IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pope v. Canadian Imperial Bank of Commerce,* 2026 BCSC 203

Date: 20260206
Docket: S207820
Registry: Vancouver

Between:

William Pope

Plaintiff

And

Canadian Imperial Bank of Commerce, CIBC Trust Corporation and CIBC Asset Management Inc.

Defendants

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:	P.J. Bates J.R.E. Archibald
Counsel for the Defendants:	J. Devereux R. Sutton L. Rennie
Place and Dates of Hearing:	Vancouver, B.C. January 5–7, 2026
Place and Date of Judgment:	Vancouver, B.C. February 6, 2026

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I. INTRODUCTION

[1] The plaintiff has applied to have this action certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. On October 24, 2022, Justice Funt determined that the action would not be certified but granted the plaintiff leave to submit further evidence, after which the Court would make a final determination on certification. The plaintiff now applies to amend his pleadings and complete the certification application.

[2] The proposed class action concerns an investment strategy referred to as "closet indexing". The plaintiff says closet indexing occurs where a mutual fund closely tracks a benchmark index, but investors are charged management fees reflecting more active management which would aim to outperform the benchmark.

[3] Justice Funt found that the plaintiff had met all the requirements in s. 4(1) of the *CPA* to certify the action as a class proceeding, except for s. 4(1)(c), which requires that the claims of the class raise common issues. On that requirement, Funt J. found that there was commonality between class members, but the plaintiff had not shown a basis in fact that a common issue actually exists with respect to closet indexing.

[4] The plaintiff has now filed affidavit evidence that applies various performance metrics to conclude that the defendants engaged in closet indexing and caused harm to the class members. He argues that this evidence fully satisfies the direction from Funt J., and certification should follow as a matter of course.

[5] The defendants consent to the proposed amendments but oppose certification. They argue that the question of whether a common issue actually exists with respect to closet indexing must be considered in light of the claims as amended and all the evidence adduced by both parties. Viewed in this light, they submit, the plaintiff has not established a basis in fact supporting the proposed common issue.

[6] For the reasons that follow, I find that the requirements of s. 4(1) of the *CPA* are now met. Accordingly, the Court must certify the action as a class proceeding.

II. BACKGROUND

[7] This action is one of four proceedings based on closet indexing, all of which were commenced by the same class action counsel. The other three proceedings are *Turpin v. TD Asset Management Inc*., *McCorquodale v. RBC Global Asset Management Inc.,* and *Gibbs v. HSBC Global Asset Management.*

[8] Each of the other proceedings was or has been certified as a class proceeding. *Turpin* was certified by consent and dismissed by Funt J. following a common issues trial. *McCorquodale* was certified by Funt J. following a contested certification application. *Gibbs* was certified by the Court of Appeal on an appeal from a decision by Funt J. denying certification in that case. The Court of Appeal decision is indexed at 2025 BCCA 31.

[9] The plaintiff in this action, William Pope, owns units of a mutual fund trust managed by the defendant CIBC Asset Management Inc. (“CIBC”). He seeks to represent a class of investors who hold or held at any time during the class period one or more units of the CIBC Equity Fund, Growth Fund or Value Fund (collectively, the “Funds”).

[10] Justice Funt summarized Mr. Pope’s case as follows in reasons for judgment on the original certification application, indexed at 2022 BCSC 1857:

> [2] In brief, the plaintiff says that he and other investors invested in units of mutual fund trusts established and managed by the defendants without the defendants disclosing that they were using an “investment strategy designed to closely track the performance” of the S&P/TSX Composite Index.

[11] Justice Funt found that Mr. Pope’s pleadings disclosed claims in civil fraud, breach of trust, breach of fiduciary duty, knowing receipt, breach of securities prospectus requirements, and unjust enrichment (paras. 49–56, 61–98). Notably, Mr. Pope did not expressly allege fraud.

