
CANADA / JUDGMENT

Sharp v. Royal Mutual Funds Inc.

2020 BCSC 1781

COURT

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2020 BCSC 1781 Sharp v. Royal Mutual Funds Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharp v. Royal Mutual Funds Inc.,

2020 BCSC 1781

Date: 20201120

Docket: S194661

Registry: Vancouver

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Between:

William Sharp and Dianne Sharp

Plaintiffs

And

Royal Mutual Funds Inc.

Defendant

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Introduction

- [1] This proposed class proceeding relates to a compensation arrangement whereby the defendant, Royal Mutual Funds Inc. ("RMFI"), offered certain of its investment advisors enhanced commissions for the sale of units of a certain type of fund (the "Enhanced Compensation Arrangement"). The plaintiffs allege that the Enhanced Compensation Arrangement was unlawful and caused them to suffer damages. Specifically, they argue that by implementing the Enhanced Compensation Arrangement for certain funds, RMFI put its own interests ahead of its clients' interests, contravening Canadian securities laws aimed at protecting investors. They argue that this contravention gives rise to causes of action against RMFI.
- [2] The defendant submits that no cause of action flows from the Enhanced Compensation Arrangement. Further, the defendant argues that even if there were a cause of action, any claims against RMFI relating to the Enhanced Compensation Arrangement would be inherently individual and not amenable to adjudication on a class-wide basis.
- [3] For the reasons that follow, I have concluded that the plaintiffs have failed to satisfy the requirements for certification and that the certification application must be dismissed.

Factual Background

- [4] RMFI is a wholly owned subsidiary of Royal Bank of Canada ("RBC") and is the principal distributor of RBC mutual funds. The advisors who sell mutual funds on behalf of RFMI are employees of RBC.
- [5] The Enhanced Compensation Arrangement involved RMFI paying certain of its advisors an extra 10 basis points in commission for the sale of particular mutual fund products known as the "RBC PS" funds. The RBC PS funds are a suite of mutual fund products, sometimes referred to as a "fund of funds", meaning each RBC PS fund is a managed portfolio of underlying mutual funds. The effect of the Enhanced Compensation Arrangement was that an advisor would receive a higher commission for selling RBC PS funds to a client than they would receive from selling a third-party fund to a client.
- [6] The RBC PS funds consist of approximately thirty different mutual "fund of funds" products offered by RBC Global Asset Management Inc. ("RBC GAM"), the fund manager for RBC. The RBC PS funds are differentiated based on risk tolerance, investment timelines, and asset mixes.
- [7] Enhanced compensation was not available to all RBC advisors who sold RBC PS funds. There are different categories under which RFMI advisors are licensed to conduct business for RFMI. However, just one category of advisor, "Financial Planner - Investment and Retirement Planner" ("IRP"), was eligible for enhanced compensation. According to the defendant, the primary role of an IRP is to meet with clients of RBC who are not currently investing with RBC and assess their needs. IRPs are primarily paid on commissions and

bonuses. About 11% of RFMI advisors who sell RFMI products, including RBC PS funds, are IRPs.

- [8] The Enhanced Compensation Arrangement was available to IRPs from November 2011 to October 2016. When investors purchased RBC PS funds from an IRP during this time, the IRP would receive an extra 10 basis points in commission. Investors were not advised when their investment advisor received enhanced compensation for selling the RBC PS fund to them.
- [9] The Ontario Securities Commission ("OSC") commenced an enforcement proceeding against RMFI with respect to the Enhanced Compensation Arrangement, on the basis that RMFI violated section 4.2 of National Instrument 81-105 - Mutual Funds Sales Practices [NI 81-105]. NI 81-105 prohibits dealers from incentivizing the sale of their proprietary funds over third party funds. The enforcement proceeding was settled in June 2018 on the basis that the defendant admitted to violations of section 4.2(1) of NI 81-105 and section 11.1 of National Instrument 31-103 - Registration Requirements, Exemptions and Ongoing Registrant Obligations [NI 31-103], and paid a fine of \$1.1 million.
- [10] William and Dianne Sharp were originally the sole proposed representative plaintiffs. They are a retired couple from Langley, B.C. who acquired RBC PS funds from an advisor working for RBC during the relevant period. Over the course of a number of pre-certification motions, it became clear that the individual who sold RBC PS funds to the Sharps was not an IRP and therefore was not eligible for enhanced compensation. As part of this certification application, the plaintiffs seek leave to amend the notice of civil claim to add three additional representative plaintiffs: Joan Balderson, Sharon Stevenson, and Ilke Yarkin. Each of these three individuals purchased RBC PS funds from IRPs during the relevant period.

Certification Requirements

- [11] Section 4(1) of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA], requires the court to certify a proceeding if five requirements are met. These requirements are:
- a) the pleadings disclose a cause of action;
 - b) there is an identifiable class of two or more persons;
 - c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
 - e) there is an appropriate representative plaintiff.

- [12] The certification requirements are to be interpreted generously, taking into account the objects of class action legislation and the perceived benefits of such proceedings: *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273 at para. 28.
- [13] The certification analysis does not involve a consideration of the merits of the claim. The question at certification is not whether a claim is likely to succeed but rather whether the suit is appropriately brought as a class proceeding: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
- [14] The class procedure has three principal goals: behaviour modification, judicial economy and access to justice: *Hollick* at para. 27.
- [15] The requirement under s. 4(1)(a) that the pleadings disclose a cause of action is assessed by means of the same test that would apply to a motion to strike. A plaintiff will satisfy this requirement unless, assuming all the facts pled to be true, it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of success: *Pro-Sys Consultants v. Microsoft Corporation*, [2013] 3 S.C.R. 477 at para. 63 [*Pro-Sys*].
- [16] With respect to the remaining subsections 4(b) - (e), the plaintiff must show "some basis in fact" to establish that these certification requirements have been met. An evaluation under the some basis in fact standard at the certification stage does not involve any detailed weighing of evidence, but rather should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.
- [17] The defendant concedes that there is an identifiable class of persons in this case. The plaintiffs proposed the following class definition which was not opposed by the defendant:

All persons (other than Excluded Persons [defined to include the defendant, its affiliates and employees]) wherever they may reside or be domiciled, who purchased or otherwise acquired during the Class Period [November 11, 2011 - October 27, 2016] one or more units of a RBC PS fund through an RMFI Advisor holding the position or title of "Financial Planner - Investment and Retirement Planner".

- [18] The defendant also does not take issue with the appropriateness of the new representative plaintiffs sought to be added as part of this certification application.
- [19] The primary issues in contention between the parties are:
- a) whether the pleadings disclose a cause of action;
 - b) whether the claims of the class members raise common issues; and
 - c) whether a class proceeding is the preferable procedure for resolving the common issues.

Do the Pleadings Disclose a Cause of Action?

- [20] While the burden the plaintiff must meet under s. 4(1)(a) of the CPA is not a high one, the plaintiff still must set out a coherent cause of action. As Mr. Justice Bowden noted in *Jiang v. Peoples Trust*, 2016 BCSC 368 at para. 39, the inquiry is not merely "symbolic." The court has an important gatekeeper role in ensuring that certification is used as a meaningful screening device. It does not serve the purposes of the CPA to permit claims to proceed if they have no prospect of success.
- [21] Whether the pleadings disclose a cause of action must be determined on the basis of the pleadings alone: *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 10.
- [22] The standard for disclosing a cause of action in the pleadings should be interpreted flexibly, permitting claims to go forward if they have any chance of success upon the pleadings as they exist or as they may be amended: *McMillan v. Canada Mortgage and Housing Corporation*, 2007 BCSC 1475 at para. 18.
- [23] While the jurisprudence mandates generosity in terms of making available the possibility of amendments to "fine tune" the pleadings, the essentials of a cause of action must be pled or else the pleadings will be found to be "fatally lacking": *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 44.
- [24] The novelty of a claim is not fatal under the s. 4(1)(a) test. Rather, the fact that a claim is novel or an issue is unsettled in the jurisprudence may be good reason not to strike a claim at the pleadings stage: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17.
- [25] It is of particular importance that all the requisite elements of a cause of action are pled with sufficient material facts to make out a claim. In *Ladas v. Apple Inc.*, 2014 BCSC 1821, Justice Adair noted that the bar to certification is not so low so as to allow the court to ignore a lack of material facts or certify on the basis of bald legal conclusions. She specifically rejected the proposition that, in the absence of a pleading of a material fact, the court will "infer" what is not there, noting that "the consequence of failing to plead a material fact, necessary to state a complete cause of action, is that no reasonable claim has been pleaded": *Ladas* at para. 63.
- [26] The causes of action set out in the proposed amended notice of civil claim are breach of fiduciary duty, breach of equitable obligation, breach of contract, and unjust enrichment. The plaintiffs are required to have set out material facts in support of the constituent elements of each of these causes of action in order to meet the requirements of s. 4(1)(a) of the CPA.
- [27] After the hearing of the certification application but prior to the release of these reasons, the Supreme Court of Canada released its reasons in *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30 [Asselin]. That case bears some facial similarities to the instant one, insofar as it was a class proceeding relating to representations made by financial planners that induced clients to invest in certain products. In *Asselin*, the Supreme Court rejected the

appellant's assertion that it is impossible to bring a class action against a brokerage firm based on wrongdoing by investment advisors: at para. 22.

