IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McCorquodale v. RBC Global Asset Management Inc.,* 2025 BCSC 2156

Date: 20251103
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*, R.S.B.C. 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:	S.K. Boyle J.R. Green
Place and Date of Hearing:	Vancouver, B.C. July 21, 2025
Place and Date of Judgment:	Vancouver, B.C. November 3, 2025

Table of Contents

INTRODUCTION

[1] The plaintiffs apply to amend the pleadings on which a justice of the Court certified this action as a class proceeding.

[2] The certified class action concerns an investment strategy the plaintiffs refer to as “closet indexing”. At a high level, closet indexing occurs when a mutual fund closely tracks a benchmark index, but investors are charged management fees reflecting more active management which would aim to outperform the market.

[3] The certification judge found that the twice amended notice of civil claim disclosed causes of action in fraud, breach of trust, breach of contract, knowing receipt, knowing assistance, breach of fiduciary duty, prospectus misrepresentation, and unjust enrichment. Notably, the plaintiffs had not expressly pleaded fraud.

[4] The plaintiffs now apply to further amend their pleadings to focus on an alleged failure by the defendants to disclose the closet indexing strategy, and to add two “corollaries”: the substantial linkage between the fund and the benchmark; and the risk that the fund would not outperform the benchmark after fees. The plaintiffs also seek to expressly disclaim fraud and remove the claims of knowing receipt and knowing assistance.

[5] The plaintiffs argue that the proposed amendments do no more than clarify the material facts and bring the pleadings in line with the Court of Appeal’s recent decision in another closet indexing case, *Gibbs v. HSBC Global Asset Management (Canada) Limited*, 2025 BCCA 31.

[6] The defendants argue that the action should proceed to a trial on the existing pleadings and certified common issues. They argue that the plaintiffs should be denied leave to amend because the proposed amendments are unnecessary; not in the interests of justice; fundamentally change the nature of the certified class action; and fail to disclose a cause of action for statutory market misrepresentation.

BACKGROUND

[7] 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 (the "Fund"), a mutual fund trust managed by the defendant RBC Global Asset Management Inc. ("RBC").

[8] The certification judge summarized the plaintiffs' case in the opening paragraph of the reasons for judgment allowing the application to certify the action as a class proceeding, 2021 BCSC 144:

> [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.

[9] This action is one of four proceedings based on closet indexing, all of which were commenced by the same class action counsel: *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*, 2022 BCSC 1857. The certification judge in this action was the judicial management judge in the three other proceedings as well.

[10] To appreciate the issues on this application, it is helpful to briefly review the procedural history of all four proceedings.

[11] On July 31, 2020, the Court certified the *Turpin* action by consent as a class action.

[12] On February 1, 2021, the Court certified this action following a four-day contested certification application. In their submissions opposing certification, the defendants took the position they were being accused of fraud. Plaintiffs' counsel stated that they were not pleading fraud. The judge took the view that, even without the word "fraudulent", fraud was pleaded. The Court gave the plaintiffs an opportunity to remove the allegations, which they chose not to do. At the request of

the defendants, the Court ruled that the plaintiffs had pleaded fraud: paras. 24–26, 37.

[13] The defendants acknowledged that the pleadings disclosed causes of action for breach of trust, breach of contract, knowing receipt, and unjust enrichment. In addition, the Court found the following causes of action:

a) The tort of civil fraud: RBC made a false representation to the class members that the Fund was actively managed; RBC knew 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: paras. 28–34;

b) Prospectus misrepresentation based on the cause of action in s. 131 of the *Securities Act,* R.S.B.C. 1996, c. 418: the closet indexing strategy was a material fact that RBC did not disclose to the unitholders of the Fund: paras. 65–70;

c) Breach of fiduciary duty: RBC owed the unitholders a fiduciary duty, which it breached by acting as both the trustee and the manager of the Fund: paras. 76–80; and

d) Knowing assistance: RBC *qua* manager knowingly assisted itself *qua* trustee: para. 82.