[12] In a proposed fresh as amended notice of civil claim (the “FANOCC”), Mr. Pope expressly disclaims fraud and removes the claim of knowing receipt. The FANOCC is substantially similar to the pleadings on which the Court of Appeal

certified the action in *Gibbs.* The focus of the FANOCC is on breach of trust, prospectus misrepresentation, and unjust enrichment.

[13] As stated, the defendants do not oppose these amendments. They acknowledge that the FANOCC discloses a cause of action as required by s. 4(1)(a) of the *CPA.*

[14] Justice Funt found that the proposed class definition meets the requirements of s. 4(1)(b): it is readily identifiable whether a person falls within the class and there is a rational connection to the proposed common issues (paras. 101–108).

[15] Turning to s. 4(1)(c), Funt J. cited *Krishnan v. Jamieson Laboratories Inc.,* 2021 BCSC 1396, where Justice Branch summarized the requirement to establish a common issue as follows:

> [115] The evidence matters in establishing the common issues. The plaintiff must adduce some basis in fact that: (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the class: *Simpson v. Facebook*, 2021 ONSC 968 at para. 43; *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 at para. 120; *Bhangu [v. Honda Canada Inc.*, 2021 BCSC 794] at para[s]. 97-99; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26, at para. 85.

[16] Based on *Krishnan* and other authorities, Funt J. found that Mr. Pope was required to show not only commonality among the proposed class members, but also some basis in fact to support the assertion that a common issue actually exists (para. 114).

[17] Mr. Pope filed an affidavit by Professor Mikhail Simutin, Ph.D. in support of the proposed common issues. Professor Simutin is an associate professor of finance at the Rotman School of Management at the University of Toronto. In *Turpin*, the Court qualified Prof. Simutin to give opinion evidence with respect to the classification and performance of investment funds, including associated metrics and related features, aspects, and related calculations.

[18] Professor Simutin provided a general description of investment management, including active management, passive (index) management, funds that may be

identified as using a closet indexing strategy based on certain performance metrics that measure active risk, and the harms to investors that may result from closet indexing.

[19] Justice Funt found that Mr. Pope had established the requisite commonality, reasoning that, if during the class period, the defendants used a closet indexing strategy without disclosing its use, some or all the class members would have been charged directly or indirectly for investment management services they were told they would receive but did not (para. 115).

[20] However, Funt J. found that Prof. Simutin had not applied the performance metrics to identify any of the Funds at issue in this case as possible closet indexers (para. 119).

[21] Justice Funt granted Mr. Pope leave "to submit a further affidavit by Professor Simutin or other evidence to show some basis in fact that a common issue actually exists with respect to closet indexing" (para. 120).

[22] Turning to s. 4(1)(d), Funt J. found a class action would be the preferable procedure to resolve the proposed common issues (paras. 124–127). Justice Funt also found that Mr. Pope is an appropriate representative plaintiff, satisfying s. 4(1)(e) of the *CPA.*

[23] Justice Funt concluded that:

> [132] The action will not be certified as a class proceeding at this time.
>
> [133] Upon receipt of evidence supporting some basis in fact to show that the [proposed common issues] actually exist and after considering any further submissions on this particular aspect, the Court will be in the position to make a final determination on certification.

III. ANALYSIS

A. The Common Issue Requirement

[24] The plaintiff bears the burden of establishing that each requirement of the certification test in s. 4(1) of the *CPA* is met. Except for s. 4(1)(a), which is assessed

based on the pleadings alone, the plaintiff must establish “some basis in fact” for each of the remaining requirements: *Hollick v. Toronto (City),* 2001 SCC 68 at para. 25.

[25] One of the key requirements is that the claims of the class members raise common issues, as required by s. 4(1)(c). Being able to frame issues in a way that is common to all class members is not enough. There must be some basis in fact that the common issues actually exist. This does not require proof on the merits, only enough evidence that the certification of a common issue functions as a "meaningful screening device": *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at para. 99, citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 103.

[26] Simply tendering an expert report is not sufficient. Without entering into a detailed scrutiny of the evidence, the court must be satisfied that the expert's evidence is sufficiently reliable that it provides some basis in fact for the existence of the common issue: *Bhanghu* at para. 99.