- [28] Notwithstanding the factual parallels between Asselin and this case, the cause of action pled by the plaintiffs in Asselin is different. The primary doctrine advanced by the plaintiffs in Asselin was the duty to inform, a doctrine not raised by the plaintiffs in this case. I therefore find the analysis of the cause of action in Asselin to be of little assistance.

Causation, loss and damages

- [29] Prior to dealing with the individual causes of action, I must address an issue that permeates all the causes of action pled: the remedies sought by the plaintiffs.
- [30] As part of the determination of whether a claim has any reasonable prospect of success, the plaintiffs must establish that the remedies they seek are available to them, assuming the truth of their pleadings, for the specific causes of action they have pled: *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19 at para. 49 [Atlantic Lottery].
- [31] The plaintiffs have not set out their claim clearly in this regard. While they have pled that the plaintiffs suffered "loss or damage" as a result of each alleged wrong of the defendant, they have not pled any material facts to support a causal connection between RMFI's actions and a particular financial loss suffered by the class members. Nor have they sought to establish a connection between the various remedies they seek and the particular causes of action they have pled. The defendant argues that this is an intentional omission, and that the failure to properly plead causation, loss, and available remedies has allowed the plaintiffs to disguise a highly individualized claim as one suitable for class determination.
- [32] I agree with the defendant that the pleadings lack material facts that would causally connect the alleged wrongs of the defendant to any monetary loss suffered by the plaintiffs. Instead, the plaintiffs have broadly drafted their claim so as to focus on two elements: the wrongs of the defendant and the menu of remedial options they would like the court to make available to them.
- [33] The plaintiffs argue that s. 29(1) of the CPA, which allows for aggregate monetary relief, eliminates the need to prove any loss or harm to class members.
- [34] Section 29(1) of the CPA states:
- 29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
- (a) monetary relief is claimed on behalf of some or all class members,
 - (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
- [35] Section 29's application is confined to the calculation of damages. In order for s. 29 to be engaged, there must be no questions of fact or law other than those relating to the assessment of monetary relief that remain to be determined. In other words, s. 29 is not an alternative means for a plaintiff to establish liability. It is a mechanism, once liability is found, for measuring damages in circumstances in which individual damages assessments might be impractical.
- [36] The plaintiffs' approach to causation and loss is also flawed because the plaintiffs fail to plead the available remedies for the specific causes of action pled. The plaintiffs submit that this is intended to give the trial judge maximum remedial flexibility. However, it also makes it extremely challenging to discern which remedies are being sought for any particular cause of action. As *Atlantic Lottery* makes clear, this determination is necessary to evaluate whether a particular cause of action is bound to fail.
- [37] The plaintiffs have argued that they are entitled to compensatory damages, alternatively, the equitable remedy of disgorgement, and alternatively, symbolic damages or nominal damages. The plaintiffs' reluctance to organize these remedial aspirations in accordance with the causes of action pled, even in argument, has obscured the very different remedial analyses that apply to the various causes of action they are asserting.
- [38] However, I am mandated to take a flexible approach and consider whether, if amended, the pleadings give rise to a cause of action that is not bound to fail. In considering each distinct cause of action, I have considered the various remedies sought by the plaintiffs and whether any of them are a component of a viable cause of action that survives scrutiny under s. 4(1) (a).

Breach of Fiduciary Duty

- [39] The plaintiffs claim that the defendant had a fiduciary duty to the plaintiffs to avoid sales compensation arrangements that put RMFI in a conflict of interest contrary to Canadian securities law.

Fiduciary relationships at common law

- [40] Fiduciary law seeks to protect parties against abuses of power in certain types of relationships or in particular factual circumstances: *Galambos v. Perez*, 2009 SCC 48 at para. 67. Fiduciary law focusses on relationships, particularly relationships in which one party is given a discretionary power to affect the legal or vital practical interests of the other: *Galambos*, at para. 70. Fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them: *Galambos*, at para. 71.

- [41] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409, Mr. Justice La Forest described two categories of fiduciary obligations: per se and ad hoc. Per se fiduciary obligations will arise from a relationship that has at its essence "discretion, influence over interests, and an inherent vulnerability". In *Hodgkinson*, La Forest J. describes two examples of per se fiduciary relationships: the relationship between a trustee and a beneficiary, and the relationship between an agent and a principal.
- [42] Ad hoc fiduciary obligations are not innate to a relationship. Rather, they arise as a matter of fact in particular circumstances: *Galambos* at para. 48.
- [43] The fiduciary relationship alleged in this case is grounded in s. 14 of the Securities Rules, B.C. Reg. 194/97, which imposes an obligation on registrants to deal fairly, honestly and in good faith with clients.[1] Because RMFI is a registrant for the purposes of the regulations, the plaintiffs submit that the regulations create a fiduciary relationship between RMFI and its clients, including the class members.
- [44] The plaintiffs admit that their fiduciary duty claim is novel, but they submit, correctly, that its novelty is not alone a reason to deny certification.

Have the plaintiffs adequately pled breach of fiduciary duty?

- [45] It is not entirely clear from the pleadings whether the plaintiffs plead a per se or an ad hoc fiduciary relationship. The amended notice of civil claim refers to neither. There are no material facts in Part 1 of the amended notice of civil claim that speak to the particular quality of the relationship between the defendant and the class members.
- [46] In describing the claim's legal basis at Part 3 of the amended notice of civil claim, the plaintiffs set out some of the constituent elements of an ad hoc fiduciary duty, pleading at para. 22 that:
- a) The defendant had significant discretion, power or control in relation to implementing and disclosing to clients a compensation arrangement that put its interest in conflict with its clients;
 - b) The defendant could unilaterally exercise its discretion, power or control to affect the class members' legal or substantial practical interests; and
 - c) The class members were at all times particularly vulnerable to the defendant holding that discretion, power or control.
- [47] At paras. 23 and 24, the plaintiffs allege that the defendant expressly or impliedly undertook to act in the best interests of the class members by virtue of the terms of the client agreement signed by each RMFI client (the "Client Agreement"), s. 14 of the Securities Rules, and other Canadian securities legislation.

- [48] The plaintiffs haven't pled any material facts to support a finding of fiduciary duty; they have simply set out the constituent elements of the legal test. By including a bare allegation that the legal test for a finding of an ad hoc fiduciary obligation has been met, without any material facts pled, the plaintiffs have failed to properly plead the cause of action.
- [49] The plaintiffs in a class proceeding should not be penalized for an awkwardly drafted pleading and this Court must be generous in allowing amendments to claims in order to ensure that the objectives behind the CPA are not undermined due to drafting errors: Finkel at para. 17.
- [50] Nevertheless, there must be some discernable cause of action pled by the plaintiffs in order for them to meet the requirements of s. 4(1)(a) of the CPA. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [Elder Advocates], the Supreme Court of Canada noted that, although the categories of fiduciary duty are not closed, plaintiffs suing for breach of fiduciary duty must still be prepared to have their claims tested at the pleadings stage, as they would for any cause of action: at para. 54.

Do the pleadings, if amended, support a finding of a fiduciary relationship?

Per se or ad hoc?

- [51] The plaintiffs' written argument illustrates some of the problems with the ad hoc fiduciary obligation as pled by the plaintiffs. In describing the alleged ad hoc fiduciary relationship, the plaintiffs state:

Of course the plaintiffs do not assert that the Defendant is a per se fiduciary. To the contrary, the defendant undertook the relational obligations created by regulatory prescriptions by carrying on business as a registered investment dealer.[2]

- [52] In other words, the plaintiffs' position is that a fiduciary relationship between the defendant and the class members arises from the regulatory prescriptions that govern the defendant as a registered investment dealer. Under this reasoning, the fiduciary duties arise from the nature of the relationship between any registered investment dealer and its client, not the facts surrounding a particular relationship between a particular dealer and a particular client. This is the definition of a per se fiduciary duty. If the plaintiffs are correct, this would give rise to a fiduciary relationship between any and all registered investment dealers and their clients.
- [53] As the plaintiffs have admitted, a per se fiduciary relationship does not exist in the financial services context, although on certain facts an ad hoc fiduciary relationship could be established: *Hodgkinson* at 409-10; *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (C.A.) at para. 36.
- [54] As such, and consistent with the stated position of the plaintiffs in their written argument, I will assume for the remainder of these reasons that the plaintiffs intend to assert an ad hoc fiduciary relationship between RMFI and the class members.

Constituent elements of an ad hoc fiduciary relationship

[55] In *Elder Advocates* at paras. 27-36, McLachlin C.J. restated the requirements for a finding of an ad hoc fiduciary duty:

- a) the class members are peculiarly vulnerable to the defendant;
- b) the alleged fiduciary has given an undertaking of responsibility to act in the best interests of a beneficiary;
- c) a defined class of people must be vulnerable to a fiduciary's control; and
- d) a legal or substantial practical interest of the class members stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

Vulnerability

[56] The plaintiffs plead that the class members were particularly vulnerable to the defendant because the defendant had the power to act in a conflict of interest which caused harm to the plaintiffs. Specifically, they plead that the defendant had discretion, power, and control in relation to implementing and disclosing compensation arrangements that placed its interests in conflict with those of its clients.