[14] On June 28, 2022, following a 38-day common issues trial, the Court dismissed the *Turpin* action. In doing so, the Court found that the claim as pleaded required proof of deceit, fraud, or dishonesty, which the plaintiff had failed to establish.

[15] On February 26, 2024, the Court dismissed the application to certify the *Gibbs* action as a class proceeding on the basis the pleadings did not disclose a cause of action. The decision to not certify the action was the third set of reasons for judgment on the certification application in *Gibbs*.

[16] In the first set of reasons, although the plaintiff had not pleaded fraud, the Court found that the pleadings disclosed a cause of action in fraud, as well as causes of action for breach of trust, breach of fiduciary duty, breach of securities disclosure requirements, and unjust enrichment. However, the Court identified a need for evidence to demonstrate the defendants had used a closet indexing strategy. The plaintiff amended her pleadings to expressly disclaim fraud and stress the importance of "active risk" in determining whether the defendants had used closet indexing. The Court rejected these amendments, finding that it was unclear how a failure to disclose a closet indexing strategy could be unintentional. The plaintiff then further amended her pleadings to provide particulars to explain how a failure to disclose an investment strategy would not necessarily involve fraud. The Court described the further amended pleadings as "confounding" and decided that they did not disclose any cause of action.

[17] Meanwhile, in *Pope*, on October 24, 2022, the Court determined that further evidence was required in that certification application as well. The Court's reasoning roughly tracked the first set of reasons in *Gibbs.*

[18] On February 4, 2025, the Court of Appeal allowed the plaintiff's appeal in *Gibbs.* The Court of Appeal held that the certification judge erred in concluding that without fraud the pleadings no longer disclosed a cause of action (para. 29). The Court of Appeal 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). In the result, the Court of Appeal granted the application for certification.

[19] On February 24, 2025, the Chief Justice, on his own motion and without a hearing, appointed me as judicial management judge in all four proceedings in place of the certification judge.

[20] On June 2, 2025, the plaintiffs applied in this action to further amend the notice of civil claim, as set out in a proposed further amended notice of civil claim ("FANOCC") and a "fresh as amended" version of the FANOCC without strikeout

and underlining. As I understand the proposed amendments, they are essentially that:

a) RBC fund managers did not take enough "active risk" (as measured by certain statistical metrics), giving rise to a risk the Fund would not outperform its performance benchmark after fees.

b) RBC failed to disclose the closet indexing strategy and associated risk in the prospectuses for the Fund.

c) The closet indexing strategy and associated risk were material facts, and their omission made RBC's statements regarding the Fund's investment strategies false or misleading.

[21] The plaintiff in the *Pope* action has also applied to amend his pleadings. That application is set to be heard, along with the completion of the certification application, in early January 2026.

ANALYSIS

[22] Generally, amendments will be granted liberally, to ensure that the real issues between the parties are identified and tried. Justice G.P. Weatherill summarized the general principles in *Peterson v. 446690 B.C. Ltd.,* 2014 BCSC 1531, at para. 37:

> [37] …
>
> (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17.
>
> (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd*., 2012 BCSC 776.
>
> (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.* 2008 BCSC 719.
>
> (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.

> (e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.,* 2006 BCSC 1567.

[23] Amendments are permitted in certified class actions. In *Lam v. Flo Health Inc*., 2025 BCSC 993, for example, Justice Blake granted the plaintiffs leave to amend their pleadings and common issues to clarify the breach of contract issues in that case.

[24] An amendment that would amount to certification of a new cause of action must be assessed under s. 4 of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, which sets out the criteria for certification: *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021 [*Coburn*] at para. 27. An amendment is not appropriate where it would have the effect of reconstituting the certified action or fundamentally changing the nature of what has been certified: *Coburn* at para. 28.

[25] The defendants argue that the proposed amendments in this case both reconstitute the class action and fundamentally change the nature of what has been certified by introducing an entirely new cause of action premised on a failure to meet risk disclosure obligations and removing a fraud allegation that the defendants say was central to the original certification decision.