[27] Requiring some basis in fact for the existence of a common issue is quite different from determining the merits of the proposed action. Certification does not require evidence on a balance of probabilities and does not require the court to resolve conflicting evidence. It requires some basis in fact, not proof of fact. This low evidentiary standard recognizes that the court is ill-equipped at the certification stage to resolve conflicts in the evidence or to engage in an assessment of the viability or strength of the action. *Lilleyman v. Bumble Bee Foods LLC,* 2024 ONCA 606 at paras. 71–74.

[28] Recently, in *Moiseiwitsch v. Canadian National Railway Company,* 2025 BCSC 2377, Branch J. issued a call for courts and litigants to adhere to the original purpose and clarity of the “some basis in fact” requirement:

> [10] …I find that the phrase “some basis in facts” should be restored to its original, unvarnished, uncomplicated force. It is binding. It works. There is no need to shade, colour or overexplain it. We should simply apply it.

[29] In assessing the weight of evidence required, Branch J. said, the courts must keep in mind the context of the *CPA* scheme, in which applications for certification will be brought at the early stages of the proceeding, normally before any merits discovery has been provided to the plaintiff: *Moiseiwitsch* at para. 116(a), citing *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 [*Mueller*] at para. 136.

[30] Further, when considering any responsive evidence tendered by the defendant, Branch J. said, the courts cannot realistically engage in a detailed weighing of conflicting evidence: *Moiseiwitsch* at para. 116(b), citing *Mentor Worldwide LLC v. Bosco,* 2023 BCCA 127 at paras. 33–34.

[31] Justice Branch's clarion call in *Moiseiwitsch* reminds us that the "some basis in fact" requirement is there, not to invite a preliminary battle on the merits, but rather to provide the certification judge with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial: *Mueller* at para. 139.

B. Defining the Remaining Certification Issues

[32] Mr. Pope advocates a narrow approach to the remaining certification issues. He argues that it should be inferred from Funt J.'s decision that the Court was satisfied common issues exist with respect to the defendants' liability for closet indexing, with the sole exception that Prof. Simutin had not applied metrics to identify the Funds as possible closet indexers. He relies on the Court of Appeal's decision in *Gibbs* to argue that certification should follow as a matter of course once this evidentiary gap is filled.

[33] I would not frame the remaining issues as narrowly as Mr. Pope does. While closet indexing remains the key to the proposed class proceeding, the pleadings have changed since the original certification application. Justice Funt inferred an allegation of fraud from his understanding of the closet indexing claim. Subsequently, in *Gibbs,* the Court of Appeal found that fraud was neither pleaded nor necessary in that proceeding. Mr. Pope now expressly disclaims fraud in this action. The defendants dispute whether there is a basis in fact for any of the

remaining causes of action. I would not assume that Funt J. considered all these submissions and rejected them.

[34] The Court of Appeal's decision in *Gibbs* is not determinative. The Court's analysis of substantially similar pleadings is certainly instructive; however, each closet indexing 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.*

[35] Justice Funt's decision establishes that Mr. Pope has met the evidentiary standard with respect to s. 4(1)(b), (d) and (e), as well as the commonality requirement of (c), but not the requirement that follows from (c) to demonstrate some basis in fact that the proposed common issues actually exist.

[36] I agree with CIBC that the question of whether a common issue actually exists must be assessed in the context of the proposed class proceeding as a whole. Simply determining whether there is some basis using certain metrics to identify the Funds as possible closet indexers would not in my view provide a meaningful screening process.

[37] Proposed common issues 1–4 relate directly to the alleged use of a closet indexing strategy. The essential factual allegations underlying these proposed common issues are:

a) In managing the Funds, the defendants used an investment strategy designed to closely track the performance of their defined benchmark, the S&P/TSX Composite Index (the "Benchmark"), before fees.

b) The before fees performance of one or more of the Funds was substantially linked to the performance of the Benchmark because of low active risk.

c) As a result of (a) and (b), there was a substantial risk that one or more of the Funds would not outperform the Benchmark after fees, and one or more of the Funds in fact did not outperform the Benchmark after fees.