[57] The most important factor in considering the vulnerability component of the fiduciary duty analysis is whether vulnerability arises from the relationship: *Galambos* at para. 68.

[58] The only fact pled by the plaintiffs that speaks to the peculiar vulnerability of the plaintiffs is the statement at para. 22 of Part 3 of the amended notice of civil claim which states:

The class members are and were at all material times particularly vulnerable to the Defendant holding that discretion, power or control as both a principal distributor of RBC mutual funds, including the RBC PS funds, and a participating dealer of Third Party Funds.

[59] While the plaintiffs do not specifically allege in the amended notice of civil claim that there is a conflict inherent in the dual role of the defendant as distributor of RBC mutual funds and participating dealer of third-party funds, they suggest that the dual role enhanced the vulnerability of the plaintiffs.

[60] But for this allegation regarding the dual role of the defendant (a role that is expressly allowed under current securities legislation[3]), the plaintiffs have pled no facts at all about the peculiar vulnerability of the plaintiffs nor have they pled any facts that speak to the particular relationship between the defendant and the class members. Their argument appears to be simply that the defendant could and did act in a conflict of interest and therefore the plaintiffs were vulnerable to the defendant for the result of that conflict.

- [61] It is important to note that this is not a case where the plaintiffs have alleged that the defendant had discretion or power over the class member's investment decisions. The class members made their own decisions with respect to trades. The sole basis for grounding the claim of vulnerability is the fact that the defendant was capable of acting in a conflict of interest that would harm the plaintiffs.
- [62] In *Hunt*, the Ontario Court of Appeal considered a breach of fiduciary duty allegation in the context of an investor and a stockbroker. Noting that the duty must exist independent of the wrong, the Court held at para. 46:

In other words, one cannot reason backwards from the fact that an individual is harmed by the unauthorized acts of their broker, to the conclusion that they are vulnerable. Rather the individuals and the nature of the relationship must be examined.

- [63] A similar principle was expressed in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 652. In that case, Justice La Forest held that a fiduciary duty will not be imposed on the basis of a wrong and "used as a conclusion to justify a result". Such a conclusion is precisely what the plaintiffs request of the court in arguing that the class members were in a position of vulnerability by virtue of defendant's potential conflict of interest.
- [64] A fiduciary duty must arise from the relationship between the alleged fiduciary and alleged beneficiary, not from a wrong committed by the alleged fiduciary, or the capacity of an alleged fiduciary to commit a wrong. As such, the plaintiffs cannot rely on a prohibition against conflicts of interest, along with allegations that the defendant acted in a conflict of interest, to ground the fiduciary duty they allege.

Undertaking

- [65] In their written argument, the plaintiffs argue that an undertaking of responsibility to act in the best interests of a beneficiary can arise out of a regulatory obligation. They state that "the regulatory prescriptions contravened by the Defendant form a solid foundation for the alleged undertaking." They cite *Galambos* and *Elder Advocates* in support of the proposition that a statute can constitute an undertaking for the purposes of the fiduciary duty analysis.
- [66] Neither of the cases relied on by the plaintiffs assists them in grounding an ad hoc fiduciary obligation in a breach of s. 14 of the Securities Rules.
- [67] *Galambos* is a case that considers whether an ad hoc fiduciary duty arose from the power dependency relationship between a bookkeeper and the lawyer for whom she worked. In considering what may constitute an undertaking of the fiduciary to exercise a discretionary power in the interests of the other party, Justice Cromwell noted that "the fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act this way": *Galambos* at para. 77. This passage does not stand for the proposition that a regulatory requirement that

does not bestow any discretion or power on the party being regulated can constitute an undertaking to act in the best interests of the other party.

- [68] In the other Supreme Court of Canada case relied on by the plaintiffs, *Elder Advocates*, the Court expressly stated that if the required undertaking to act in the best interests of the other party is alleged to flow from a statute, the language must clearly support it: at para. 45. As further noted in *Elder Advocates* at para. 45, the cases in which fiduciary relationships have been grounded in statutes are ones in which statutes impose discretionary power on the alleged fiduciary, such as the Crown's obligations to Indigenous peoples under the Indian Act (*Guerin v. The Queen*, [1984] 2 S.C.R. 335), or the obligation of governments to hold and administer funds on behalf and for the benefit of incapable veterans and their dependents (*Authorson v. Canada (Attorney General)*, 2000 53 O.R. (3d) 221 (S.C.J.) at para. 28, *aff'd* (2002), 58 O.R. (3d) 417 (Ont. C.A.) at para. 73, *rev'd* on other grounds, 2003 SCC 39).
- [69] The regulations governing mutual fund dealers that prohibit conflicts of interest and mandate fair dealing are simply not analogous in any way to a statute that grants a party power over the legal rights of others and broad discretion to exercise that power.
- [70] The plaintiffs have failed to point to anything in the legislation or regulations that would support an express or implied undertaking by the defendant to act with undivided loyalty towards the class members with respect to avoiding conflicts of interest.

Defined class of persons

- [71] The defendant concedes, and I agree, that the class members are part of a defined group.

Legal or substantial practical interest at stake

- [72] The final factor the plaintiffs would need to plead in order to disclose a cause of action for an ad hoc breach of fiduciary duty is a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
- [73] The only statement in the amended notice of civil claim which refers to the particular legal and practical interests at stake is the statement that the class members' financial interests are affected because they were entitled to receive advice untainted by conflicts of interest. Given my findings on the relationship between the defendant and class members, and the absence of an undertaking on the part of the defendant, I need not consider whether the right to receive untainted advice is the type of "legal or substantial practical" interest protected by fiduciary law.

Conclusion re: breach of fiduciary duty claim

- [74] A fiduciary duty must derive from a relationship, not from a wrong committed by the defendant, nor from a regulation governing the defendant's behaviour. Because the plaintiffs cannot ground their alleged fiduciary relationship in anything other than the defendant's conflict of interest, their claim is bound to fail.

Breach of equitable duty

- [75] The plaintiffs have pled that the court should recognize a new cause of action, namely an "equitable obligation of fair dealing" grounded in the regulations and particularly s. 14 of the Securities Rules.
- [76] The plaintiffs concede that, pursuant to the authority of the Supreme Court of Canada in *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 222-28 [Saskatchewan Wheat Pool], there is no cause of action at common law to enforce a statutorily conferred right. However, they argue that the legislation can and should inform the court's interpretation of the scope of common law causes of action.
- [77] The plaintiffs and the defendant disagree about the extent to which securities legislation is a "complete code" such as to preclude common law claims. The plaintiffs rely on *Tucci v. Peoples Trust Company*, 2020 BCCA 246 [Tucci CA], rev'ing in part 2017 BCSC 1525 [Tucci SC], to support their position on the applicability of statute to common law claims. In that case, the certification judge had found that the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, did not constitute a complete code that would preclude the plaintiffs from bringing a common law claim arising out of a privacy breach. The Court of Appeal upheld the certification judge's determination in this regard: Tucci CA at para. 40. The plaintiffs argue that Tucci supports their position.
- [78] Tucci dealt with the question of whether a particular statute extinguished a recognized common law right. Tucci is different from this case, where the plaintiffs are seeking to ground a new cause of action in a breach of statutory provision which, the defendant says, pursuant to *Saskatchewan Wheat Pool*, they are not entitled to do.
- [79] I agree with the defendant that the court must proceed with caution in considering a novel cause of action based on a breach of statute or regulation, particularly in circumstances where the legislature has put in place a comprehensive regulatory scheme and chosen not to create civil liability for a breach of the statutory provision in issue. More importantly, I find that the plaintiffs' proposed cause of action for breach of equitable obligation is bound to fail because the plaintiffs have not set out the constituent elements of a discernable cause of action.
- [80] In *Atlantic Lottery*, Brown J. considered an application to strike in the context of novel claims and held that, while novelty is not determinative on a motion to strike, a claim will not survive simply because it is novel:

It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco; Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).

- [81] It is therefore necessary for this Court to consider whether, if the facts as pled are taken to be true, the plaintiffs' equitable duty of fair dealing claim is doomed to fail.
- [82] The plaintiffs have not set out a separate legal basis for their novel equitable duty of fair dealing claim. Rather, their pleadings with respect to fiduciary duty and equitable duty of fair dealing are the same. They have pled the constituent elements of a fiduciary duty and, for each element, pled that the defendant has breached its fiduciary duty "and/or its equitable obligation of fair dealing to the plaintiff".
- [83] In oral argument, the plaintiffs' counsel described the breach of equitable obligation claim as a "novel, sui generis claim," but could not describe for the court how the equitable obligation claim was different from the fiduciary duty claim, except that it provided another avenue for the plaintiffs to access equitable remedies in the event that the court declined to find an ad hoc fiduciary relationship between RMFI and the class members.
- [84] The breach of equitable obligation claim is not presented in the amended notice of civil claim as a novel, sui generis claim, indeed it is not presented as a claim independent from the breach of fiduciary duty claim at all. The same legal basis is relied on for both.
- [85] At para. 54 of *Atlantic Lottery*, in considering the applicability of UK authority on the availability of disgorgement as a remedy for breach of contract, Brown J. distinguished the UK position on "quasi-fiduciary" relationships as set out in *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.) at 27 [Blake], wherein the House of Lords recognized that disgorgement could be available as a remedy for breach of contract in circumstances in which the obligations imposed on one party were "closely akin to a fiduciary obligation". The court in *Atlantic Lottery* further noted that the imposition of "quasi-fiduciary relationships" is a concept foreign to Canadian law: at para. 54. Brown J. cited with approval from Professor McInnes' paper, "Gain-Based Relief for Breach of Contract: *Attorney General v. Blake*" (2001) 35 Can. Bus. L.J. 72 at 85 [McInnes], which is also apposite to the case before me:

To impose relief in a contractual context on the basis of an undefined notion of a quasi---fiduciary duty dangerously ignores Justice Sopinka's warning that such obligations "should not be imposed simply to improve the nature or extent of the remedy." It is not merely that Lord Nicholls' approach [in *Blake*] fails to reveal a sound basis for liability, it also implicitly invites lower courts to similarly manipulate equitable doctrine for instrumental purpose. Such an exercise is inimical to the development of coherent principle.

