffs allege that the defendants managed a mutual fund using a strategy to closely track the fund’s market benchmark index, while charging management fees that should reflect more active management of the fund.

[2] The original certification judge certified sixteen common issues. Several years later, the plaintiffs applied to amend the notice of civil claim and amend the certified common issues. I granted them leave to amend the pleadings. These reasons for judgment address the application to amend the common issues.

[3] The plaintiffs seek to add two new common issues:

a) Was the performance of the fund substantially linked to the performance of the benchmark because of low active risk?

b) Was there a substantial risk the fund would not outperform the benchmark after fees?

[4] The plaintiffs say these are “natural corollaries” of the already-certified “core” common issue which asks whether the defendants used a closet indexing strategy. They characterize this application as narrow. The only material question, they argue, is whether the evidence, much of which the original certification judge accepted, establishes some basis in fact for the two additional issues.

[5] The defendants characterize the amendments and the application much differently. They argue that the action should proceed based on the original common issues. They say the plaintiffs have gone to great lengths to reframe their case post-certification to avoid a defeat at the merits stage due to a lack of evidence of deceit or dishonest intent. The defendants argue that the reframed allegations based on “risk disclosure” (the defendants’ characterization) should not pass the court’s gatekeeping function under s 4(1) of the *Class Proceedings Act,* RSBC 1996, c 50

[*CPA*]. While the defendants raise multiple objections, their focus is on the commonality and preferability requirements.

[6] The defendants acknowledge that the proposed common issues are "common" in the sense that a resolution of the issues pleaded by the plaintiffs would be common to all class members. They also acknowledge that there is some evidence supporting the "existence" of the proposed common issues, at least during parts of the class period.

[7] The defendants argue, however, that the plaintiffs have failed to satisfy the "some basis in fact" standard for commonality because there is no evidence that the impugned conduct is contrary to any Canadian securities law or otherwise illegal or wrongful. Further, the defendants argue that the plaintiffs have failed to show there is a workable methodology for determining losses arising from the new allegations on a class-wide basis. In addition, they argue that the new issues raise industry-wide policy questions that the courts should leave to the securities regulators, assuming there is any merit in the plaintiffs' concerns about inadequate risk disclosure.

[8] In my view, both parties miss the mark on this application. The defendants are entitled to a meaningful evidentiary screening of the proposed common issues. However, that screening must be functional and pragmatic, used not as a preliminary assessment of the merits, but as a means of ensuring that the case does not founder at the merits stage due to a lack of commonality or preferability.

[9] Applying this test, I conclude that the plaintiffs should be granted leave to amend the common issues.

II. BACKGROUND

A. The CEF Mutual Fund

[10] The plaintiffs represent a class of investors who hold or held at any time during the class period one or more units of the Canadian Equity Fund ("CEF"). The CEF is a mutual fund trust managed by the defendant RBC Global Asset Management Inc. ("RBC").

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[11] The stated investment objective of the CEF is to provide long-term capital growth. The CEF fund managers invest primarily in equity securities of major Canadian companies. They may also invest in securities of comparable foreign companies, so long as those holdings do not exceed 25% of the CEF portfolio. The simplified prospectus of the CEF says that the fund managers use active management strategies such as market research, stock selection, technical analysis, and portfolio structuring to achieve the fund's objectives.

[12] RBC charges management fees for each series of the CEF based on a management expense ratio, expressed as a percentage of the assets under management, and a share of the total fund expenses of that series.

[13] The benchmark index of the CEF is the S&P/TSX Capped Composite Total Return Index (the "Benchmark"). Market indices such as the Benchmark are one way of assessing the performance of a mutual fund.

[14] RBC discloses the past performance of the CEF relative to the Benchmark. In 14 of the 20 years from 2005 to June 2025, the CEF outperformed the Benchmark before accounting for management fees. At times, certain series of the CEF outperformed the Benchmark after fees. At other times, they did not.

[15] Two concepts that arise in these proceedings are active risk and the difference between an actively managed mutual fund and an index fund.

[16] Active risk is a statistical measure of the difference between the performance of a mutual fund and its benchmark index due to active management strategies (i.e. the extent to which the fund's managers select holdings or weightings that differ from the benchmark securities). Actively managed funds with high active risk aim to outperform the benchmark but may carry higher investment risk levels.

[17] An index fund or exchange-traded fund (ETF) is a mutual fund that tracks a market benchmark index. A pure index fund would have zero active risk. Generally, the fees for an index fund are lower than the management fees for an actively managed mutual fund.

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[18] Mutual funds are highly regulated investments. This regulation includes a series of “National Instruments” and related forms that prescribe various disclosure obligations for Canadian mutual funds. For example, Form NI 81-101F requires disclosure of the fund’s investment strategies and any material risks associated with investing in the fund.

[19] Canadian regulators have not adopted a formal definition of closet indexing, nor have they established that a certain level of active risk must be maintained to justify a given level of management fees. There is no express requirement for mutual fund managers to disclose a risk the fund will not outperform its benchmark after fees.

B. The Certification Decision

[20] Justice Funt certified the action as a class proceeding in reasons for judgment indexed at 2021 BCSC 144 (the “Certification Decision”). The Certification Decision is foundational to the issues on this application, so I will review it in some detail.

[21] Justice Funt summarized the plaintiffs’ case concisely in the opening paragraph of the Certification Decision:

> [1] In brief, the plaintiffs say that they paid or bore investment fees and related expenses based on the active management by the defendant, RBC … when, in truth, RBC … used an investment strategy that closely tracked or replicated an index fund.

[22] Justice Funt found that the pleadings raised several causes of action, including the tort of civil fraud. Notably, the plaintiffs did not expressly plead fraud. Instead, Funt J. inferred a pleading of fraud from the following allegations of fact by the plaintiffs: RBC made a false representation to the class members that the fund was actively managed; RBC knew that the fund was in truth an index fund; the class members paid fees that were higher than those of an index fund; and the class members suffered damages as a result: Certification Decision at paras 28-34.

[23] Justice Funt also found that the pleadings raised a statutory cause of action for prospectus misrepresentation under s 131 of the *Securities Act,* RSBC 1996,

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c 418, based on the following allegations: the closet indexing strategy was a material fact that RBC did not disclose to the unitholders; this non-disclosure could constitute a misrepresentation as defined in the *Securities Act*; and unjustified fees would reduce the value of a class member's units, which could be characterized as a loss that may be claimed as damages under s 131: Certification Decision at paras 65-70.

[24] In addition, Funt J. found that the pleadings raised a cause of action for breach of fiduciary duty: the plaintiffs allege that RBC owed the unitholders a fiduciary duty, which it breached by acting as both the trustee and the manager of the fund and paying itself excessive fees: Certification Decision at paras 76-80.

[25] The defendants acknowledged that the pleadings disclosed additional causes of action for breach of trust, breach of contract, knowing receipt, and unjust enrichment. In addition, Funt J. found that the pleadings raised a claim of knowing assistance: Certification Decision at para 82.