[38] Mr. Pope must show some basis in fact for each of these propositions. However, that cannot be the end of the analysis.

[39] This is because Mr. Pope does not allege that there is anything inherently illegal or wrongful about closet indexing. Rather, he alleges that fund managers who use a closet indexing strategy are required by equitable, legal and statutory obligations to disclose its use and associated risk and ensure that the management fees they charge are reasonable given the strategy. These allegations form the basis of proposed common issues 5–21.

[40] Proposed common issues 5–8 ask whether each defendant, as trustee or manager of the Funds, breached its standard and duty of care as set out in the applicable trust instrument or asset management agreement. Proposed common issues 9–14 ask whether each defendant owed and breached a fiduciary duty to the class members. Proposed common issue 15 asks whether the simplified prospectuses for the Funds contained a misrepresentation within the meaning of the *Securities Act*, R.S.B.C. 1996, c. 418 (and, as applicable, other Canadian securities legislation). Proposed common issues 15–21 ask whether CIBC was unjustly enriched.

[41] Without a common issue existing on one or more of these potential bases of legal liability, a common issue that asks whether the defendants used a closet indexing strategy would not advance the claims of the class members in a meaningful way. There must be some level of confidence that certification of the closet indexing issue will be of practical benefit when, in the future, the claims reach trial. Standing alone, the closet indexing issue would be, as CIBC says, of academic interest only.

[42] Accordingly, I find that Mr. Pope must establish some basis in fact supporting the existence of proposed common issues 1–4 (the “Closet Indexing Strategy”), but also some basis in fact supporting one or more of the proposed common issues concerning breach of trust, breach of contract, breach of fiduciary duty, prospectus misrepresentation, or unjust enrichment (collectively, the “Liability Issues”).

[43] I will address the evidence with respect to the Closet Indexing Strategy first. I will then address the evidence with respect to the Liability Issues, together, under a separate heading.

C. The Closet Indexing Strategy

[44] CIBC argues that there is no basis in fact for Mr. Pope's allegation that the defendants used the Closet Indexing Strategy as defined, or that the performance of the Funds was "substantially linked" to the performance of the Benchmark due to low active risk, and thus no basis in fact for proposed common issues 1–4. I disagree.

[45] In his first affidavit, filed in support of the original certification application, Prof. Simutin opined that classifying a fund as a closet indexer involves:
"(1) measuring how similar its investment portfolio is to the benchmark index, and (2) defining the threshold of similarity of the fund and the benchmark index that separates closet indexers and truly active funds".

[46] In his second affidavit, filed in support of this application, Prof. Simutin applies the three specific performance metrics which he says can be used to detect closet indexing:

a) *active share*, which measures the share of 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; and

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

[47] Prof. Simutin analyzes the Funds using these metrics and concludes that they reflect closet indexing during the class period:

a) Active share: the Funds were persistently below a "closet indexing threshold of 0.60".

b) Tracking error: the Funds demonstrated a tracking error of zero, meaning that "overall, the before-expenses performance of the underlying funds closely tracked the performance of the benchmark index".

c) R-squared: the Funds had values of 0.954 and 0.971, which "placed them inside the set of closet indexers."

[48] Professor Simutin concludes that, in his opinion, the Funds were "significantly and persistently" below what he describes as the "commonly used thresholds to identify closet indexers".

[49] CIBC relies in response on an affidavit by Professor Christian Lundblad, Ph.D, a professor of finance and economics at the University of North Carolina. Professor Lundblad agrees with Prof. Simutin's categorization of investment (mutual) funds as active or passive, and the basic concept of closet indexing. However, Prof. Lundblad disagrees with Prof. Simutin's use of metrics to determine whether a mutual fund may be properly characterized as a closet indexer.