[26] I do not agree with the defendants' characterization of the existing pleadings or the proposed amendments. I do not agree that the proposed amendments fundamentally change the nature of what has been certified; nor do I agree that the amendments introduce a new cause of action.

[27] In my view, the defendants' submissions, if accepted, would have the effect of replicating in this proceeding the error that was identified by the Court of Appeal in *Gibbs.* The plaintiffs did not allege fraud in the pleadings that formed the basis of the certification order in this action. The certification judge inferred the allegation of fraud from his understanding of their closet indexing claim. A very similar inference caused

the judge to fall into error in *Gibbs* according to the Court of Appeal. Speaking for the Court, Justice Fenlon said this:

> [34] It is evident from the allegation of intentional nondisclosure that the appellant could have pleaded the tort of civil fraud. However, she chose not to. That decision was hers to make…
>
> [Emphasis by Fenlon J.A.]

[28] Like the plaintiff in *Gibbs,* the plaintiffs in this case chose not to plead fraud. As in *Gibbs,* that decision was theirs to make. The interests of justice would not be served by holding the plaintiffs to a pleading they did not make and now seek to expressly disclaim.

[29] Contrary to what the defendants submit, it was not necessary for the plaintiffs to appeal the decision by the certification judge in this action. One appeals orders, not reasons for judgement. The plaintiffs had no reason to appeal the order certifying the action. They do not seek to set that order aside.

[30] I am not bound as a matter of horizontal *stare decisis* by the ruling by the certification judge that the pleadings allege fraud. The subsequent decision of the Court of Appeal in *Gibbs* affects the validity of that ruling, allowing a different approach to be taken on this application: *R. v. Sullivan,* 2022 SCC 19 at para. 73.

[31] While *Gibbs* involved different defendants, a different mutual fund and some different facts, the reasoning of the Court of Appeal is both persuasive and binding: the plaintiffs are entitled to disclaim fraud they did not plead; and fraud is not a required element of breach of trust, breach of fiduciary duty, breach of securities disclosure requirements, or unjust enrichment.

[32] Accordingly, I find that the plaintiffs are entitled to expressly disclaim fraud.

[33] Likewise, they are entitled to discontinue the pleaded claims of knowing assistance and knowing receipt. Generally, a plaintiff controls the action as *dominus litis*, meaning they are not required, except in unusual circumstances, to continue a

claim against a defendant contrary to their wishes: *Aiton v. Fisher*, 2007 BCSC 1468 at paras. 19–21.

[34] After a certain point, it may be too late for a plaintiff to discontinue a claim. The action may carry on far enough that the plaintiff is no longer *dominus litis*, and the defendant is entitled to a trial, especially where the defendant has acquired an interest in clearing their name of allegations of serious wrongdoing: *Aiton* at paras. 22–23

[35] However, there is little to suggest that that point has been reached in this case. Discoveries have not yet begun. Notice has not been given to the class members. There is no evidence of adverse publicity or reputational harm to the defendants from the allegations of knowing assistance or knowing receipt. Essentially, the plaintiffs put this proceeding in abeyance while their counsel litigated the trial in *Turpin* and the appeal in *Gibbs*.

[36] The defendants argue that, in making the certification decision, the certification judge was guided by his understanding the plaintiffs had pleaded fraud, such that allowing them to remove the pleaded claims of knowing assistance and knowing receipt would undermine the certification order. I disagree.

[37] The remaining causes of action do not require proof of intentional dishonesty. In particular, the cause of action in s. 131 of the *Securities Act* does not require proof of intentional nondisclosure. As stated by the Court of Appeal in *Gibbs*: “[A] prospectus may fail to disclose material information through oversight rather than deceit” (para. 32).

[38] Although the original pleadings included allegations of intentional wrongdoing, including a claim for punitive damages, those allegations did not inform the Court’s analysis beyond the discussion of fraud. In other words, the allegations of intentional wrongdoing did not inform the Court’s analysis of whether there is an identifiable class in this case; whether the claims of the class members raise other common issues; whether a class proceeding is a preferable procedure; or whether the

plaintiffs are suitable representatives of the class members. In my view, removing those allegations does not undermine the certification order.