[26] Justice Funt found that the proposed class definition met the requirements of s 4(1)(b) of the *CPA*: he held that the class was clearly defined with a rational connection to the proposed common issues: Certification Decision at paras 85-111.

[27] Turning to s 4(1)(c), Funt J. found that the plaintiffs had shown some basis in fact that the claims of the class members raised common issues. In this regard, the plaintiffs relied on two affidavits by Mikhail Simutin, Ph.D., an associate professor of finance at the Rotman School of Management at the University of Toronto. Professor Simutin applied various performance metrics and concluded that, in his opinion, the defendants engaged in closet indexing and caused harm to the class members in the form of excessive management fees. Justice Funt accepted this analysis for the purposes of the certification application:

> [120] I find that Professor Simutin's analysis provides "some basis in fact" that RBC GAM used a Closet Index Strategy and such raises a common issue across the Class. In particular, the Canadian Equity Fund's performance characteristics relative to its benchmark index are correlated to at least some considerable measure based on Dr. Simutin's analysis.
>
> [121] If it is found at trial that RBC GAM used the Closet Index Strategy or that the Canadian Equity Fund had substantially all of the performance

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> characteristics of its benchmark index and such was not disclosed, then there is the common live argument that Class Members paid or bore excess fees (for management or trading or both).

[28] Justice Funt rejected the defendants' submission that the plaintiffs' proposed methodology to determine loss on a class-wide basis was unworkable. The defendants had argued that Prof. Simutin's analysis was fundamentally flawed because it presumed that all unitholders had the same investment preferences and objectives, and because some investors suffered no loss in the value of their investments relative to the Benchmark. Justice Funt accepted the plaintiffs' argument that damages could be assessed on an aggregate basis using the difference between the management fees that RBC charged and a representative index fund fee, without the need to enquire into individual investment decisions:

> [125] As noted, a quantifiable component of measuring loss or damage may be the difference between the management fee charged and a representative index fund fee. For each class member, the number of units held and for what period(s) may be ascertained based on the trading records for each unitholder.

[29] Justice Funt also rejected the defendants' submission that liability would require an analysis of individual trading decisions by the fund managers:

> [128] The defendants also focus on a stated need to examine individual management decisions regarding the purchase and sale of securities by the Canadian Equity Fund. The plaintiffs plead that the Closet Indexing Strategy was an investment "strategy". As a strategy, I find that the examination of particular trades will likely not be necessary.

[30] Turning to s 4(1)(d), Funt J. found that a class action would be the preferable procedure to resolve the common issues. He found that the common issues dominated over individual issues: Certification Decision at para 150. He also rejected the defendants' submission that the issue of closet indexing should be addressed by regulators rather than a court of law in a class proceeding: Certification Decision at paras 154-160.

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[31] Lastly, Funt J. found that the named plaintiffs were appropriate representatives of the class members, satisfying s 4(1)(e): Certification Decision at paras 170-176.

C. The Related Class Proceedings

[32] This action is one of four proceedings based on closet indexing, each of which has been certified as a class proceeding: *McCorquodale v RBC Global Asset Management Inc.* (this action); *Turpin v TD Asset Management Inc.*; *Gibbs v HSBC Global Asset Management*; and *Pope v Canadian Imperial Bank of Commerce*.

[33] Justice Funt was the certification judge in all four proceedings and the common issues trial judge in *Turpin,* the only case to go to trial so far. Developments in these related proceedings are relevant to a full understanding of the parties' positions on this application.

[34] In *Turpin*, both the certification order (which was by consent) and the pleadings defined closet indexing as "an investment strategy designed to closely track or replicate, not exceed, the performance of the [b]enchmark". Justice Funt found that the use of the word "designed" in the definition was significant. He held that proof of the Closet Indexing Strategy as defined "require[d] deceit, fraud, or dishonesty by one or more individual portfolio managers or by [the defendant] operating as an institution": *Turpin v TD Asset Management Inc.,* 2022 BCSC 1083 at para 68. On the evidence, Funt J. answered the common issues in the negative: para 445.

[35] The defendants argue that the application to amend the certified common issues in this case is brought by the plaintiffs in an effort to avoid the result in *Turpin.*

[36] In *Gibbs,* the pleadings are now substantially the same as the pleadings in this case. Justice Funt dismissed the application to certify *Gibbs* as a class proceeding in several sets of reasons. Initially, he found that the pleadings disclosed causes of action in fraud, breach of trust, breach of fiduciary duty, prospectus misrepresentation, and unjust enrichment. He also found that the remaining

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requirements in s 4(1)(b), (c), (d) and (e) were met. However, after the plaintiff amended her pleadings to disavow fraud, Funt J. described the amended pleadings as “confounding”, determined they no longer disclosed any cause of action, and dismissed the certification application on that basis.

[37] On the plaintiff’s appeal, the Court of Appeal held that the judge erred in concluding that without fraud the pleadings no longer disclosed a cause of action: *Gibbs v HSBC Global Asset Management (Canada) Limited*, 2025 BCCA 31 [*Gibbs CA*] at para 29. The Court held that the plaintiff was entitled to disclaim fraud, and that none of the causes of action she pleaded required proof of fraud: paras 33-34. At the same time, the Court held that the respondents had not demonstrated any error in the judge’s general reasoning on the certification application: paras 38-47. In the result, the Court of Appeal certified the action as a class proceeding.

[38] The plaintiffs in this case argue that the appellate decision in *Gibbs CA* provides a persuasive analogue for a certification order that includes the proposed common issues.

[39] In *Pope*, Funt J. denied the initial certification application, but granted the plaintiff leave to submit further evidence. The point on which the initial application fell short was the requirement that the claims of the class members raise common issues. Justice Funt held that it was not enough for Mr. Pope to frame the closet indexing issue in a way that was common to the class members; he needed to provide some basis in fact that a common issue with respect to closet indexing actually exists: *Pope v Canadian Imperial Bank of Commerce*, 2022 BCSC 1857 at para 114. Otherwise, Funt J. found that Mr. Pope had satisfied the requirements for certification.

[40] Mr. Pope filed a supplemental affidavit by Prof. Simutin that applied a very similar analysis to his evidence in this case. Prof. Simutin opined that the *Pope* defendants engaged in closet indexing and caused harm to the class members. The defendants responded with a supplemental affidavit of their own expert taking issue with Prof. Simutin’s methodology and conclusions.

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[41] In *Pope v. Canadian Imperial Bank of Commerce*, 2026 BCSC 203 [*Pope #2*], I found that the requirements of s 4(1) of the *CPA* were met and certified the action as a class proceeding. The plaintiffs in this action rely on *Pope #2.* The decision is under appeal.

D. The Pleadings Amendment Application

[42] Following the decision by the Court of Appeal in *Gibbs CA*, the plaintiffs applied to further amend the notice of civil claim and amend the certified common issues in this case. At a case planning conference, I agreed with counsel to bifurcate the application and hear the pleadings amendment application first.

