Court of King's Bench of Alberta

Citation: Edmunds v Royal Bank of Canada, 2025 ABKB 754

Date:
Docket: 1401 13650
Registry: Calgary

Between:

John Edmunds, Merlyn Steciw as representative plaintiffs and Investment Exchange Mortgage Corp.

Plaintiff

- and -

Royal Bank of Canada

Defendant

Reasons for Decision on Certification Application
of the
Honourable Justice G.H. Poelman

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I. Introduction

[1] The plaintiffs apply for certification of their action as a class proceeding, pursuant to section 5(1) the *Class Proceedings Act,* S. A. 2003, c. C-16.5. Their application is opposed by the defendant, the Royal Bank of Canada.

[2] The plaintiff and proposed class members invested in The Investment Exchange Mortgage Corporation ("TIE"), owned and operated by Kenneth Fowler. The investors believed TIE was a company carrying out legitimate real estate and other secure investments. Mr. Fowler and TIE used a branch of RBC for depositing funds received from investors and then dealing with those funds.

[3] Instead of a legitimate investment business, Mr. Fowler and TIE were operating a Ponzi-type scheme. They did not use the funds paid by investors for any legitimate purpose. Eventually, when the scheme was discovered, TIE and its business collapsed and investors collectively lost (according to their claims) approximately 27 million dollars. The investors who claim this loss seek recovery from RBC who they say is answerable in various causes of action for the fraudulent activity of its customer.

[4] This action ("1401 action") was commenced on December 12, 2014. There are two versions of the statement of claim at issue on this application: one as yet unfiled, attached as a schedule to the certification application (referred to in this decision as the "2023 claim"); and a proposed further amended statement of claim submitted as part of the plaintiffs' materials for this hearing (the "2024 claim").

[5] The decision requires consideration of the statutory requirements for certification of a class action as well as disputes over amendments proposed in the 2024 claim.

II. Factual Overview

[6] This action concerns a Ponzi-type scheme operated by TIE and its principal, Mr. Fowler. TIE and Mr. Fowler used a branch of RBC for banking in their investment scheme.

[7] The evidence in support of the certification application comprises affidavits from the proposed representative plaintiffs, transcripts from questioning of both parties, selected documents and expert reports from each party. Most of the facts necessary to determine the certification application are not in dispute. They can be summarized briefly, with additional facts included as necessary throughout this decision.

[8] TIE was an Alberta corporation formed in 2001 by Mr. Fowler who controlled it as the sole director, officer and common shareholder. He was the "managing mind" of TIE and the person responsible for investing and dealing with TIE's shareholder funds.

[9] Between 2002 and 2012, TIE solicited subscription investments in the form of the purchase of preferred shares in TIE. In its offering memorandum, TIE stated the following with respect to "use of proceeds":

> In summary, TIE Mortgage will use the Net Proceeds to invest in Residential Mortgages as one of its primary investment endeavours, and may also hold funds on deposit at a bank or credit union, acquire interest in real property, invest in other MICs or real estate investment trusts (which may or may not be affiliated with the Issuer), invest in commercial real estate mortgages, or carry out other investment activities which MICs are permitted to by the Tax Act.

[10] All funds received from investors were made payable to TIE. Investments in TIE could be made in one of two ways: directly, by cheque to TIE; or, as an RRSP-qualified investment, by signing over a portion of RRSP accounts held through Olympia Trust Company to TIE and directing Olympia Trust to forward the funds to TIE.

[11] In April 2003, Mr. Fowler opened a small business chequing account at an RBC branch in Calgary. In doing so, he identified himself as the 100 percent owner of TIE, president of TIE, primary contact for TIE, sole signatory and signing authority for the TIE account, and the sole individual authorized to instruct RBC about the TIE account: see the RBC "Business Services Agreement – Corporation" signed by an RBC employee and by Mr. Fowler, April 2, 2003. The account was for deposits only; RBC was not lending money to TIE through it. Mr. Fowler was the only person dealing with the account on behalf of TIE.

[12] In fact, TIE was not operated as a mortgage investment company and did not do any legitimate business. Mr. Fowler was running a Ponzi scheme. It unravelled in late 2012. The Alberta Securities Commission issued a cease trade order against TIE on November 21, 2012. A group of thirty-five investors, including John Edmunds, commenced action 1201-15857 ("1201 action") on December 13, 2012 seeking damages from TIE and Mr. Fowler. RBC was not a party.