[39] The defendants also argue that the certified action was based on a different misrepresentation claim from what is now advanced. At the time of certification, the plaintiffs alleged that RBC misrepresented that the Fund was actively managed, whereas the proposed amendments would allege that RBC failed to disclose a risk that the Fund would underperform its benchmark after fees. The defendants argue that this is a new cause of action. Again, I disagree.

[40] In *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, the Court of Appeal, at paras. 27–28, adopted the following descriptions of a "cause of action":

a) "every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court" (para. 27); and

b) "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (para. 28).

[41] The Court held that an amendment will not be taken to raise a new cause of action so long as it does not "change the substance of the issues" (para. 30). More specifically, an amendment does not raise a new cause of action where "a party merely pleads a new or alternative remedy based on the same facts already pleaded" (para. 31).

[42] The plaintiffs have alleged a closet indexing strategy from the very beginning in this case. They have alleged that RBC charged management fees based on active management when in fact the Fund closely tracked a benchmark. The proposed amendments clarify that closely tracking the benchmark is not the alleged wrong; rather, the allegation is that the defendants wrongfully failed to disclose this strategy and the risk that the Fund would not outperform the benchmark after fees. These amendments do not change the substance of the issues; they merely restate

the theory of liability. To the extent there is anything new, it does not raise a new cause of action.

[43] The Court of Appeal disagreed with the contention in *Gibbs* that the amendments amounted to a "wholly revised claim" (para. 28). The Court said the certification judge "seemed to lose sight" of the other causes of action as he grappled with the amendments and in particular the plaintiff's disclaimer of fraud (para. 35).

[44] In reaching this conclusion, the Court of Appeal said it was "noteworthy" that, in *McCorquodale* (the present action), the judge certified a class action on the basis of breach of fiduciary duty, breach of trust, prospectus misrepresentation and unjust enrichment, among others "on substantially the same pleading" as the one used in *Gibbs* (para. 36; emphasis added).

[45] In other words, while the evidence in this action may be different, the pleading is substantially the same as what the Court of Appeal certified in *Gibbs*.

[46] Accordingly, I cannot accept the defendants' submission that the existing pleadings are fundamentally different from *Gibbs*; nor can I accept their submission that the plaintiff should be denied leave to bring the pleadings more in line with those in *Gibbs.*

[47] Also, in my view, some flexibility is required with respect to the pleadings in this action. In *Valeant Canada LP/Valeant Canada S.E.C*. *v. British Columbia*, 2022 BCCA 366 [*Valeant*], the Court of Appeal recognized that in complex cases it is not uncommon for pleadings to be amended several times, or for pleadings to be supplemented by particulars to further articulate, refine, and define the issues. This is, Justice Harris observed, largely a reflection of the reality of complex commercial litigation. Complex litigation requires a "degree of flexibility" and a "functional approach" to the rules of pleadings:

> [38] …The role of pleadings in such cases remains important, but some degree of flexibility is required in the application of the general rules governing pleadings to respond to the felt necessities of the case. The rules

> of pleadings are servants, and not masters, in attempting to foster fair and efficient adjudication of disputes.
>
> [39] In short, the principles governing pleadings have to be applied functionally in the context of the case, in order to foster the interests of justice and what is fair and convenient between the parties. There is, therefore, a significant degree of discretion vested in a case management judge to identify whether pleadings are sufficient to promote their purpose in the context of the particular case, and to control their evolution as the litigation unfolds.
>
> [Emphasis added.]

[48] A functional approach to pleadings recognizes that plaintiffs in these kinds of cases may not know the specifics of the conduct they allege at the early stages of an action before discovery. A claim that evolves somewhat may nonetheless fulfill the foundational purposes of pleadings, so long as it discloses the case against the defendant, permits responsive pleading and identifies the scope of relevance and parameters of discovery (*Valeant,* at paras. 62–63).