[43] In reasons for judgment indexed at 2025 BCSC 2156 (the "Amendment Decision"), I granted the plaintiffs leave to further amend the notice of civil claim to expressly disclaim fraud, remove the claims of knowing receipt and knowing assistance, focus more on the alleged failure to disclose the Closet Indexing Strategy, and add the two allegations reflected in the proposed common issues: a substantial linkage between the before-fees performance of the CEF and the Benchmark, and a substantial risk the CEF would not outperform the Benchmark after fees.

[44] I rejected the defendants' submission that the amendments fundamentally changed the nature of the certified class proceeding: Amendment Decision at paras 26-32. I also rejected their argument that the amendments raised a new cause of action: Amendment Decision at paras 39-42.

III. ISSUES

[45] As stated, the plaintiffs propose to add two new common issues to the certification order. They also propose to make minor amendments to the definition of the Closet Indexing Strategy which would result in a small change to the existing

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common issue 1. The proposed amendments are identified by the plaintiffs as follows:

> **Defined Terms**
>
> For the purposes of the ~~proposed~~ common issues, the following definitions apply:
>
> …
>
> (f) "**Closet Indexing Strategy"** means an investment strategy ~~that~~ to closely track~~s~~ ~~or replicates~~ the performance of the Benchmark before fees; ~~and is not disclosed to investors~~;
>
> …
>
> **The Closet Indexing Strategy on the Canadian Equity Fund's Before and After-Fee Performance Relative to the Benchmark**
>
> 1. In managing the Canadian Equity Fund, did RBC GAM use the Closet Indexing Strategy?
>
> 2. Was the (before fees) performance of the Canadian Equity Fund substantially linked to the performance of the Benchmark because of low active risk in the Canadian Equity Fund?
>
> 3. Was there a substantial risk that the Canadian Equity Fund would not outperform the Benchmark after fees?
>
> …

[46] I agree with plaintiffs' counsel that the primary question on this application is whether, having regard to the Certification Decision, there is some basis in fact for proposed common issues 2 and 3. But that is not the only question.

[47] The certification order must serve as a "meaningful screening device": *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at para 103. This means that post-certification amendments to the common issues should be screened to ensure they do not create new concerns or undermine the basis of the original order.

[48] Certification decisions in other proceedings, such as *Gibbs CA* and *Pope #2,* are not determinative. The analysis of substantially similar pleadings is instructive; however, each case must be considered on its own evidence for whether the plaintiff has shown some basis in fact for the requirements in s 4(1)(b), (c), (d) and (e) of the *CPA*.

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[49] In this case, I must consider the following issues raised by the defendants:

a) Have the plaintiffs shown some basis in fact for the proposed common issues?

b) Is the plaintiffs' fee-based methodology to determine loss on a class-wide basis workable with the addition of the proposed common issues?

c) Is a class proceeding the preferable procedure for resolving the proposed common issues?

d) Are the plaintiffs still suitable representatives of the class members?

[50] In addition, I will provide reasons for the ruling I made during the hearing dismissing an application by the defendants for an order that one of the plaintiffs' affiants attend to be cross-examined on his affidavit.

IV. ANALYSIS

A. Is There a Basis in Fact for the Proposed Common Issues?

1. The "some basis in fact" test

[51] The defendants argue that the plaintiffs must provide "some evidence of illegality" to establish some basis in fact that the proposed common issues are common to the class members as required by s 4(1)(c) of the *CPA.*

[52] I disagree. The plaintiffs must demonstrate some basis in fact that the proposed issues can be resolved on a common basis in a way that advances the litigation. They are not required to provide evidence of illegality at the certification stage.

[53] In *Noramco LLC v British Columbia*, 2026 BCCA 272 [*Noramco*], the Court of Appeal directed chambers judges to focus on the procedural issues engaged by the certification requirements. Rather than arguing the merits or disputing settled certification principles, the Court instructed, litigants should focus on applying those

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principles to their case: *Noramco* at paras 4-6, citing with approval *Moiseiwitsch v Canadian National Railway Company*, 2025 BCSC 2377 at para 4.

[54] Justice Fisher summarized these instructions speaking on behalf of the Court of Appeal in *McKinsey & Company, Inc. United States v British Columbia*, 2026 BCCA 284 [*McKinsey*]:

> [42] …
>
> - The commonality requirement should be a relatively straightforward inquiry to determine as a procedural matter whether there is some basis in fact to conclude the claims raise issues that can be decided commonly so as to avoid duplication of fact finding or legal analysis;
> - The screening of cases through this lens should be functional and pragmatic, designed not as a concealed merits test, but as a means of ensuring that a case will not founder at the merits stage due to a lack of commonality; and
> - It is time to return to basics, and to encourage parties as well as certification judges to focus on the procedural issues engaged in assessing the commonality requirement.

[55] There must be an evidentiary foundation—some basis in fact—to support a common issue. It is not sufficient for the plaintiffs to merely plead common issues. They must provide some evidence that the issues are common to the class members. However, the certification stage is not meant to test the merits of the proposed issues. The focus instead is on "whether there is a rational connection between the class as defined and the asserted common issues": *Noramco* at para 41, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 19.

[56] Previous caselaw suggested that the some basis in fact standard has two components: (1) some minimal evidence supporting the existence of a claim; and (2) some evidence that the resolution of the common issue is necessary to the resolution of each class member's claim. The Court of Appeal laid this notion to rest in *Noramco* and *McKinsey.* The approach in British Columbia is a functional one that does not require two distinct categories of evidence but rather "simply requires a minimum evidentiary foundation supporting the existence of a common issue": *McKinsey* at para 55, citing *Nissan Canada Inc. v Mueller*, 2022 BCCA 338 at paras 132-134 and *Noramco* at para 86.

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[57] The "existence" of a common issue is not a merits-based inquiry. The court must consider the language of the proposed common issue and whether there is some evidence that supports the argument it is common across members of the class. However, this analysis is not analogous to a summary judgment application. To certify a common issue, the plaintiff need only show there is a common factual or legal issue that, once determined at the merits stage, will advance the litigation. *Noramco* at paras 45-48, 88-89; *McKinsey* at paras 56-58.

[58] *Noramco* and *McKinsey* demonstrate the correct approach. These cases are both certified class actions by the province of British Columbia on behalf of Canadian governments to recover health care costs related to the national opioid crisis. In *Noramco,* the defendants are manufacturers, wholesalers, and distributors of opioid-related products. In *McKinsey,* the defendant is an American consultancy firm. The essential common issues in both cases concern whether the defendants engaged in a civil conspiracy to misrepresent the attributes of opioid medications.

[59] *McKinsey* raised the question squarely: whether and how the Province was required to demonstrate some basis in fact that the common issues existed. As I read the Court of Appeal decision, evidence was not required to establish that the consultants knew or ought to have known that statements about opioids were false or misleading (a merits inquiry); rather the common issues were shown to exist because there was some evidence McKinsey developed tactics or recommendations that were used in Canada (a some basis in fact inquiry). The evidence of McKinsey's involvement in the Canadian market was disputed, but sufficient to establish some basis in fact that the claims raised common issues: paras 63-73.