[13] On December 13, 2012, an order was granted on application by the plaintiffs compelling RBC to freeze TIE's bank accounts, appointing Grant Thorton Limited as inspector under Part 18 of the *Business Corporations Act*, RSA 2000, c. B-9 ("*BCA")* and authorizing searches of Mr. Fowler's residence and TIE's business address. The plaintiffs obtained default judgment against Mr. Fowler for $100,000.

[14] Mr. Edmunds and Merlyn Steciw both invested in TIE through Mr. Fowler and are the proposed representative plaintiffs. Mr. Edmunds revived TIE as a corporation on September 15, 2015 and amended the 1201 statement of claim to add it as a plaintiff.

[15] As noted, the 1401 action at issue here was commenced on December 12, 2014 as a proposed class action.

III. Certification: General Principles

[16] The legislation sets out criteria on which the court must be satisfied for a certification order to be made (section 5(1)); and directs that where each of the criteria are met, certification must be granted; and if not all of the criteria are met, certification must not be granted (section 5(3) and (4)). The certification requirements in section 5(1) are that: the pleadings disclose a cause of action; there is an identifiable class of two or more persons; the claims raise a common issue; a class proceeding would be the preferable procedure; and there is a suitable representative plaintiff (having regard to certain qualifications). If all of the criteria are met, the action must be certified; if not, the application for certification must be dismissed: *Fisher v Richardson GMP Ltd*, 2022 ABCA 123 at para 34, citing *Spring v Goodyear Canada Inc*, 2021 ABCA 182 at para 17.

[17] A generous approach should be taken to the interpretation and application of class proceedings legislation to give full effect to the policy of facilitating access to justice, judicial economy, behaviour modification and the general objectives of fairness and efficiency: *Hollick v Toronto (City)*, 2001 SCC 68 at paras 14-15; *Starratt v Mamdani*, 2017 ABCA 92 at para 9. Any member of a class of persons may commence a proceeding on behalf of the members of that class, but must then apply for an order certifying the proceeding as a class proceeding and appointing a person as representative plaintiff (*Act*, section 2).

[18] The emphasis in the *Act* is on procedural considerations. Section 6(2) provides that "an order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding." An application for certification is a procedural motion that concerns the form of an action, not its merits: *Warner v Smith & Nephew Inc*, 2016 ABCA 223 at para 10; *Starratt* at para 9. The question is whether the claim is appropriately prosecuted as a class action: *Fisher* at para 36, citing *Hollick* at para 16.

[19] There are different evidentiary requirements for the certification criteria. The cause of action criterion looks to the pleadings, whereas the other four require some evidence in support, often called the "some basis in fact" standard: *Setoguchi v Uber BV*, 2023 ABCA 45 at para 19; *Hollick* at para 25. The "some basis in fact" standard requires sufficient facts to show that the conditions for certification have been met to a degree that would allow the matter to proceed on a class basis without foundering at the merit stage by reason of the requirements of section 5(1): *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 104.

[20] In summarizing the thrust of *Pro-Sys*'s holdings, Hall J. stated that "the certification requirements need not be proven on a balance of probabilities, nor is the certification judge to enter into a weighing of conflicting evidence": *Walter v Western Hockey League*, 2017 ABQB 382, 62 Alta LR (6th) 85 at para 13, citing *Pro-Sys* at paras 99-105, aff'd 2018 ABCA 188.

IV. Inspector's Report

[21] Before turning to each of the criteria to be satisfied for certification, there is an evidentiary point to be addressed. As I have noted, except for the requirement of establishing a

cause of action on the pleadings, there must be some basis in fact for each of the criteria, although the evidentiary threshold is not onerous.

[22] The plaintiffs heavily rely on the report of Grant Thornton, appointed as inspector by the court under section 232 of the *BCA.* Section 238 of the *BCA* provides that "[a] copy of the report of an inspector under section 232, certified as a true copy by the inspector, is admissible as evidence of the facts stated in it without proof of the appointment or signature of the inspector."

[23] The inspector's report provided the court with information regarding his review of records of Mr. Fowler and his companies. In particular, the investigation reviewed how investor funds were used. The conclusion was that some funds were used to make limited repayments to investors as dividends, some were transferred to other entities owned by Mr. Fowler or to support his activities and lifestyle; and, generally, that investor funds were not invested in mortgages or other investments such that limited assets remained available for investors.