- [86] The plaintiffs have not pled that the defendant was a quasi-fiduciary. Rather they have asked this Court to recognize a new (albeit similar) cause of action, being a breach of an equitable obligation of fair dealing. However, Professor McInnes' warning that courts should not manipulate equitable doctrines for instrumental purpose is well received in this case. The plaintiffs were frank in argument that the equitable obligation of fair dealing is pled in order to make available to the plaintiffs equitable remedies that a breach of contract would not afford them. This is precisely the kind of exercise that Professor McInnes warned was "inimical to the development of coherent principle": McInnes at 85.
- [87] A claim for a novel cause of action must set out the scope and nature of the cause of action pled so that it may be subject to scrutiny under s. 4(1)(a) of the CPA, and must set out facts that, if taken to be true, would support the relief sought. It is not enough to simply describe a cause of action as "novel" or "sui generis" in order to shield it from scrutiny. In this case, the plaintiffs are not engaging in "the type of incremental change that falls within the remit of courts applying the common law": *Atlantic Lottery* at para. 35. Rather, they have invoked the power of equity in order to assist them in accessing remedies the common law does not afford. This is not a principled basis for establishing a new cause of action and it is bound to fail.

Breach of contract

- [88] The plaintiffs' breach of contract claim is grounded in the standard form Client Agreement between the class members and the defendant. The plaintiffs plead that pursuant to the terms of the Client Agreement, the defendant was required to treat clients' interests as paramount, and was required to comply with applicable Canadian securities laws. The plaintiffs claim that Canadian securities law, RMFI's policies and the RBC Code of Conduct are incorporated by reference into the Client Agreement, and these require the defendant to avoid all conflicts of interest. Because the defendant acted in a conflict of interest, the defendant breached the Client Agreement and is liable for loss suffered by the class members.

Incorporation by reference

- [89] Paragraph 27 of Part 3 of the amended notice of civil claim states:

Pursuant to the terms of the Client Agreement, the Defendant was required to treat clients' interests as paramount. It was further required to comply with applicable Canadian securities laws, as well as the Defendant's policies and RBC Code of Conduct incorporated by reference, requiring the avoidance of conflicts of interest prohibited by law.

[90] The ordinary grammatical meaning of the second sentence in this paragraph suggests that only "the Defendant's policies and RBC Code of Conduct" are claimed to be incorporated by reference into the Client Agreement, not "applicable Canadian securities laws". However, both the plaintiffs and the defendant argued on the basis that the plaintiffs claim that Canadian securities laws, as well as the defendant's policies and the RBC Code of Conduct, are incorporated by reference into the Client Agreement, so I will analyze the plaintiffs' claim on this basis.

Claim that Canadian securities laws are incorporated by reference into the Client Agreement

[91] The plaintiffs argue that the Client Agreement imposed an obligation on the defendant to comply with securities law by virtue of the section of the Client Agreement that says "RMFI follows the policies and procedures developed by the Mutual Fund Dealers Association of Canada and provincial securities laws."

[92] The two most pertinent provisions of securities law are section 4.2 of NI 81-105 and section 11.1 of NI 31-103. These are the two sections that, in the course of the OSC enforcement proceeding, RMFI admitted to violating. These sections state:

NI 81-105, s. 4.2(1): A principal distributor of a mutual fund that is also a participating dealer of another mutual fund shall not provide an incentive for any of its representatives to recommend a mutual fund of which it is a principal distributor over a mutual fund of which it is a participating dealer.

NI 31-103, s. 11.1: A registered firm must establish, maintain and apply policies and procedures that establish a system of controls and supervision sufficient to

- (a) provide reasonable assurance that the firm and each individual acting on its behalf complies with securities legislation, and
- (b) manage the risks associated with its business in accordance with prudent business practices.

[93] I understand the plaintiffs' claim to be that these provisions were incorporated by reference into the Client Agreement such that a violation of these provisions constitutes a breach of the Client Agreement.

- [94] In considering the pleading of incorporation by reference, it is important to observe the distinction between implying pre-existing statutory duties as terms of a contract (which is something the court will not do: *Broutzas v. Rouge Valley Health System*, 2018 ONSC 6315 at para. 217) and interpreting contracts that contain terms that incorporate legislative requirements (which may be enforced by the court in a breach of contract claim: *Tucci v. People's Trust Company*, 2017 BCSC 1525 at para. 73).
- [95] In order for a court to find that a term or an obligation is incorporated by reference into an agreement, the parties must have objectively intended the referenced materials to be incorporated as contractual terms: *One West Holdings Ltd. v. Greata Ranch Holdings Corp.*, 2013 BCSC 1570 at para. 16, rev'd on other grounds, 2014 BCCA 67.
- [96] The defendant argues that any reference to securities legislation in the Client Agreement is informational and does not confer rights. They rely on an analogous case from the UK, *NRAM Plc v. McAdam & Anor*, [2015] EWCA Civ 751 [NRAM], in which the Court of Appeal of England and Wales considered a standard form contract between a lender and various borrowers. The issue was whether the applicable consumer protection legislation was incorporated by reference into the contract by virtue of the fact that it was referenced multiple times in the contract. The contract in question contained a statement that it was "regulated" by the applicable legislation. The court considered case authorities in which references in a contract to the contract being "governed" by and "subject to" legislation were held to incorporate the applicable legislation into the contract. The court held that "regulated by" was different from "governed by" and "subject to" insofar as it was "a statement of fact rather than a word of incorporation": *NRAM* at para. 21. As such, the legislation was held not to be incorporated by reference into the contract.
- [97] The parties did not provide the court with any Canadian cases that squarely consider the interpretation of a contract that incorporates an entire statutory scheme by reference or what language is necessary to objectively denote an agreement by the parties to incorporate legislation by reference into a contract. Based on the UK authorities, the interpretation issue will likely require a consideration of whether the statement "RMFI follows the policies and procedures developed by the Mutual Fund Dealers Association of Canada and provincial securities law" is more akin to an information statement or to words of incorporation. It may be that surrounding circumstances evidence is necessary to decide this point, and at a minimum it would be necessary to construe the Client Agreement as a whole in order to determine the meaning of this provision. On the basis of the material before me, I cannot find that the claim that securities legislation is incorporated by reference into the Client Agreement is bound to fail.

Claim that RMFI policies and RBC Code of Conduct are incorporated by reference

[98] The plaintiffs claim that RMFI policies and the RBC Code of Conduct are incorporated by reference into the Client Agreement. This is based on a section of the Client Agreement that states:

RMFI has established policies to prevent conflicts of interest when its mutual funds representatives sell Funds. RMFI has adopted the RBC Code of Conduct which clearly outlines that mutual funds representatives are to avoid any situation in which their personal interests conflict or appear to conflict with their duties as a mutual funds representative. The guiding policy when conflicts of interest arise is that the client's interest is paramount.

[99] The defendant argues that for the same reason that the reference to provincial securities law was informational and not contractual, so too are the statements in this section relating to RMFI policies and the Code of Conduct. These statements refer to steps RMFI has already taken ("RMFI has established;" "RMFI has adopted"), not steps that RMFI is committing to take. These sections would appear on their face to be intended to provide information to clients about the policies and code of conduct in place, not to create contractual obligations. However, as noted above with respect to provincial securities legislation, any incorporation by reference claim must be determined objectively with reference to the contract as a whole and may require the consideration of evidence. On the basis of the pleadings, I cannot find that this claim is bound to fail.

Assuming all facts pled to be true, is it plain and obvious that the breach of contract claim cannot succeed?

[100] In addition to those documents that the plaintiffs claim are incorporated by reference into the Client Agreement, the plaintiffs also allege that the defendant breached an express section of the Client Agreement (the same section referenced at para. 98 above), on the basis that by implementing Enhanced Compensation, RMFI did not treat client interests as paramount.

[101] For the purposes of this analysis, I must consider whether the plaintiffs' breach of contract claim is bound to fail on the basis that Canadian securities law, the defendant's policies, and the RBC Code of Conduct are incorporated by reference into the Client Agreement.