[60] I do not accept the defendants' submission that wrongdoing was "implicit" in *McKinsey* or "self-evident" once the factual context of the opioid crisis was established. Commonality was implicit in the pleaded claims of agency, common design, and civil conspiracy. To that extent, evidence that "the impugned conduct could or might have occurred" (i.e. evidence that *McKinsey* was involved in the Canadian market) was relevant to commonality: para 55. However, the Court did not

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base its decision on findings or assumptions about the merits of the common issues. The merits were and (as of the date of these reasons) remain hotly contested: for example, see para 73.

[61] The interrelationship between the existence of an issue and its commonality was illustrated by Justice Fisher with reference to the decision of the Ontario Court of Appeal in *Lilleyman v Bumble Bee Foods LLC,* 2024 ONCA 606. The proposed class action in *Lilleyman* concerned allegations of a price-fixing conspiracy in the Canadian canned tuna market. The plaintiff relied on evidence from antitrust proceedings in the United States that had found a conspiracy in the U.S. market. The certification judge held there was no evidence linking the U.S. conspiracy to the Canadian market or demonstrating that the alleged conspiracy could have affected Canadian consumers, and therefore no basis in fact for the asserted common issues.

[62] In affirming this order, the Ontario Court of Appeal described the “some basis in fact” test as requiring some evidence that the impugned act "could or might have occurred": para 71. The Court considered this to be a minimal but necessary requirement as "a matter of logic and common sense":

> [72] ... if there is no basis in fact to suppose that a conspiracy with attendant harm actually occurred, it necessarily follows that there is no basis to suppose that such a nonexistent conspiracy could have caused harm across members of the proposed class.

[63] In *McKinsey,* Justice Fisher explained *Lilleyman* as an example where there was no basis in fact that the asserted common issues existed. There was no evidence to support the common issues–which were implicit in the pleaded cause of action (conspiracy)—because the evidence had nothing to do with Canada; it concerned conduct in the U.S. only, which has an entirely separate market for tuna: *McKinsey* at paras 55, 66.

[64] Importantly, Justice Fisher expressly declined to relate the analysis to “rooting out frivolous and unfounded claims” as discussed in *Lilleyman*: *McKinsey* at para 60. In other words, while our Court of Appeal agreed with the result in *Lilleyman*, it

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clearly distanced itself from a merits-based screening of the common issues under the guise of requiring some basis in fact they "exist".

[65] The defendants rely heavily on *Frayce v BMO Investor Line Inc.*, 2023 ONSC 16 [*Frayce #1*], where Justice Belobaba of the Ontario Superior Court dismissed the certification application primarily because "The plaintiffs have not satisfied the 'some evidence of illegality' requirement.": para 28.

[66] Justice Belobaba did not cite any authority for this requirement. In my view, it arose from the language of the proposed common issue. The central issue in *Frayce #1* was whether the receipt of trailing commissions by discount brokers contravened any applicable securities law before the practice was prohibited in 2022. If the answer to that question was "no" then there was no basis for any other common issue.

[67] On appeal, the Ontario Divisional Court held that Justice Belobaba was entitled to assess the evidence for whether there was an "air of reality" to the plaintiffs' allegation that trailing commissions were illegal prior to 2022: *Frayce v BMO Investorline Inc.*, 2024 ONSC 533 [*Frayce* #2] at paras 22-25. The appellate court held that, to perform his screening function at the certification stage, it was necessary for the motion judge to examine the evidentiary record "with a view to determining whether there was some basis in fact for the proposition", "being put forward by the Plaintiffs": paras 24-25).

[68] *Frayce* may be understood as an example where there was no basis in fact that the common issues existed. With no evidence that trailing commissions might have been illegal prior to 2022, there was no evidence the issue pleaded by the plaintiffs existed. To that extent, *Frayce* is consistent with the law in British Columbia. However, to the extent *Frayce#1 or Frayce #2* endorses a preliminary assessment of the merits of the common issue for evidence of illegality or an air of reality, I respectfully decline to follow it.

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[69] Neither s 4(1) of the *CPA* nor any decision binding on me requires the plaintiffs to demonstrate that their claims have an air of reality. Our Court of Appeal has confirmed that the focus of the certification process is on the form of the proceeding, not its merits, and emphasized that other procedural mechanisms exist to weed out claims lacking in merit. Adding additional requirements such as an "air of reality" would be contrary to the instructions from the Court of Appeal set out above.

[70] For these reasons, I respectfully decline to adopt the statement urged on me by the defendants from *Quantz v Ontario*, 2025 ONSC 90, that "there must be some facts to go on that give the causes of action an air of reality": para 122. Likewise, I respectfully decline to adopt the suggestion in *Parris v Firmenich International SA,* 2026 ONSC 3922, that the court should be satisfied the action has at least an air of reality "[b]efore subjecting a defendant to the onerous requirements of responding to collective action on behalf of millions of potential class members": para 33.

[71] The real issue is a practical application of the some basis in fact standard in the context of the plaintiffs' claims and whether the proposed issues can be resolved on a common basis in a way that moves the litigation towards resolution: *Noramco* at para 87.

2. Application of the test

[72] I reproduce the proposed common issues for ease of reference:

> 2. Was the (before fees) performance of the Canadian Equity Fund substantially linked to the performance of the Benchmark because of low active risk in the Canadian Equity Fund?
>
> 3. Was there a substantial risk that the Canadian Equity Fund would not outperform the Benchmark after fees?

[73] The plaintiffs have shown an evidentiary foundation supporting the existence of these issues. Professor Simutin's affidavits provide evidence that the performance of the CEF was statistically and economically linked to the performance of the

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Benchmark because of low active risk. Professor Simutin says the level of active risk can be measured with three performance metrics:

a) Active share, which measures the share of the portfolio holdings that differ from the benchmark.

b) Tracking error, which measures volatility (standard deviation) of the difference in returns of the fund and the benchmark.

c) R-squared, which measures the proportion of variability in a fund's returns that is explained by some passive portfolio holdings.

[74] According to Prof. Simutin, nearly all the variation in the performance of the CEF over the class period can be explained by movements in the Benchmark. He regards the pre-fee performance of the CEF as economically and statistically indistinguishable from the Benchmark. He concludes that there was a substantial risk the CEF would not outperform the Benchmark after fees.

[75] The defendants rely, as they did at the original certification hearing, on the evidence of Vinita Juneja, Ph.D., a senior consultant at NERA. Dr. Juneja does not disagree with Prof. Simutin's use of performance metrics to measure divergence from a benchmark. Her main point is that these metrics do not determine whether a fund is being actively managed. An active manager, she says, may conduct research and make genuine stock and sector selections yet ultimately produce returns close to a benchmark.

[76] Dr. Juneja identifies evidence that, in her opinion, demonstrates the CEF was actively managed by a team carrying out research and managers who determined the holdings, overweighting and underweighting certain sectors and securities relative to the Benchmark. She further states that, in her opinion, the performance of the CEF varied in a material way relative to the Benchmark over the class period.

[77] Justice Funt accepted Prof. Simutin's analysis as a basis in fact for the common issue whether RBC used the Closet Indexing Strategy as defined:

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Certification Decision at paras 120-121, 124). I infer from this conclusion that he found Dr. Juneja's evidence insufficient to show there was no basis in fact and effectively raised merits issues.