[24] The plaintiff says this is a sufficient basis for the report to be used in the certification hearing, as an exhibit to Mr. Edmund's affidavit. In *First Investors Corp. (Re),* 1988 CanLII 3464 at para 38, Berger J. (later J.A.) allowed for the possibility (albeit likely in *obiter dictum*) when he observed that "the legislation, read as a whole, anticipates that the report will be relied upon by interested parties who may pursue their remedies pursuant to s. 234 [now section 242] of the *Act* and, arguably, by the initiation of legal proceedings in another context."

[25] RBC argues that the report cannot be used outside of the context of *BCA* remedies, at least without leave of the court. It relies on *Principal Savings & Trust Co. v The Principal Group Ltd Estate*, 1994 ABCA 349, which concerned whether an inspector's report could be used in a hearing under *The Winding-up Act*, R.S.C. 1985, c. W-11, to rule on the validity of disputed claims against the estate of a bankrupt financial corporation. The court held the report could not be used in the hearing, because *prima facie* it would shift the burden of calling evidence and, as the facts in the report were based on hearsay, the party against whom the report would be used would not have effective cross examination rights.

[26] A certification hearing is very different. The plaintiffs' evidentiary burden is low and the court is not to weigh evidence. It is only to determine if there is some factual basis for the certification requirements. There are no final determinations of any merits of the action. Hearsay is admissible on such applications. The evidentiary standard would be very different at trial.

[27] RBC also complains that at questioning on February 25, 2020, the plaintiffs refused requests for source documents relied upon by the inspector. That does not go to admissibility of the report. RBC could have applied for an order for those documents to be produced, or at least to be requested by the plaintiffs.

[28] Thus, I find the inspector's report is properly before me for consideration on this application.

V. Causes of Action: Generally

[29] Section 5(1)(a) requires the court to be satisfied that the pleadings disclose a cause of action. This requirement is satisfied by a review of the pleadings: *Setoguchi* at para 20.

[30] The test is the same one used to strike pleadings for failure to disclose a cause of action. Thus, it must be asked "whether, taking the facts pleaded as true, it is plain and obvious the

pleadings do not disclose a cause of action": *Reilly v Alberta*, 2024 ABCA 270 at para 14, citing *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14.

[31] It is a low bar; pleadings are to be read generously and in anticipation of what might be remedied through amendments: *Reilly* at para 14, citing *Bruno v Samson Cree Nation*, 2021 ABCA 381 at para 67 and *Setoguchi* at para 35.

[32] Reading the pleadings generously, according to recent cases, sometimes involves the court going beyond the four corners of the current pleading. The court in *Setoguchi* agreed with the certification judge that "pleadings are to be read generously, and in the anticipation of what might be remedied through an amendment" and went on to state that it therefore would "focus on the appellant's theory of damages as articulated in her factum and during the appeal hearing": at para 35. The need to recognize what might be remedied through an amendment was reiterated in *Reilly* at para 14.

[33] Examples of this approach appear in the well-known companion cases of *Kherani v Bank of Montreal*, 2012 ONSC 2230, and *Pardhan v Bank of Montreal*, 2012 ONSC 2229. In *Pardhan*, the court considered significant evidence on a certification hearing, although recognizing it was not its role to "find facts" while noting the need for "some evidence" to support the statutory requirements other than a cause of action: at para 104. When looking at the cause of action requirement, the court noted that "the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information": at para 107, citing *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959 at 980.

[34] Pleading a cause of action does not mean merely identifying it by name. A cause of action is a set of facts the existence of which entitles a party to obtain a remedy from the court; it is more than, and need not even include, the legal label attached to a claim: *Polla v Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818 at paras 33-34; *Astolfi v Stone Creek Resorts Inc*, 2023 ABKB 416 at para 45; *Stackard (Estate) v 1256009 Alberta Ltd*, 2025 ABCA 171 at paras 7-9; *Anglin v Resler*, 2024 ABCA 113 at paras 45-47.

[35] The plaintiffs argue that their statement of claim discloses causes of action in constructive trust, conversion and negligence. Because there is a disputed application to amend the statement of claim, it is necessary to consider both the 2023 and proposed 2024 versions – because if a cause of action was not made out in the former, it is a relevant consideration in whether to allow amendments.