[50] In Prof. Lundblad's opinion, the metrics used by Prof. Simutin may provide a starting point to investigate the activeness of a mutual fund, but "alone are not a reliable test of whether an actively managed fund is actually being passively managed". According to Prof. Lundblad, the activeness assessment must also consider the characteristics and context of the specific fund, and the same threshold metrics may not be appropriate to evaluate funds in different markets.

[51] For example, Prof. Lundblad opines that the concentrated nature of the Canadian equity market provides limited opportunities for fund managers to deviate significantly from the holdings of the benchmark due to fewer available equities that may align with the objectives of the funds.

[52] In addition, Prof. Lundblad finds "no evidence supporting claims that the [Funds] were seeking to track the performance of the benchmark index". According to Prof. Lundblad, the performance of the Funds varied over time and diverged from the Benchmark. He notes that Prof. Simutin used an averaging approach for

variations in the metrics compared to the thresholds he applied. Professor Lundblad states that this averaging approach is not indicative of indexing because, in his opinion, performance similar to the benchmark on average over time, with periods of over- and under-performance, is in fact performance that one would expect from an actively managed mutual fund.

[53] In a third affidavit, filed in reply, Prof. Simutin takes issue with various aspects of Prof. Lundblad's opinion and maintains the conclusion that the Funds reflect closet indexing, stating that:

> Their pre-fee performance is economically and statistically indistinguishable from their benchmarks, which is consistent with closet indexing rather than genuine active management. As a result, investors in the At-Issue Funds paid active-management-level fees for portfolios that could have been closely replicated using low-cost passive instruments. This misalignment between the fees charged and the service delivered is the core economic harm associated with closet indexing.

[54] CIBC argues that Prof. Simutin's evidence is unreliable. First, it argues that the thresholds he identifies for closet indexing are theoretical and arbitrary and have not been accepted by regulators or the courts as having any legal or other consequence. Second, CIBC argues that Prof. Simutin fails to address characteristics of the Canadian equities market which distinguish the environment in which the Funds invest from the data and research on which Prof. Simutin relied.

[55] In my view, CIBC's challenge to Prof. Simutin's evidence goes beyond what is appropriate to be determined at the certification stage. The Court is not equipped on a certification application to weigh and assess competing expert evidence. The "reliability" threshold is necessarily low at this stage, and not the same as at a trial. The question at this stage is whether the expert's methodology is sufficiently reliable that it provides some basis in fact for the existence of the common issue.

[56] Professor Simutin's analysis provides an evidence-based argument that one or more of the Funds exhibited closet indexing during the class period. His debate with Prof. Lundblad over the use of active risk metrics illustrates that a common issue actually exists. I do not agree with CIBC that the thresholds proposed by

Prof. Simutin are arbitrary or inherently unreliable. I do not agree that Prof. Simutin failed to consider data from Canada. Whether his methodology is ultimately reliable as proof of closet indexing will require a trial in my view.

[57] CIBC further argues that there is no evidence the defendants actually used a strategy designed to closely track the Benchmark.

[58] CIBC is correct in so far as there is no evidence the defendants intended to deceive investors. However, as noted, Mr. Pope expressly disclaims fraud, and, in *Gibbs,* the Court of Appeal held that fraud is not a requisite element of the similar claims alleged in that case (para. 33).

[59] Without a pleading and evidence of fraud, it may be difficult for Mr. Pope to prove that the defendants used a “strategy”, or that any such strategy was “designed” to track the Benchmark. It may also be difficult for Mr. Pope to prove that the performance of the Funds was “substantially linked” to the Benchmark, given evidence that their performance varied over time and diverged from the S&P/TSX Composite Index.

[60] However, in my view, these are issues that go to the merits of the claim. As confirmed by the Court of Appeal in *Gibbs,* the Court is not concerned at this stage with the merits and ultimate success of the proceeding (para. 46).

[61] Mr. Pope does not allege that the defendants intended to *duplicate* the Benchmark. Rather, he alleges that the defendants ought to have recognized that the Funds’ performance was substantially linked to the Benchmark and the risk they would not outperform the Benchmark after fees.