[78] Professor Simutin's evidence of a statistical and economic correlation with the Benchmark also provides some basis in fact for the proposed common issues. It provides some, albeit disputed, evidence that the performance of the CEF was functionally linked to the Benchmark and a risk the fund would not outperform the Benchmark after fees.

[79] The defendants do not seriously dispute that the proposed issues exist as framed by the plaintiffs. Their primary argument is that certifying additional common issues on this basis would accomplish little absent evidence establishing legal thresholds for "low" active risk, "substantial" linkage to the Benchmark, "substantial" risk of underperforming the Benchmark, or a legal obligation to disclose such a risk. Without evidence of this nature, they argue, there is no assurance the proposed common issues would serve any useful purpose.

[80] As discussed, I reject the defendants' submission that the plaintiffs must provide "some evidence of illegality". That said, I accept their submission that the plaintiffs must do more than plead common issues and then provide some evidence the issues they plead exist. The proposed common issues must advance the litigation: *McKinsey* at para 61; *Noramco* at para 79.

[81] Whether a common issue advances the litigation is considered from the perspective of the proceeding, not the plaintiffs. A common issues trial "has the potential to either determine liability or terminate the litigation." In other words, the litigation is "advanced" in that it is moved towards resolution, not that it is "advanced" in the plaintiffs' favour: *Noramco* at para 47, citing *Pioneer Corp. v Godfrey*, 2019 SCC 42 at para 109.

[82] Resolution of the proposed common issues will advance the existing claim based on the alleged Closet Indexing Strategy. I agree with the defendants that

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proof of the Closet Indexing Strategy will require some evidence of intent. A strategy is "a plan designed to achieve a particular long-term aim": *Concise Oxford English Dictionary*, 12th ed (Oxford University Press, 2011) [*Oxford Dictionary*]. To prove that the defendants used the Closet Indexing Strategy, the plaintiffs will need to prove that the fund managers planned to closely track the Benchmark. As a matter of common sense, the defendants could not plan to track the Benchmark by mistake.

[83] However, I do not agree with the defendants that proof of a correlation with the Benchmark is irrelevant to the alleged Closet Indexing Strategy. Whether the defendants' anticipated evidence of their actual trading decisions and strategies explains the statistical correlation and provides a defence is an issue on the merits for the common issues trial.

[84] That said, I agree with the defendants that the proposed common issues are more than "natural corollaries" of the Closet Indexing Strategy. A corollary is "a proposition that follows from (and is often appended to) one already proved": *Oxford Dictionary.* A link between the performance of the CEF and Benchmark, giving rise to a risk the CEF would not outperform the Benchmark after fees, would follow naturally from a proven plan to track the Benchmark.

[85] Should the proposed common issues be added, however, the outcome of the common issues trial may no longer be dependent on proof of the Closet Indexing Strategy. Citing *Gibbs CA,* the plaintiffs argue that fraudulent intent is not a requirement of any of the pleaded causes of action. They argue that it will be open to the trial judge to find that the performance of the CEF was substantially linked to the Benchmark because of low active risk, without necessarily finding intent. As stated, active risk is a function of the fund managers' investment decisions. Accordingly, the plaintiffs will argue that a link with the Benchmark may be established from a pattern of management decisions, even if the fund managers did not deliberately pursue that objective.

[86] Where I depart from the defendants is their characterization of the plaintiffs' claims based on the proposed common issues. In my view, the defendants advance

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a form of strawman fallacy. The plaintiffs do not allege that low active risk, statistical linkage to a benchmark, or underperforming the benchmark are contrary to Canadian securities law. Nor do they claim that a positive resolution of these issues alone would result in liability to the class members.

[87] Instead, the proposed common issues reflect the key factual allegations in the further amended notice of civil claim. The legal bases for the claim are found in common issues 4 to 12, which have already been certified. Common issues 4 and 5 ask whether the defendants breached the applicable trust instrument or asset management agreement. Common issues 6 to 8 ask whether the defendants owed and breached a fiduciary duty to the class members. Common issue 9 asks whether the simplified prospectuses for the CEF contained a misrepresentation within the meaning of the *Securities Act.* Proposed common issues 10 to 12 ask whether RBC was unjustly enriched by the management fees.

[88] In short, the plaintiffs allege that the defendants were required by contractual, fiduciary, and/or prospectus disclosure obligations to recognize that the CEF was functionally tracking the Benchmark, disclose the resulting risk the fund would not outperform the Benchmark after fees, and charge management fees that were reasonable in the circumstances. They rely on the general requirement under NI 81-101F to disclose all material risks, not just those that are expressly required.

[89] The defendants clearly dispute this case on its merits. Their expert David Gilkes opines that no Canadian securities rule requires disclosure of a risk that an actively managed fund will underperform its benchmark after fees. Mr. Gilkes has 23 years experience in the securities industry, including work as a regulator at the Ontario Securities Commission (the “OSC”). In his opinion, failing to outperform a benchmark after fees is not a material risk within the meaning of NI 81-101F or any related instrument. He states that there have never been any disclosure rules related to a risk of underperforming a benchmark after fees. Indeed, he says, such a disclosure would be both confusing to investors and misleading, in direct

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contravention of NI 81-102CP (which strictly regulates representations about future performance).

[90] Mr. Gilkes concludes that, in his opinion, the CEF disclosed all material risks required by Canadian securities laws and regulations.

[91] In addition, Dr. Juneja reports that, in a review of disclosures from 2013 to present, she did not identify any actively managed Canadian mutual fund that disclosed a risk the fund would underperform its benchmark after fees.

[92] In reply to Mr. Gilkes' evidence, the plaintiffs filed an affidavit by Francis Allen, an Ontario lawyer and former policy advisor with the OSC. Mr. Allen opines that, if the CEF was substantially linked to its benchmark through low active risk or had a substantial risk of underperformance after fees, those circumstances called for disclosure in plain language. Notably, however, Mr. Allen was asked to assume that the defendants used a closet indexing strategy. Much of his opinion assumes that the fund managers intended to closely track the Benchmark. It is of limited assistance to the plaintiffs without proof of the Closet Indexing Strategy as defined.

[93] I agree with the defendants there is currently an evidentiary gap in the plaintiffs' case on the merits. Professor Simutin is an economist. His evidence is based on an analysis of public data and performance metrics derived from the academic literature. He does not purport to express an opinion on the standard of care or disclosure obligations of a Canadian mutual fund manager. These matters will require properly qualified expert evidence from the plaintiffs. Conclusions about what constitutes adequate disclosure or reasonable fees in a particular investment context are outside the ordinary knowledge of a trial judge: *Pope #2* at para 76.

[94] However, I am not persuaded that further expert evidence from the plaintiffs is necessary to establish some basis in fact for the proposed common issues. This is not a case where there is no evidence that the asserted common issues exist. Professor Simutin's affidavits provide adequate evidence the issues exist, and Dr. Juneja's initial report acknowledges that an issue exists (although, of course, she

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disagrees on the merits). The additional expert evidence relied on by the defendants (and currently lacking from the plaintiffs) goes to the merits, not the existence of the common issues.