[102] If the applicable securities legislation were incorporated by reference into the Client Agreement, this could give rise to a cause of action for breach of contract by virtue of the defendant's admitted failure to comply with NI 81-105 and NI 31-103.

[103] Further, in my view, it is not plain and obvious that the plaintiffs' claim that enhanced compensation violated RMFI's obligation under the Client Agreement to treat the client's interest as paramount is bound to fail. RMFI acted in a conflict of interest; the only matter of controversy is the meaning of the phrase, "[t]he guiding policy when conflicts of interest arise is that the client's interest is paramount." It is not plain and obvious to me that this phrase allows conflicts but mandates how they will be managed (as argued by the

defendant), rather than prohibiting them outright.

Available remedies for breach of contract

- [104] Whether the plaintiffs' breach of contract claim discloses a reasonable cause of action should be considered in light of the remedies the plaintiffs are seeking: *Atlantic Lottery* at para. 49.
- [105] In this case, the plaintiffs seek compensatory damages, disgorgement, symbolic damages, and nominal damages. I will consider the issues of compensatory damages, symbolic damages, and nominal damages as part of my analysis of common issues. The issue of disgorgement must be dealt with at the pleadings stage, as I am satisfied that any claim the plaintiffs have to disgorgement as a remedy for breach of contract is bound to fail.
- [106] Disgorgement is only available for breach of contract where, at a minimum, other remedies are inadequate: *Atlantic Lottery* at para. 59.
- [107] The plaintiffs have not pled any material facts to support access to the exceptional relief of disgorgement for breach of contract. They have not pled that compensatory damages are inadequate nor have they pled any legitimate interest in the profit making activity of RMFI. As pointed out by Brown J. in *Atlantic Lottery*, disgorgement is not available at the plaintiffs' election to obviate matters of proof: at para. 61.
- [108] It is plain and obvious that the plaintiffs' claim for a disgorgement remedy for breach of contract is bound to fail.

Conclusion re: breach of contract claim

- [109] Taking a flexible approach, and subject to the concerns about commonality raised below, I find that the plaintiffs have adequately pled that the defendant breached the Client Agreement causing loss to the class members and giving rise to a claim for damages.

Unjust enrichment claim

- [110] The plaintiffs have also framed their claim in unjust enrichment. In the legal basis section of the amended notice of civil claim, they plead that the defendant has been enriched by its receipt of fees from mutual funds sales pursuant to the Enhanced Compensation Arrangement. They claim that the class members suffered a corresponding deprivation insofar as they acquired RBC PS funds without having received suitable investment advice free from conflicts of interest. They claim that there is no juristic reason for the defendant's enrichment.
- [111] It is not disputed that there are three elements of a claim for unjust enrichment. These include an enrichment of the defendant, a corresponding deprivation of the plaintiff, and a lack of a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

- [112] In their written argument, the plaintiffs expand on their theory of the case with respect to the unjust enrichment claim. They argue that there is a sufficient nexus between the defendant's gain (the receipt of distribution fees tied to the sale of approximately \$24.5 billion of RBC PS funds) and the plaintiffs' loss (their interest in receiving investment advice not tainted by conflicts of interest) that the criteria for enrichment and corresponding deprivation have been met.
- [113] The plaintiffs argue that the failure to provide suitable investment advice constitutes the kind of deprivation that the court may recognize in considering an unjust enrichment claim. They state that "deprivation for the purpose of unjust enrichment and restitutionary liability is not limited to observable economic loss and encompasses legally protected rights, including the Class Members' right to receive advice that is free of an unlawful conflict of interest".
- [114] The defendant argues that the plaintiffs' unjust enrichment claim has no reasonable prospect of success because the alleged enrichment and deprivation are not corresponding, and because the deprivation alleged by the plaintiffs, namely the failure to receive investment advice free from conflicts of interest, is not the type of deprivation that the law recognizes in the unjust enrichment analysis. The defendant also argues that there is a juristic reason for the enrichment, namely the two contracts that govern the receipt of fees by the defendant, the distribution agreement between the defendant and RBC GAM, and the Client Agreement.

Correspondence between enrichment and deprivation

- [115] The enrichment alleged by the plaintiffs is the receipt by the defendant of distribution fees on funds that were sold to class members and were subject to the Enhanced Compensation Arrangement. In the amended notice of civil claim, the plaintiffs value those fees at \$24.5 billion. "Distribution Fees" is a defined term in the amended notice of civil claim. It is defined to mean "the distribution fees that have been paid and continue to be paid to the Defendant in respect of the units of RBC PS Funds acquired by Class Members during the Class Period."
- [116] Distribution fees are paid to RFMI by RBC GAM pursuant to a distribution agreement. No allegation is made in the amended notice of civil claim, nor was it the plaintiffs' position in argument, that any portion of the distribution fees was paid by the class members.
- [117] The fact that the distribution fees were not paid by the plaintiffs is, in the defendant's submission, fatal to the plaintiffs' unjust enrichment claim.
- [118] In *Moore v. Sweet*, 2018 SCC 52 at para. 41, Justice Côté discussed the necessity that enrichment and deprivation be "two sides of the same coin":

The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (Kerr, at para. 37; Garland, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value -- a "tangible benefit" -- passed from the latter to the former (Kerr, at para. 38; Garland, at para. 31; Peel, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 ("PIPSC"), at para. 151) and thus as being "essentially two sides of the same coin" (Peter, at p. 1012). [Emphasis added.]

[119] In this case, the plaintiffs argue that there is correspondence between the enrichment of the defendant (the receipt of distribution fees) and the deprivation of the class members (non-receipt of suitable investment advice). I cannot agree. In order for the plaintiffs to have a plausible unjust enrichment claim, something of value must have passed from the plaintiffs to the defendant. In this case, the distribution fees did not pass from the plaintiffs to the defendant.

[120] In *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305, leave to appeal denied [2015] S.C.C.A. No. 291 [Apotex], Justice Feldman of the Ontario Court of Appeal engaged in a helpful discussion of the enrichment and corresponding deprivation branches of the unjust enrichment test. In that case, Apotex pled that Eli Lilly had been unjustly enriched by virtue of having a monopoly over a particular drug, thereby keeping Apotex out of the market and depriving it of opportunities for making its own profits.

[121] In Apotex at paras. 43-45, Feldman J.A. discussed two types of unjust enrichment claims: unjust transfers of wealth, in which the gain is a direct transfer of funds from plaintiff to defendant, and family law claims like *Pettkus v. Becker*, [1980] 2 S.C.R. 834, where there is a causal connection between the enrichment and deprivation even if there is no quantifiable equivalence. In family law claims, the causal connection most frequently arises as a result of direct financial contributions or indirect contributions of labour that are causally linked to the acquisition and maintenance of property.

[122] The court in Apotex cited Professors Maddagh and McCamus' text on restitution at para. 45, explaining the holding in *Pettkus*:

In Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, loose-leaf (2014-Rel. 14) (Toronto: Canada Law Book, 2004), the authors explain, at pp. 3-23 to 3-24, that "[a]lthough there was no equivalence between the value of Ms. Becker's efforts and Mr. Pettkus' benefits, those benefits did result from or, in the Court's words, there existed a 'causal connection' between the services provided by the plaintiff and the benefits enjoyed by the defendant." Where that benefit should have accrued to the plaintiff, the "corresponding deprivation" factor will be met.

[Emphasis added.]

[123] In this case, in order to plead enrichment and corresponding deprivation, the plaintiffs must either plead a direct transfer of wealth from the plaintiffs to the defendant, or the plaintiffs must plead that they made direct or indirect contributions that are causally connected to the defendant obtaining a benefit that rightfully ought to have accrued to the plaintiffs. Neither scenario is pled in this case. Rather the plaintiffs say that the defendant received distribution fees, and the class members were deprived of adequate investment advice. Like the plaintiff in *Apotex*, the funds by which the defendant was enriched are not funds that rightfully ought to accrue to the plaintiffs. As such, there is a fundamental flaw in the plaintiffs' unjust enrichment analysis.

Must the deprivation be economic?

[124] The deprivation pled by the plaintiffs is the non-receipt of suitable investment advice. The defendant argues that a plaintiff must have suffered an economic loss in order to be able to advance a claim for unjust enrichment.

[125] The "straightforward economic approach" to unjust enrichment has deep and well established roots in Canadian law: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 990; *Garland* at para. 31; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para. 152.

[126] In support of their argument that the deprivation suffered by a plaintiff need not be economic, the plaintiffs rely on *Wilson v. Fotsch*, 2010 BCCA 226, primarily the following sentence at para. 17: "Deprivation may derive from a transfer of wealth by the plaintiff to the defendant or from an infringement of an interest of the plaintiff". The plaintiffs argue that this sentence should be construed broadly. They argue that *Wilson* stands for the proposition that a deprivation can be non-economic and can include a breach of a duty owing by a defendant to a plaintiff.