[49] While *Valeant* was decided prior to a certification order, the functional approach it endorses remains compelling post-certification. I agree with the defendants that the *Class Proceedings Act* does not provide an open platform for parties to continuously reframe a certified case. However, at the same time, pleadings cannot be frozen as they stood when the case was certified. The object is to ensure that the real issues are identified and tried.

[50] Here, the proposed amendments explain the case the defendants must meet more clearly. They allow the defendants to join issue on what the plaintiffs say is their real complaint. Indeed, the defendants argue that they made disclosure of their investment strategies and associated risk. They argue that the plaintiffs have not identified anything in the disclosures that was false or misleading or required correction under the *Securities Act*. These are defences to the merits that can and should be decided on a proper factual record.

[51] The defendants further argue that the applicable limitation period for misrepresentation under the *Securities Act* has expired. They note that the certification judge already raised issues with the limitation period because both

representative plaintiffs had sold their units in the Fund more than three years before they commenced the action.

[52] The existence of a limitation defence is a relevant, but not determinative factor in deciding whether to allow an amendment that raises a new cause of action. This is because the effect of the amendment may be to extinguish a defence that could be raised in a separate action. In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd*. (1996), 19 B.C.L.R. (3d) 282 (C.A.) and *Letvad v. Fenwick*, 2000 BCCA 630, the Court of Appeal identified the following factors to be considered on an application to add new parties or new causes of action after the expiry of a limitation period: the extent of the delay; the reasons for the delay; any explanation put forward to account for the delay; the degree of prejudice caused by delay; and the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[53] In *Chouinard v. O'Connor*, 2011 BCCA 161, the Court of Appeal confirmed that this list of factors is not exhaustive. The overriding concern is whether it would be "just and convenient" to grant leave to amend the pleading.

[54] Here, I have found that the amendments do not raise a new cause of action.

[55] In any event, the only prejudice the defendants identify from the plaintiffs' delay is the presumed prejudice that results from the passage of time. As discussed, the delay in this case is largely a result of the proceedings having been put in abeyance while plaintiffs' counsel prosecuted the trial in *Turpin* and the appeal in *Gibbs*. As far as I am aware, the defendants did not object to this course of action.

[56] In my view, it is just and convenient to grant leave to amend the pleadings and common issues to clarify the certified claims and define the real issues between the parties.

[57] Lastly, and in the alternative, the defendants argue that certain of the proposed amendments violate rules of pleadings and should be struck out. They argue that paras. 5-6, 9, 31–33, 38–41, 44–47, 53, 57–61, 64 of the FANOCC

contain argument, legal conclusions, and evidence, and should not be allowed. Additionally, they argue that the section entitled “Overview of the Claim” is argumentative and ought not to be allowed.

[58] The basic rules for pleading a notice of civil claim are set out in Rules 3-1(2) and 3-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 and numerous decisions of this Court. A notice of civil claim must:

a) state facts and not merely conclusions of law;

b) include, for each cause of action, the material facts on which the plaintiff relies to establish a complete cause of action;

c) not include the evidence by which those facts are to be proved; and

d) be as concise as the case allows.

Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc., 2021 BCCA 362 at paras. 9–12, 19–20; *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at paras. 15–19.

[59] I agree with the defendants that the FANOCC contains some argument and some evidence. In particular, the charts at pp. 16–20 of the draft are evidence and not appropriate for a pleading. However, I do not agree with the defendants that the impugned paragraphs are so defective that leave to make these amendments should be denied. This is a complicated case. An overview and some explanation of the plaintiffs’ theory of the case is helpful to the reader. The pleading, while lengthy, is not overburdened with inappropriate or unnecessary content.

CONCLUSION

[60] The plaintiffs are granted leave to file the second further amended notice of civil claim attached as Schedule B to the notice of application, without the charts. The plaintiffs may then file the “Fresh as Amended Notice of Civil Claim” attached as Schedule A to the notice of application, without the charts.

[61] The plaintiffs are granted leave to amend the common issues as attached as Schedule C to the notice of application.

"Elwood J."