[95] I also disagree with the defendants' assertion that the proposed issues are too vague to be certified, or that they require additional sub-issues to be certified. The proposed issues are defined with sufficient precision and not overly broad. A properly informed trial judge can assess the level of active risk, linkage to the Benchmark, and risk of underperformance after fees. It's not unusual for courts to assess qualitative and quantitative variables.

[96] An affirmative answer to the proposed common issues will move the litigation forward to the legal issues for all class members. Conversely, a negative answer will put an end to all class members' claims based on functional benchmark-tracking.

[97] I conclude that the proposed issues can be resolved on a common basis in a way that moves the litigation towards resolution. The plaintiffs have met the governing standard to show that the proposed issues are common to the class members.

B. Is the Plaintiffs' Fee-Based Methodology Workable?

[98] Justice Funt accepted the plaintiffs' argument that damages may be assessed on a class-wide basis using the difference between the management fees charged and a representative index fund fee: Certification Decision at paras 124-125.

[99] The defendants argue that this methodology does not work with the proposed common issues. If the wrong is a failure to disclose a risk of underperformance, they argue, the correct counterfactual asks what each investor would have done had the disclosure occurred.

[100] Dr. Juneja opines that different investors could be expected to have reacted differently to a disclosure that the CEF would not outperform the Benchmark after fees. Depending on their individual risk preferences, investment objectives, and

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periods during which they held units: some investors may not have read the disclosure; some may have moved to another active fund; some may have switched to an index fund; and some may have done nothing.

[101] The defendants also rely on a report by Richard Deaves, Ph.D., an economics professor emeritus at McMaster University. Professor Deaves designed and conducted a survey to investigate the preferences, motivations, and behaviours of Canadian mutual fund investors. He found that mutual fund investors are a diverse group. He concludes that there are numerous and varied factors that influence investors' decisions (a) to invest in an actively managed fund; and (b) how to judge that fund's performance.

[102] Only 13.9% of the respondents in Pof. Deaves' survey said performance relative to a benchmark was what they paid most attention to. The fund's "absolute return" (whether it gained or lost money) was the most popular answer with 31.7% of respondents, followed by the fund's performance compared to "my investment goals" at 21.8%.

[103] Professor Deaves also found that the respondents expressed differing preferences regarding levels of "activeness" of the funds they invested in. Some investors preferred high levels of activeness, while others preferred lower levels (and therefore lower investment risk).

[104] Based on this evidence, the defendants argue that the court should reject the presumption—which they say underlies the plaintiffs' fees-based methodology—that all the class members would have preferred an index fund. The defendants argue that damages can only be determined by comparing each investor's actual position with what that individual would have done following proper risk disclosure.

[105] I disagree. The plaintiffs do not claim damages based on the difference in performance between the CEF and alternative investments. They do not allege that the class members would have purchased or switched to an index fund but for the lack of proper risk disclosure. Instead, the plaintiffs seek reimbursement for the

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alleged overpayment of management fees by the class members while they held units of the CEF. The essence of their damages claim is that the class members paid active-management fees for a fund that functionally tracked its benchmark and therefore did not justify those fees. The plaintiffs argue that whether a particular investor would have made a different investment is beside the point. Their claim is that class members overpaid for the management services they received. Professor Simutin's evidence provides some basis in fact for this approach.

[106] The plaintiffs also rely on the deemed reliance provision in s 131 of the *Securities Act.* Section 131(1) provides that, if a prospectus contains a misrepresentation, a person who purchased a security offered by the prospectus is deemed to have relied on the misrepresentation and has a right of damages. The plaintiffs allege that a failure to disclose the risk of underperforming the Benchmark after fees was a misrepresentation within the meaning of this provision. They rely on the deemed reliance in s 131(1) to eliminate the need for proof of individual reliance.

[107] Section 131(10) may provide a defence to a prospectus misrepresentation claim. It provides that a defendant is not liable if the defendant proves the damages claimed do not represent a depreciation in value of the security resulting from the misrepresentation. The defendants say that management fees are not a depreciation in the value of the CEF (especially if the value of an investor’s holdings increased). The plaintiffs respond that fees are a fund expense which diminish real unit values.

[108] These are arguments on the merits. For the present purposes, I agree with the reasons given by Funt J. for accepting the plaintiffs’ proposed methodology. The difference between the management fees charged by RBC and a representative index fund is a workable component of measuring loss or damage in this case: Certification Decision at paras 125, 129.

[109] While the original pleadings concerned primarily a closet indexing strategy, I am not persuaded that the plaintiffs’ shift to more of a risk disclosure claim undermines the approach accepted by the certification judge. The defendants argue that an investor’s negative reaction to a “fraud” (which is how they continue to

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describe the Closet Indexing Strategy) may be presumed. However, this argument fails to answer the reasoning of the certification judge, which is that the plaintiffs' claim based on excessive management fees does not require proof of individual reliance.

[110] Individual issues will arise on either version of the claim. The financial consequences of the allegedly excessive management fees will differ across class members. For one thing, depending on which series of the CEF they owned and when, some class members realized returns that exceeded the Benchmark, even after fees.

[111] As Funt J. noted, the court "must not refuse to certify a proceeding as a class proceeding merely because ... the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues": Certification Decision at para 130, citing *CPA* s 7(a).

[112] It is not necessary that the proposed common issues predominate over the individual issues for them to be proper common issues. An issue is common if it is a "substantial ingredient" of each class members' claim: *Noramco* at paras 38-39, citing *Hollick* at para 18; *Pro-Sys* at para 108.

[113] The commonality requirement also does not mean that an identical answer to a certified question is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer does not give rise to conflicting interests among the members. In other words, success for one class member must not result in failure for another: *Noramco* at para 40, citing *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at paras 45-46; *Canada (Attorney General) v Roberts,* 2026 BCCA 397 at paras 22, 47.

[114] In this case, there may be individual causation or damages issues to be addressed after the common issues have been decided. However, the proposed common issues are a substantial ingredient of each class member's claim. Success for one class member will not result in failure for another.

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C. Is a Class Proceeding the Preferable Procedure?

1. Legal Principles

[115] The plaintiffs must show some basis in fact that a class proceeding would be (1) a fair, efficient and manageable way to advance the claim; and (2) preferable to any other reasonably available way to resolve the class members' claims: *Noramco* at para 199, citing *AIC Limited v Fischer*, 2013 SCC 69 at paras 1, 42, 48.

[116] "The preferability analysis involves a comparative exercise where the court considers the costs and benefits of a class proceeding compared to those of an alternative proceeding.": *Noramco* at para 200. In this case, the defendants say the better alternative is regulatory action by one of the securities regulators.

[117] In taking this "cost-benefit approach", the court should "consider the impact of a class proceeding on class members, the defendants, and the court": *Noramco* at para 200, citing *AIC Limited* at para 21; *Hollick* at para 29. "Further, the court should consider the common issues in the context of the entire action and in relation to the claims as a whole": *Noramco* at para 200, citing *Hollick* at paras 29-30; *AIC Limited* at para 21. In this case, I must consider the proposed common issues in the context of the already-certified class proceeding and the Certification Decision.