[127] In *Wilson*, Justice Huddart reiterated the straightforward economic approach to determining enrichment and corresponding deprivation. At para. 18 (the paragraph following the sentence relied on by the plaintiffs), she explained "a transfer of wealth" and "an infringement of an interest" in the family law context:

[18] In a marriage-like relationship, the full-time devotion of one's labour and earnings without compensation or with less than complete remuneration can be viewed as a deprivation: *Sorochan* at 45-46, 50; *Panara* at para. 34. Where the benefits received by the defendant are unpaid household or domestic services, the deprivation is the fact that those services were uncompensated. Where the benefits received by the defendant are money or its equivalent, the deprivation is the transfer of that value from the plaintiff to the defendant. The precise quantum of the deprivation is not the focus; that is left for the assessment phase. But the identification and definition of the detriment corresponding to the enrichment is essential to this stage.

- [128] An infringement of an economic interest, such as one's interest in being paid for domestic labour, constitutes deprivation. That is the point made by Huddart J.A. in *Wilson*. *Wilson* does not derogate from the straightforward economic analysis required in considering enrichment and corresponding deprivation. The interest infringed must be economic.
- [129] As the failure to receive appropriate investment advice is not, in and of itself, an economic detriment, the plaintiffs have not pled a deprivation that is compensable under an unjust enrichment analysis.

Potential amendment to plead economic deprivation

- [130] In their reply written argument, the plaintiffs state:

If the Court determines that "corresponding deprivation" is confined to an "economic transfer of wealth" as the Defendant contends, the Plaintiffs intend to seek leave to amend the NOCC to plead that the Class Members suffered a corresponding deprivation equivalent to the portion of the funds they invested into the RBC PS Funds which were paid out of the RBC PS Funds as distribution fees to the Defendant.

- [131] The proposed amendment would not cure the fundamental flaw with the plaintiffs' cause of action for unjust enrichment. The class members did not pay the distribution fees that the plaintiffs allege constitute the enrichment of the defendant. Stating that the class members suffered a corresponding deprivation "equivalent to" the portion of the funds they invested that were paid out of the RBC PS funds as distribution fees is not accurate and is in fact misleading. The distribution fees were paid by RBC GAM; they were not paid by the class members.
- [132] Ultimately, the wrong identified by the plaintiffs is the fact that the defendant acted in a conflict of interest when it sold the RBC PS funds to its clients, not that the defendant is wrongly holding onto funds that equitably belong to the plaintiffs. No allegation has been made, nor could it be made, that the class members paid fees to the defendant that must be returned under restitutionary principles. As such, I find that the unjust enrichment claim of the plaintiffs is misconceived and has no prospect of success.

Conclusion re: cause of action

- [133] While the threshold for disclosing a cause of action on the pleadings pursuant to s. 4(1)(a) of the CPA is a low one, I find that the plaintiffs have failed to meet that threshold with respect to their claim for breach of fiduciary duty, breach of equitable obligation and unjust enrichment. The only cause of action that survives the test under s. 4(1)(a) is the plaintiffs' breach of contract claim.

Dispute re: Admissibility of Certain Evidence

- [134] In considering the remaining elements of the certification test, I may consider the evidence provided by the parties to determine whether there is some basis in fact for each of the requirements of subsections 4(1)(b) - (e) of the CPA.
- [135] There is a dispute between the plaintiffs and the defendant about the admissibility of certain reply affidavits that were filed by the plaintiffs. The defendant objects to the admissibility of two affidavits sworn by Harvey Naglie, as well as the second, third, and fourth affidavits of Dr. Cumming.
- [136] Mr. Naglie is a member of the Ontario Securities Commission. His affidavits were tendered as expert opinion evidence in this proceeding. I find that much of Mr. Naglie's two affidavits consist of thinly disguised argument. While small portions of his first affidavit contain background information about the mutual fund industry in Canada, any relevant evidence he provides is undermined by the advocacy that he engages in. He uses inflammatory language (referring, for example, to the Enhanced Compensation Arrangement as "cunningly crafted"), engages in argument about the sufficiency of the defendant's evidence (a section of one affidavit is entitled "The RMFI Affidavits and Their Misplaced Focus on Suitability"), and offers opinions on the law (for example, he opines that the actions of RMFI "subverted the fundamental intent of NI 81-105").
- [137] An expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision-maker. Opinion evidence that is not independent and impartial should be excluded: *White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23 at paras. 35-40.
- [138] Neither of Mr. Naglie's affidavits meet the standards of independence and impartiality that this Court requires in order to admit expert opinion evidence. As such, his affidavits are excluded and I have not considered them in making my determination about certification.
- [139] The second, third, and fourth affidavits of Dr. Cumming call for a different approach. Dr. Cumming is the expert upon whose evidence the plaintiffs rely to establish some basis in fact for class-wide loss. He appears to be a well-respected economist and professor of finance with vast experience studying mutual fund markets. His first affidavit attaches a report wherein he proposes two different methodologies for calculating damages: a disgorgement model and a compensatory damages model.
- [140] Dr. Cumming's subsequent three affidavits, which are objected to by the defendant, respond to affidavit evidence filed by Ms. Phillips, an RMFI representative. In these affidavits, Dr. Cumming addresses concerns about alleged discrepancies and flaws in the data provided in his earlier affidavit. He also takes issue with various assertions made in Ms. Phillips' evidence, none of which are particularly probative to the issues before me.

- [141] In the course of his second, third, and fourth affidavits, Dr. Cummings adjusts some of his calculations based on different approaches to determining benchmarks. However, nothing in his later affidavits changes his methodology for calculating damages as set out in his first affidavit. In his second affidavit he states that "there is nothing in Ms. Phillips' affidavit that counters the methodologies for aggregate monetary relief that I described in my previous report."
- [142] Dr. Cumming's second, third, and fourth affidavits do not contain the kind of advocacy present in Mr. Naglie's affidavits and ought not be struck for lack of independence or impartiality. Moreover, Dr. Cumming's original methodology and calculations are relevant and necessary insofar as the court is not able, without expert assistance, to determine whether methodologies exist to calculate aggregate monetary relief, in the event such methodologies are held to be properly employed in this case. Dr. Cumming's subsequent affidavits shed light on and clarify his initial methodology. As such, I am prepared to allow Dr. Cumming's second, third, and fourth affidavits into evidence.

Does the Claim Raise Common Issues?

- [143] In determining commonality, the court does not need to resolve conflicts in the evidence. The common issues requirement will be met if there is some basis in fact for the proposition that the issues can be determined on a class-wide basis: *Pro-Sys* at para. 99.
- [144] For common issues to be certifiable, they need only be "issues of fact or law that move the litigation forward:" *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at paras. 8-11.
- [145] As part of their written argument, the plaintiffs have listed proposed common issues. Those issues are reproduced as Schedule "A" of these reasons for judgment.

Common issues relating to breach of fiduciary duty, breach of equitable duty, and unjust enrichment

- [146] I have found that the plaintiffs' breach of fiduciary duty, breach of equitable duty, and unjust enrichment claims are bound to fail and therefore do not meet the requirements of s. 4(1)(a). However, in the event I am incorrect on this point, I have considered whether the proposed common issues with respect to these claims are indeed common. For the reasons that follow, I am satisfied that issues 1-3 (breach of fiduciary duty and equitable obligation) and 6-8 (unjust enrichment) are common issues.
- [147] The defendant argues that any determination of an ad hoc fiduciary relationship requires an inquiry into the specific situation said to give rise to fiduciary duties. This requires an analysis of whether the proposed beneficiaries are especially vulnerable to the proposed fiduciary, whether the fiduciary has given an undertaking to act exclusively in the best interests of the beneficiary, and whether the proposed beneficiaries have a legal or substantial practical interest that could be adversely affected by the fiduciary's exercise of discretion or control. All of these factors require some measure of individualized inquiry.

[148] However, because of the way the plaintiffs have framed their case, specifically by grounding their allegation of a fiduciary relationship in the governing regulations, were they to be successful in advancing such a claim, it would be common to all class members. The same is true of their novel equitable claim. Were the cause of action viable, it would be common, because the duties the plaintiffs assert are grounded in legislation that applies to the defendant in its dealings with all class members: *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd et al.*, 2005 BCSC 232 at para. 85, *aff'd* 2006 BCCA 96; *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273 at para. 48.

[149] The unjust enrichment claim, if it were a cause of action with any prospect of success, would also be common. This is because the enrichment (the receipt of distribution fees by the defendant from RBC GAM) and deprivation (the lack of suitable investment advice) claimed by the plaintiffs are common with respect to all class members.

Common issues relating to breach of contract

[150] Having found that the plaintiffs' breach of contract claim is the only cause of action that withstands scrutiny under s. 4(1)(a), I must consider whether the cause of action raises issues that are common. The common issues proposed by the plaintiffs relating to the breach of contract claim are:

- a) Did the terms of the Client Agreement preclude the defendant from implementing the Enhanced Compensation Arrangement?
- b) If yes, did the defendant breach the Client Agreement?

[151] The defendant concedes that both questions are common. The Client Agreement is a standard form agreement and any conclusion reached by the court about its interpretation will apply to all RMFI clients who were parties to a Client Agreement. For the same reason, the question of whether the Enhanced Compensation Arrangement constituted a breach of the Client Agreement is also common to all class members.

Causation and damages as common issues

[152] The proposed common issues dealing with remedies are:

- a) If the defendant is found liable on any claims asserted by the class members, what remedies, including damages and/or equitable remedies, are the class members entitled to receive?
- b) How should recoveries under each type of remedy be measured?
- c) Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the class members?