[62] Professor Simutin’s analysis provides an evidence-based argument that the performance of the Funds was economically and statistically linked to the Benchmark. Whether that linkage was sufficient to attract legal liability is a complex issue that cannot be answered simply by looking at graphs or performance reports.

[63] I find that there is some basis in fact for proposed common issues 1–4.

D. The Liability Issues

[64] CIBC argues that there is no basis in fact that a common issue actually exists with respect to any legal liability for the Closet Indexing Strategy, if it exists. Again, I disagree.

[65] There are essentially two separate legal grounds for Mr. Pope's claims based on closet indexing: (a) trust law obligations; and (b) securities disclosure obligations. (Mr. Pope also alleges unjust enrichment, but this seems to be a subset of the claims based on trust law.)

1. Trust Law Obligations

[66] The proposed common issues based on trust law obligations arise from the terms of the declarations of trust under which the defendants constituted the Funds for the benefit of the unit holders (the "DOTs"). The DOTs each provide that the trustees will exercise their powers and discharge their duties honestly and in good faith, and in the best interests of the Funds, and must exercise the degree of care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. These undertakings mirror provisions of Canadian provincial securities legislation, including s. 125 of the *Securities Act*, that prescribe the duties of investment fund managers.

[67] Mr. Pope alleges that the defendants' failure to disclose the Closet Indexing Strategy and the risk the Funds would not outperform the Benchmark after fees was a breach of their obligations under the DOTs and s. 125 of the *Securities Act.* He also alleges that the management fees charged by the defendants were a breach of their obligations under the DOTs and s. 125.

[68] While they impose a general duty of care, neither the DOTs nor s. 125 of the *Securities Act* prescribe a standard of disclosure or a standard of fees relative to the level of active risk or investment strategy.

[69] Mutual funds are highly regulated investments. Canadian regulators have not adopted a formal definition of closet indexing, nor have they established that a

certain level of management or active risk must be maintained to justify a given level of fees.

[70] Put another way, there is no express contractual or regulatory standard that directly governs the matters that Mr. Pope seeks to raise in this proceeding.

[71] CIBC argues that, because the proposed common issues impugn the conduct of professional fund managers, the trial judge will require the assistance of a properly qualified expert to determine the applicable standard of care. Factors such as custom and industry practice may inform this standard of care, CIBC argues, meaning that a properly qualified expert will need experience and expertise in the Canadian mutual fund industry to assist the court.

[72] As discussed, Prof. Simutin's evidence is based on an analysis of various performance metrics derived from the academic literature on closet indexing. Professor Simutin does not purport to express an opinion on the standard of care of a reasonable fund manager.

[73] CIBC argues that, to establish a basis in fact for the existence of the proposed trust law issues, Mr. Pope would need to tender expert evidence from a properly qualified expert that a failure to meet the thresholds identified by Prof. Simutin was a breach of the professional standard of care required of trustees and managers of Canadian mutual funds.

[74] This argument misstates the basis of the proposed common issues. Mr. Pope does not allege that closet indexing is a breach of the defendants' trust law obligations. Rather, he alleges that the defendants breached their obligations by failing to disclose the Closet Indexing Strategy and associated risk and by failing to ensure that the fees charged were reasonable.

[75] Nonetheless, Mr. Pope alleges in paras. 59–60 of the FANOCC that the defendants breached their standard of care as trustees and fiduciaries. In other words, the proposed common issues concerning disclosure and fees are bound up with an alleged breach of an asserted standard of care.

[76] I agree with CIBC that proof of the standard of care requires expert evidence. Conclusions about what constitutes adequate disclosure or reasonable fees in a particular investment context are outside the ordinary knowledge of a trial judge.

[77] However, I do not agree with CIBC that expert evidence of the standard of care is necessary to establish some basis in fact that a common issue based on trust law obligations actually exists.