[118] The court must consider all relevant factors, including the statutory factors in s 4(2) of the *CPA*:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[119] The defendants raise concerns based on factors (a), (d), and (e).

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[120] These factors do not need to be established “one way or another like a checklist”. Rather, they must be “considered and weighed”: *Noramco* at para 202, citing *Good Guys Recycling Inc. v 676083 B.C. Ltd*., 2023 BCCA 128 at para 85.

[121] The preferability analysis is conducted through the lens of the three principal goals of class action proceedings—access to justice, judicial economy, and behaviour modification: *Noramco* at para 203, citing *Hollick* at para 27. Here, the plaintiffs argue that class proceedings would serve all three goals.

[122] A plaintiff is not required to show a class action will “*actually* achieve those goals” in their specific case (emphasis in original): *Noramco* at para 203, citing *AIC Limited* at para 22. The “ultimate question is whether the class proceeding is preferable, not whether a class proceeding would fully achieve the three goals”: *Noramco* at para 203*,* citing *AIC Limited* at para 23.

2. Application of the Principles

[123] Justice Funt found that a class action was the preferable procedure to resolve the existing common issues. In doing so, he considered each of the factors in s 4(2) and found that they favoured class proceedings over individual actions or regulatory proceedings: Certification Decision at paras 149-154, 161-169.

[124] The defendants argue that the proposed common issues change this conclusion. They say the new common issues will be “overwhelmed” by important individual issues. They rely on the submissions summarized above—reliance and damages can only be determined, they say, by comparing each investor's actual position with what that individual would have done following proper risk disclosure. They also argue that the court will be required to consider individual transactions by the fund managers to determine whether the level of active risk was “low” and the risk of underperformance was “substantial”.

[125] I do not agree that the calculus has fundamentally changed. As discussed, the plaintiffs’ case is not a reliance-based claim, whether it is pleaded as a closet indexing claim or a risk disclosure claim. The defendants can be expected to raise

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their investment strategies and transactions as a common defence to either claim. Individual trading decisions may be more relevant to a claim based on low active risk than one based on an overall strategy. However, active risk is a common issue, not an individual issue that each member would need to prove. In other words, trading decisions by the defendants are not "questions affecting only individual members": *CPA* at s 4(2)(a).

[126] I acknowledge that the claims raise individual issues that affect individual members, including the financial consequences of the management fees. However, it is difficult to assess the significance of those individual issues at this stage of the proceeding, when the parties describe the case so differently. I do not accept the defendants' position that individual inquiries will overwhelm the proposed common issues. But I also do not fully accept the plaintiffs' position that individual investment decisions are entirely irrelevant.

[127] In *Noramco,* the Court of Appeal held that s 4(2)(a) requires only that "the court consider whether common issues of fact or law predominate over any questions affecting only individual members. Although significant in the analysis, preferability does not hinge on whether the common issues predominate [citations omitted]. In fact, in some cases, it may not be possible to fully determine whether the common or individual issues predominate…" (emphasis in original): *Noramco* at para 204, citing *Good Guys* at para 85 and *Hollick* at para 30.

[128] In this case, the common issues will address the factual context of the claims, the Closet Indexing Strategy, the defendants' management of the fund, the level of active risk, the relationship between the CEF and the Benchmark, and whether the defendants breached any legal duty, including the important question of whether failing to outperform the Benchmark after fees was a material risk they were required to disclose in the prospectuses.

[129] The full scope of the remaining individual issues will not be known until the common issues are determined. For example, it is impossible to reach any

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conclusions about the importance of the reliance issues raised by the defendants before the s 131 misrepresentation claim is adjudicated.

[130] I note that the *CPA* provides tools for the fair and expeditious determination of remaining individual issues after the resolution of the common issues: *CPA* at ss 12, 27(1), 28; *Noramco* at paras 205-206, citing *Jiang v Peoples Trust Company*, 2017 BCCA 119 at paras 118-119.

[131] I am unable to fully determine at this stage whether the proposed common issues predominate over the individual issues. However, I am satisfied that the proposed common issues are substantial ingredients of the liability issues that can be resolved on a common basis, thereby eliminating the need to litigate them for each class member. At a minimum, the predominance factor still favours class proceedings over individual actions.

[132] The defendants' second argument is that the provincial securities regulators are better positioned to investigate and address the plaintiffs' concerns about active risk and management fees. They argue that if a securities regulator determined that the CEF was charging excessive management fees for the level of active risk, it could order RBC to disgorge those fees without the expense and complexity of a class proceeding.

[133] The defendants made an almost identical argument about the Closet Indexing Strategy, and Funt J. rejected it: Certification Decision at paras 154-157.

[134] The defendants now accept that a class action should proceed to determine if they charged excessive management fees because the fund managers used a closet indexing strategy. However, they argue that the proposed common issues would fundamentally change the policy implications of a class proceeding. While the defendants now acknowledge that a claim based on closet indexing aligns with existing securities laws, they argue that the new issues concerning active risk and underperformance must be left to the regulators or the legislatures.

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[135] The defendants assert that “a decision to certify the proposed common issues will affect the entire Canadian mutual fund industry”. They argue that regulatory reform is preferable to what they characterize as judicially mandated, performance-based obligations, or “regulation through litigation”.

[136] The defendants cite several authorities for the well-established principle that the role of the legislative branch in a democracy requires deference from the courts on policy matters (for example, *Vriend v Alberta,* [1998] 1 SCR 493 at paras 134-136). They also cite authority for the uncontroversial proposition that securities regulators have specialized expertise relative to the courts on issues relating to financial markets (for example, *British Columbia Securities Commission v Branch*, 4, [1995] 2 SCR 3 at para 94). None of these cases concern class proceedings or a preferability analysis.

[137] More instructive is the decision by the Supreme Court of Canada in *AIC Limited*. The question in that case was whether an investor class action would be the preferable procedure for resolving certain common issues given that settlement payments were made to some of the same investors following proceedings by the OSC. The OSC investigated a group of mutual fund managers for “market timing” that allegedly harmed long-term investors. The fund managers agreed to pay approximately $110 million. The settlement agreements were without prejudice to potential civil claims.

[138] The Court confirmed that preferability compares all reasonably available means of resolving the claims, including non-court processes. “[T]o assess whether a class action is preferable to an alternative method of resolving the … claims, the court compares the competing possibilities through the lens of the goals of behaviour modification, judicial economy, and access to justice…”: *AIC Limited* at para 16.

[139] “A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain

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even when alternative avenues of redress are considered": *AIC Limited* at para 26, citing *Hollick* at para 33.

[140] The Court identified two potential barriers to access to justice. First, an economic barrier arose from the nature of the claims. The individual claims were too small to support viable individual claims. Second, there was no access to a fair process in traditional litigation geared toward protecting the rights of class members: *AIC Limited* at para 50.