[153] The plaintiffs have not proposed a common issue dealing with causation of loss. They seek certification of common issues relating to the wrongs committed by the defendant (breach of contract being the only one that has survived scrutiny under s. 4(1)(a)) and they seek certification of common issues relating to quantification of remedies.

[154] As Bowden J. noted in Jiang at para. 135, "the plaintiff cannot go straight to quantification of damages before liability is established." More recently, the Ontario Divisional Court considered the "some basis in fact" test as it pertains to common issues of causation in Kuiper v. Cook (Canada) Inc., 2020 ONSC 128 at para. 32:

Pro-Sys confirmed the low standard of "some basis in fact" insofar as it applied to the class Plaintiffs' damage or injury. That the whole class suffered class wide damage, injury or loss must still be demonstrated by some evidence meeting the "some basis in fact" standard. To put it another way, the Supreme Court in Hollick and Pro-Sys did not use the term "common" to mean that the common issue was invariable between the class members. Rather, they used the word "common" in the sense that all class members had to have some basis in fact to say that they all suffered the loss and therefore have a genuine interest in the litigation's resolution. [Emphasis added.]

[155] I must carefully consider whether there is some basis in fact for the commonality of any remedy sought by the plaintiffs, and doing so requires further consideration of the causes of action pursued by the plaintiffs, the available remedies, and the extent to which any plaintiff must demonstrate a financial loss caused by the defendant in order to avail themselves of a remedy.

Compensatory damages for breach of contract

[156] The plaintiffs claim that they suffered a loss as a result of the acts or omissions of the defendant and they seek a compensatory damages remedy.

[157] The plaintiffs claim that, but for the alleged conflict of interest arising from the Enhanced Compensation Arrangement, they would have invested in different, better-performing funds and they would be financially better off than they are now. This is the only basis on which the plaintiffs seek to link the alleged wrongs of the defendant with financial loss suffered by the class members, and it is the theory behind the report of their expert, Dr. Cumming.

[158] Any financial loss suffered by class members will require an extremely individualized inquiry. The individualized nature of any compensatory claim is illustrated by the evidence of the proposed representative plaintiffs.

[159] Joan Balderson deposed that she invested in the RBC Select Conservative Portfolio Solution Fund through Sandeep Sangha, an IRP who received enhanced compensation for Ms. Balderson's investment. Despite knowing about the enhanced compensation, Ms. Balderson had \$118,522.50 invested with the RBC Select Conservative Portfolio Solution Fund as of

December 31, 2019, after she swore an affidavit requesting to be a representative plaintiff in this action. Nowhere in her evidence does she state that she would have invested differently had the fund she purchased not been subject to enhanced compensation.

- [160] Ilke Yarkin first purchased an RBC PS fund, the RBC Select Very Conservative Portfolio Solution Fund, from an RBC employee who was not an IRP and not eligible for enhanced compensation. Later, she made further contributions to the same fund and to another RBC PS fund with the assistance of different IRPs who received enhanced compensation for these sales.
- [161] Sharon Stevenson made a number of investments into RBC PS funds between February 2013 and January 2016. Some of the investments were eligible for enhanced compensation and some were not. In her affidavit, Ms. Stevenson states that after she learned of the Enhanced Compensation Arrangement she converted most of her RBC PS funds to GICs, although she continued to hold \$66,256 in the RBC Select Conservative Portfolio Solution Fund after she had sworn an affidavit requesting to be added as a representative plaintiff.
- [162] The evidence of the proposed representative plaintiffs does not provide some basis in fact for compensatory damages as a common issue. None of the representative plaintiffs deposed that they would have invested in different, better performing funds but for the Enhanced Compensation Arrangement. Indeed, the only witness who deposed that she made changes to her investments as a result of enhanced compensation was Ms. Stevenson, who liquidated a portion of her RBC PS fund investments and purchased GICs. Based on the evidence of Dr. Cumming regarding the performance of the RBC PS funds during the relevant time, Ms. Stevenson's switch to GICs constituted a move to a lower performing, not a higher performing, investment.
- [163] The representative plaintiffs, with their unique investment profiles, investment histories, and interactions with RBC representatives, illustrate the lack of commonality in any kind of compensatory damages claim. Determining whether a plaintiff would have invested in different, better performing funds as a result of the Enhanced Compensation Arrangement is inherently and unambiguously an individual inquiry.
- [164] The plaintiffs argue that some basis in fact for a common compensatory damages claim can be found in the expert report of Dr. Cumming.
- [165] In *Pro-Sys*, Rothstein J. considered the standard of expert methodology required to certify loss related questions as common issues in indirect purchaser actions. In that case, the Court held that expert evidence at certification served the function of establishing the ability to prove common impact to all members of the class:

- [115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see Chadha, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact".
- [166] Any expert methodology must "offer a realistic prospect of establishing loss on a class wide basis. It cannot be purely theoretical or hypothetical, but must be grounded in the facts of a particular case in question:" Pro-Sys at para. 118.
- [167] In *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 117 [Godfrey], Brown J. held that, where loss is an element of the cause of action pled, aggregate damages may not be used to distribute damages to class members who did not in fact suffer a loss. To use aggregate damages methodologies to prove liability under the CPA would effectively confer substantive rights under a statute intended to confer only procedural rights.
- [168] I cannot agree that Dr. Cumming's report offers some basis in fact for establishing loss on a class-wide basis.
- [169] Dr. Cumming is undoubtedly an expert in the workings of the mutual fund industry. He has written papers concluding, among other things, that compensation models can skew fund flows. In his opinion, when investment advisors receive commissions, the performance of a fund is negatively affected. Dr. Cumming's conclusions in this regard are based on statistical evidence derived from large amounts of data about fund performance and investor behaviour.
- [170] Dr. Cumming's compensatory damages model is described in his report as having three steps:
- (1) First, I would calculate misdirected flow, unless the court were to otherwise find that the misdirected flow is \$24.5 billion, the full flow into the RBC PS Funds during the period of the alleged misconduct. (2) Second, I would calculate the performance impact of the misdirected flow. (3) Third, I would calculate the compensatory damages using the information in steps (1) and (2).
- [171] Dr. Cumming's means of determining misdirected flow, the first step in his model, requires the use of a prediction model to demonstrate what, if any, portion of the fund flow would have gone to the RBC PS funds regardless of the defendant's alleged misconduct. Once he has put a value on the misdirected flow, he then proposes to assess the performance of the RBC Funds as against the performance of benchmark funds. Compensatory damages would be calculated by taking the total misdirected flow and multiplying it by the expected return had the misdirected funds been invested elsewhere.

- [172] Dr. Cumming uses a prediction model to statistically estimate the behaviour of class members, rather than looking to the actual behavior of class members, in order to determine loss. His methodology obscures the evidence of the actual class members about the real life investment choices they would make absent Enhanced Compensation and instead makes mathematical predictions based on statistical evidence in order to establish class-wide liability by way of aggregate damages.
- [173] In asking the court to rely on Dr. Cumming's report for some basis in fact of class wide loss, the plaintiffs are asking the court to do the very thing that the Supreme Court of Canada in *Godfrey* warned against, namely using an aggregate damages methodology to prove class wide liability. Where loss is an element of the cause of action pled, as it is for the plaintiffs' claim for compensatory damages for breach of contract, loss must be proven. Dr. Cumming's methodology does not prove loss and, were this Court to accept his methodology, it would result in the CPA being used to confer substantive rights because class members who suffered no loss would be entitled to relief.
- [174] Even if Dr. Cumming's statistical evidence were sufficient to show some basis in fact for the proposition that, absent enhanced compensation, all class members would have chosen not to invest in RBC PS funds and would have invested in funds that performed at benchmark (a proposition not supported by the evidence of the proposed representative plaintiffs), this would not establish class-wide loss. According to Dr. Cumming's report, some of the RBC PS funds performed better than benchmark during the relevant period.[4] As such, on the plaintiffs' evidence, some class members suffered no loss at all as a result of the Enhanced Compensation Arrangement.
- [175] In seeking to prove an entitlement to compensatory damages on the basis of Dr. Cumming's aggregate damages model, the plaintiffs are confusing liability and damages. Aggregate monetary relief has a place in class proceedings in assisting in calculating damages awards once a class-wide loss has been established. It is not a tool for establishing liability against the defendant in favour of plaintiffs who suffered no loss at all.
- [176] As such, I find that any issues relating to compensatory damages are not common and I decline to certify them as common issues.

Symbolic damages

- [177] The plaintiffs also seek "symbolic or vindication damages to redress public law contraventions using section 29" of the CPA. In other words, they wish to look to aggregate monetary relief for the purposes of receiving a symbolic damages award should their claim for compensatory damages be unsuccessful.
- [178] While symbolic damages are often invoked, the courts have been careful to ensure that consistency and fairness are maintained in their application. Citing *Waddams*' statement in *The Law of Damages* (5th Ed, 2012) at para. 10.50 [Waddams] that symbolic damages are awarded "to vindicate rights or symbolize recognition of their infringement", *Sharpe J.A.*, in

Jones v. Tsige, 2012 ONCA 32 at para. 75, noted the importance of "consistency, predictability and fairness between one plaintiff and another" in the making of awards for symbolic damages.