[78] As discussed, Mr. Pope has shown some basis in fact that the defendants ought to have recognized a linkage between the Funds' performance and the Benchmark and a risk they would not outperform the Benchmark after fees. He has also shown some basis in fact the defendants charged the class members active management-level fees for returns they could have realized by investing in low-cost passive index funds.

[79] In my view, Mr. Pope has met the governing standard of "some basis in fact". An additional requirement for expert evidence on the standard of care in the Canadian mutual fund industry would impose too high an evidentiary burden for the purposes of certification.

2. Prospectus Misrepresentation

[80] The proposed common issues relating to prospectus misrepresentation are based on s. 63 of the *Securities Act* and National Instrument 81-101, *Mutual Fund Prospectus Disclosure* ("NI 81-101").

[81] Section s. 63 of the *Securities Act* provides that "a prospectus must provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed."

[82] NI 81-101 and the accompanying Form 81-101 require that a prospectus include:

> "The principal investment strategies that the mutual fund intends to use in achieving its investment objectives."

> "The process by which the mutual fund's portfolio adviser selects securities for the fund's portfolio, including any investment approach, philosophy, practices or techniques used by the portfolio adviser or any particular style of portfolio management that the portfolio adviser intends to follow. and
>
> "Disclosure in the context of the mutual fund's fundamental investment objectives and investment strategies, outlining the risks associated with any particular aspect of those fundamental investment objectives and investment strategies."

[83] Mr. Pope alleges that s. 63 and NI 81-101 required the defendants to disclose that they were using the Closet Indexing Strategy and the associated risk the Funds would not outperform the Benchmark after fees.

[84] CIBC argues that there is no evidence the defendants failed to disclose the performance of the Funds relative to the Benchmark. It points out that the Performance Reports for the relevant periods disclose the performance of the Funds, with comparison data for the Benchmark. Further, the prospectuses contain information that in certain years certain classes of the Funds did not outperform the Benchmark after accounting for management fees.

[85] However, Mr. Pope does not allege that the defendants failed to disclose the performance of the Funds relative to the Benchmark. Rather, he alleges that they failed to disclose a *strategy* to track the Benchmark. He alleges that the investment objectives set out in the prospectuses were misleading.

[86] CIBC argues that, contrary to this allegation, the simplified prospectuses provided full, true and plain language disclosure of the investment objectives. For example, in the case of the Equity Fund, the investment objective is "to provide long-term growth through capital appreciation by investing primarily in Canadian equity securities". For the Growth Fund, the objective is "to achieve long-term investment returns through capital growth, primarily in equity securities of large to medium-sized Canadian issuers". For the Value Fund, it is "to achieve long-term investment returns through capital growth by investing in senior issuers that are primarily medium to large Canadian companies".

[87] In my view, the evidence provides a basis in fact for a common issue concerning the adequacy of disclosure of the management strategies the Funds intended to use to achieve their investment objectives.

[88] As explained by Prof. Simutin, an active management strategy seeks to outperform a fund's benchmark after fees by taking active risk. Managers of actively managed funds charge higher fees than index funds because of higher expenses associated with research to select stocks and costs associated with trading activity. Investors purchase an actively managed fund hoping that it will outperform the benchmark by a margin that offsets the higher fees charged for active management.

[89] Whether the management of a fund is described in terms of active or passive investing is a material fact in my view. Disclosure may be inadequate or misleading if a fund is described in terms that suggest it is actively managed, if in fact it is functionally benchmark tracking.

[90] It may be difficult for Mr. Pope to prove that the defendants breached s. 63 or NI 81-101. However, these issues should be decided on a complete evidentiary record following discovery on the merits. For the purposes of the certification application, Mr. Pope has shown some basis in fact for a common issue based on prospectus misrepresentation.

IV. CONCLUSION

[91] Mr. Pope is granted leave to file the proposed FANOCC.

[92] The action is certified as a class proceeding.

[93] The notice of application seeks additional orders the parties did not address. The parties may request an additional appearance if they require further direction to settle the terms of the formal order.

"Elwood J."