[141] Turning to the alternative proceeding, the Court found that the main jurisdiction of the OSC was regulatory, not compensatory. While the OSC obtained settlement agreements, compensation for the investors was not its primary focus. There was also no way to know how the OSC arrived at the settlement amounts. Further, the OSC proceedings provided limited participation rights for investors: *AIC Limited* at paras 54-55.

[142] The Court also considered the substantive outcome of the OSC process but cautioned that any consideration whether the class members had been fully compensated must respect the "some basis in fact" standard at the certification stage: paras 56-58. The Court concluded that the class action ought to have been certified: paras 62-65.

[143] In this case, the plaintiffs raise legitimate concerns with access to justice. As in *AIC Limited,* the individual claims are too small to support viable individual claims. The only alternative advanced by the defendants is to defer claims based on the proposed common issues until such time as a securities regulator considers the matter and takes some kind of regulatory action, which may include restitution or other remedies.

[144] Mr. Gilkes reports that in 2015 the OSC conducted a "Focused Review" of actively managed mutual funds to determine whether the funds exhibited a close tracking of their benchmarks. Following the Focused Review, Mr. Gilkes says, the OSC did not issue any staff notice, propose any new rules, nor provide any other

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guidance. In Mr. Gilkes's opinion, this means that the OSC did not object to the practices it may have observed.

[145] In the circumstances, there is no assurance of any actual or potential regulatory proceedings to address the claims and compensate the members of the class if appropriate. If the securities regulators were to act, it may only be in the form of guidance or regulation, not compensation. If there was any form of public proceeding, the class members would have limited rights to participate. In addition, the regulators would not have any jurisdiction to award trust-based damages, which is a component of the plaintiffs' claim.

[146] The absence of new rules or regulatory action does not necessarily mean the courts should defer class proceedings. The courts remain responsible for adjudicating private law claims. Trial judges can adjudicate issues like active risk while recognizing the limits of their role. Policy arguments can be raised by the defendants at a common issues trial or a summary judgment application.

[147] In my view, this preferability argument by the defendants is a thinly veiled objection to the merits of the plaintiffs' claims. The preferability analysis is not an assessment of the merits. Instead, the focus is on the choice of available procedures. The court considers the costs and benefits of a class proceeding compared to other reasonably available ways to resolve the class members' claims. Awaiting some kind of action by the securities regulators which may never include any compensation to the class members is not a reasonably available alternative.

[148] Certifying the proposed common issues will not create a judicial requirement that all active mutual funds must maintain a certain level of active risk or outperform their benchmarks. It will not usurp the role of the securities regulators in mutual fund regulation. Rather, it would permit common adjudication of whether the class members in this case were charged active-management fees while receiving an investment product which the plaintiffs say was economically and statistically indistinguishable from a low-cost index fund.

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[149] I conclude that class proceedings remain the preferable procedure because they promote behaviour modification, overcome investors' inability to litigate individually, and provide access to remedies that are not available in any reasonably available alternative proceeding.

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D. Are the Plaintiffs Suitable Representatives?

[150] The defendants argue that the plaintiffs are no longer appropriate representatives of the class members. They argue that the plaintiffs cannot adequately represent the interests of the class because neither plaintiff has given evidence they would have done anything differently had RBC disclosed a risk the CEF would underperform the Benchmark after fees.

[151] As discussed, I do not agree with the defendants' characterization of the amended claim. My reading of the claim is that the plaintiffs allege the class members paid excessive management fees throughout the class period. The plaintiffs were unitholders who bore management fees during the class period. They do not have a conflict with other class members on the common issues, regardless of why they bought, held, or sold their units.

[152] The defendants also argue that the plaintiffs have failed to address the limitations issue identified in the Certification Decision. The plaintiffs each sold their units more than three years before the commencement of the action. Accordingly, both may be statute barred with respect to a prospectus misrepresentation claim. Justice Funt found the plaintiffs were nonetheless appropriate representatives, stating: "I am satisfied that, if necessary, plaintiffs' counsel will be able to find a suitable representative plaintiff": Certification Decision at paras 172-173.

[153] This issue needs to be addressed by plaintiffs' counsel. It may provide a defence to the merits. However, it is not a reason to dismiss the application to amend the common issues. Justice Funt found that the plaintiffs are suitable representatives, despite the limitations defence. I do not see any basis on which I could come to a different conclusion.

[154] Lastly, in oral submissions, defendants' counsel argued that the litigation plan that Funt J. approved is no longer workable. Counsel raised concerns with policy issues and statistical evidence but did not identify any specific defects in the approved litigation plan. The current plan is a standard litigation plan. It may need to be reviewed in light of amendments to the pleadings; however, this is also not a reason to dismiss the application to amend the common issues. As Funt J. noted, litigation plans are to some degree "works in progress": Certification Decision at para 176, citing *Jiang v Vancouver City Savings Credit Union*, 2019 BCCA 149 at paras 60-61.

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E. Application to Cross-Examine Mr. Allen

[155] The defendants applied on the first day of the hearing for leave to file a further affidavit by Mr. Gilkes and leave to cross-examine Mr. Allen on his affidavit. I granted them leave to rely on Mr. Gilkes' supplemental affidavit and dismissed their application to cross-examine Mr. Allen. These are my reasons for dismissing the application to cross-examine.

[156] Justice Gomery summarized the governing principles speaking as a judge of this Court in *Leonard v The Manufacturers Life Insurance Company*, 2020 BCSC 1051:

> [17] I do not think that the principles governing the exercise of the court's discretion to order cross-examination are different in the context of a class proceeding than in any other context. While the presence or absence of a conflict in the evidence is important, the fundamental questions are whether there are material facts in issue and, if so, whether the proposed cross-examination will be relevant to an issue that may determine the outcome and will likely serve a useful purpose in terms of eliciting evidence that will assist in determining the issue, *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882 [*Equustek*], at paragraphs 6 to 9.
>
> [Emphasis added.]

[157] The primary disagreement between Mr. Allen and Mr. Gilkes concerns the interpretation of NI 81-101F and whether it gives rise to any obligation to disclose a risk the fund will not outperform its benchmark. They also disagree on the significance of the fact the OSC did not issue a staff notice following the Focused

Review in 2015, and whether this demonstrates the OSC had no objection to the practices it observed amongst fund managers.

[158] The debate between Mr. Allen and Mr. Gilkes is not relevant to the procedural issues engaged by the certification analysis. The plaintiffs are not required to provide evidence of illegality or demonstrate that their claims have an air of reality. Inaction by the OSC does not persuade me that regulatory proceedings provide a preferable alternative to class proceedings.

[159] If anything, the debate between Mr. Allen and Mr. Gilkes demonstrates the existence of common issues. The application to amend the common issues was not the appropriate forum in which to test their respective opinions. A cross-examination on affidavits was unlikely to serve any useful purpose in terms of eliciting evidence that would have assisted in determining the issues before me at this stage of the proceedings. For these reasons, I dismissed the application to cross-examine Mr. Allen.

V. CONCLUSION

[160] The application by the plaintiffs to amend the common issues is allowed.

"Elwood J."

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