- [179] Symbolic damages are most commonly awarded for violations of the Canadian Charter of Rights and Freedoms. The courts have also awarded symbolic damages in circumstances such as those that arose in Jones, in which the tort of intrusion upon seclusion is proven but no measurable loss is identified. Symbolic damages awards outside these two situations are highly exceptional, though Waddams notes at para. 10.50 that symbolic damages have also been awarded in cases involving loss of autonomy in the medical context.
- [180] I find that the plaintiffs have failed to show some basis in fact for the proposition that this case falls within the limited types of cases in which symbolic damages are available. The plaintiffs themselves, in oral argument, described symbolic damages as a remedy for the "breach of important public law obligations". Public law is not invoked in this case.
- [181] Symbolic damages do not exist to enable plaintiffs to avoid the requirement of demonstrating loss. They are a specific class of damages awarded to vindicate particular rights, none of which has been established on the "some basis in fact" standard in this case.

Nominal damages

- [182] Nominal damages are defined in Waddams as "a sum awarded where the plaintiff's legal right has been invaded but no damage has been proved": at para. 10.10.
- [183] Nominal damages are, consistent with their name, nominal. Under the case authorities cited by Waddams, they range in value from 20 cents to \$250. Waddams notes that the figure of \$1 for nominal damages has the most authoritative support in Canadian case law: at para. 10.30.
- [184] To the extent that the plaintiffs have made out a breach of duty by the defendant but cannot establish loss giving rise to compensatory damages, they may be eligible for nominal damages. However, I have not found that no class member has a compensatory damages claim. Rather, I have found that compensatory damages are not a common issue because of the individual nature of the claims. This will have the result that, at a common issues trial, there would be no finding that the class members have, or have not, suffered losses which give rise to compensatory damages. Certifying nominal damages as a common issue would require a class wide finding that no loss was incurred as a result of the defendant's actions. For obvious reasons, this would be contrary to the interests of the individual class members who may have viable compensatory claims against the defendant. I therefore decline to find that nominal damages are a common issue.

Punitive damages

[185] The plaintiffs have also pled that they are entitled to punitive damages and they have sought to have their entitlement to punitive damages certified as a common issue.

[186] In *Cassano v. Toronto-Dominion Bank*, [2005] O.J. No. 845 (S.C.J.) rev'd on other grounds, 2007 ONCA 781, Justice Cullity considered a plaintiff's submission that punitive damages should be certified as a common issue in circumstances where the court had rejected compensatory damages as a common issue. He pointed out that the Supreme Court of Canada's analyses of punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, are not consistent with an analysis that would permit punitive damages to be awarded and assessed without regard to the amount of compensatory damages the defendant had been found liable to pay. For example, in *Whiten* at para. 74, Justice Binnie noted that the governing rule for punitive damages is proportionality:

The overall award, that is to say, compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation).

[187] If the proportionality of the entire award is relevant to a determination of punitive damages, it is self-evident that punitive damages cannot be determined on a common basis if compensatory damages are determined individually. Having found that there are no common issues related to compensatory damages, I cannot find that punitive damages are a common issue.

Conclusion re common issues

[188] I find that the following issues are common issues:

- a) Did the terms of the Client Agreement preclude the defendant from implementing Enhanced Compensation?
- b) If the answer to (a) is yes, did the defendant breach the Client Agreement?

Is a Class Proceeding the Preferable Procedure for Resolving the Common Issues?

[189] In considering whether a class proceeding is the preferable procedure, I am bound to consider the criteria set out 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.

[190] The term "preferable" captures two ideas: first, the question of whether a class action is a "fair, efficient and manageable method" of advancing a claim and second, whether a class proceeding is preferable to other available processes: Hollick at para. 28.

[191] In determining whether a class action is preferable, the court must evaluate the common issues in the context of the proceeding as a whole: Hoy v. Medtronic Inc., 2003 BCCA 316 at para. 43 [Hoy].

[192] The preferability question is often considered with reference to a "cost/benefit" analysis involving an assessment of whether a class proceeding would advance the claims in any meaningful way: Hoy at para. 54.

[193] There are only two issues that I have found to have met the cause of action test under s. 4(1) (a) and have also held to be common issues. A common issues trial could be held to determine whether terms of the Client Agreement preclude the Defendant from implementing Enhanced Compensation, and whether RMFI breached the Client Agreement by implementing Enhanced Compensation. I must consider whether determining these two issues at a common issues trial would advance the claims of the class members in a meaningful way.

[194] In considering the preferability of a class proceeding in Asselin, the Supreme Court of Canada considered Fisher v. Richardson GMP Limited, 2019 ABQB 450, a case that was relied on by the defendant in this case due to its analogous facts. Fisher involved a proposed class proceeding by clients of the defendant investment firm for poor investment management. The Alberta Court of Queen's Bench held that a class proceeding was not the preferable procedure because the individual issues predominated over common issues. In Asselin, Kasirer J. rejected the preferability analysis in Fisher, but his basis for doing so is important.

[195] Asselin is a Quebec case. The distinction between common law and Quebec civil law as it relates to class proceedings was noted by Kasirer J. who stated, in declining to follow Fisher, that common law decisions cannot "necessarily be imported without adaptation into Quebec civil procedure": at para. 118.

[196] In Quebec, unlike British Columbia, there is no requirement that a certification judge consider whether common issues predominate over individual issues. A single common issue may be enough for certification so long as it advances the litigation in a not insignificant manner: Asselin, at para. 85. As such, in Asselin, the court declined to follow cases in which certification was denied on the basis of predomination.

- [197] Because of the distinction between the Quebec and British Columbia class action regimes, I find that the Supreme Court's conclusions in *Asselin* about the viability of a Quebec class proceeding in circumstances that may bear factual similarity to this case are of little assistance. Just as Kasirer J. declined to follow common law case authorities, so too must this Court be cautious about following a case from Quebec in which class certification was upheld on the basis of a single common issue.
- [198] In this case, a trial on the two common issues would not advance this proceeding in any meaningful way. The plaintiffs, having been unsuccessful in providing some basis in fact for establishing class-wide loss, are in a position in which any finding of liability against the defendant will require an individual inquiry. In this case, the determination of each class member's claim will require evidence of their financial circumstances, when and why they purchased an RBC PS fund, whether they would have purchased an RBC PS fund absent enhanced compensation, and whether they suffered a financial loss as a result of investing in RBC PS funds.
- [199] The plaintiffs argue that many of the claims are very small and that a class proceeding is the only mechanism through which the class members can obtain access to justice. As noted by Justice Verhoeven in *Clark v. Energy Brands Inc.*, 2014 BCSC 1891 at para. 155, an absence of an alternative procedure does not make a class proceeding preferable:
- The fact that a class proceeding may be the only practical procedure available to the plaintiff cannot justify certification of an unworkable class proceeding that involves individual evidence and fact-finding; it is not enough for the plaintiff to establish that there is no other preferable procedure, as the court must also be satisfied that a class proceeding would be fair, efficient, and manageable.
- [200] I must consider preferability in the context of the three objectives of class proceedings: judicial economy, access to justice, and behaviour modification: *AIC Limited* at paras. 6-17.
- [201] This case, which will almost certainly devolve into a multitude of individual trials, will not serve the goal of judicial economy. With respect to behaviour modification, it is important to note that the defendant has already been fined by the OSC and the Enhanced Compensation Arrangement has been terminated. The goal of behaviour modification has already been met. I must weigh these factors against the increased access to justice inherent in a class proceeding where each plaintiff's claim is for a relatively small sum.
- [202] Ultimately, I cannot find that a class proceeding in this case would be fair, efficient, or manageable. The heart of the plaintiffs' case is the allegation that the defendant harmed their financial interests by acting in a conflict of interest when selling RBC PS funds. This is the theory behind Dr. Cummings' compensatory damages model and is the thrust of the submissions made in support of the viability of the causes of action pled. This is a highly individualized claim that is simply not amenable to class determination.

[203] As such, I find that the plaintiffs have failed to meet the requirements of s. 4(1)(d) of the CPA. A class proceeding is not the preferable procedure for resolving the class members' claims. The plaintiffs' application for certification is dismissed.

"Francis, J."

Schedule "A"

- [1] Section 14(1) states that "a registrant must deal fairly, honestly and in good faith with the clients of the registrant."
- [2] The nature of the alleged fiduciary relationship was not made clearer in oral argument. Notwithstanding the assertion that "of course" the plaintiffs were not asserting a per se fiduciary relationship, in oral argument, counsel for the plaintiff argued that "it is a per se fiduciary breach to introduce a sales compensation agreement like this".
- [3] NI 81-105 contemplates that the same entity may be a distributor of its own funds and a participating dealer of third-party funds.
- [4] Dr. Cumming reviews the 10-year total annualized return of 13 RBC PS funds and compares it to the benchmark return. While most of the RBC PS funds had a lower rate of return than benchmark, two of the RBC PS funds, the "RBC Managed Payout Solution-Enhanced Plus" and the "RBC Managed Payout Solution, Enhanced Adv", had a rate of return that was higher than benchmark.

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