[36] After the application to amend has been decided, it is necessary to consider the defendant's application to strike some allegations – which, in most cases, involves the same analysis as in the amendments application, except for who bears the onus.

[37] In this case, there is significant dispute over the elements of the causes of action. Thus, I will begin by identifying the essential elements of the three actions at issue and then measure the pleadings against them.

VI. Cause of Action in Constructive Trust

A. Introduction

[38] There are, broadly speaking, two forms of constructive trust: Waters, Gillen & Smith, *Waters' Law of Trust in Canada*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2021) at 514-601; McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed. (Toronto: LexisNexis Canada Inc, 2022) at 1783-1800. The first has been described as "institutional" and is a cause of action against a stranger to a trust relationship between a trustee (or fiduciary: *Waters* at 599) and beneficiary. It gives rise to an *in personam* claim against a stranger to the trust – typically because the trustee and trust property can no longer answer for the amount claimed. The constructive trust actions of knowing receipt and knowing assistance fall into this category.

[39] The second form of constructive trust is "remedial." In Canada, it originates from *Pettkus v Becker*, [1980] 2 S.C.R. 834 (after strong minority decisions in earlier cases) as a remedy to prevent unjust enrichment.

[40] The 2016 amended statement of claim in this action (the 1401 action), to which RBC filed its statement of defence, sought a remedial constructive trust against RBC as an alternative to judgment or damages: paras 24(b) and 27. No amendments are sought related to the remedial constructive trust, and it does not need to be considered further for certification purposes.

[41] However, the plaintiffs also now seek to add an institutional constructive trust to their claim, adding claims for both knowing receipt and knowing assistance. The first express reference to an institutional constructive trust as a cause of action came with the plaintiffs' 2024 proposed amendments, which plead that "the monies deposited into TIEMC's RBC Account between 2003 and 2012 were trust funds or were impressed with a resulting or a constructive trust" (para 21(f)).

[42] As noted, in an action based on an institutional constructive trust, the plaintiff seeks to impose liability on a stranger to a trust. Whether such liability should be imposed "depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability": *Air Canada v M & L Travel Ltd*, [1993] 3 S.C.R.787 at 808.

[43] *Air Canada* describes two general bases for a stranger's liability as a constructive trustee: at 808-10. The first can be dealt with briefly. Trustees *de son tort* take it upon themselves to act as though they were trustees and process and administer trust property. This type of liability is not applicable here because the pleadings do not allege that RBC personally took possession of trust property or assumed the office or function of trustees on behalf of beneficiaries.

[44] The second basis for imposing personal liability upon a stranger to a trust is if they knowingly participate in a breach of trust. This broad area of liability is usually considered as involving two separate categories, "knowing receipt" and "knowing assistance": *Air Canada* at 809-10; *Gold v Rosenberg*, [1997] 3 S.C.R. 767 at 780-81. In the first the stranger is personally in receipt of trust property and in the second the stranger knowingly assists in a "dishonest and fraudulent design on the part of one of the trustees": *Air Canada* at 810-811. Discussion of the elements of the two tests follows.

B. Tests for Knowing Receipt and Knowing Assistance

[45] The category of *knowing receipt* of trust property "requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as an agent of the trustees": *Air Canada* at 810-11. Usually this is expanded to include the following three-element test, see *Boal v International Capital Management Inc,* 2021 ONSC 651 at para 117; *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v Obregon*, 2020 ONCA 412 at para 57, cf. *Kherani* at para 128:

a) The plaintiff must be a beneficiary of a trust or fiduciary relationship;

b) The defendant must receive property from the trust or fiduciary in its personal capacity; and

c) The defendant must have actual or constructive knowledge that the property was transferred in breach of trust or fiduciary duty.

[46] The *knowing assistance* category of personal liability for a stranger does not depend on its receipt of any trust or fiduciary property. Rather, "it depends on the existence of a breach of trust by the trustee, which will itself create a liability on the trustee, and the defendant is an accessory to that breach": *Waters* at 592.

[47] The basis for this kind of liability revolves around two main areas: the nature of the breach of trust and the degree of knowledge required of the stranger: *Air Canada* at 811. These two general areas, for completeness, often are expanded to address all of the factors implicit in the *Air Canada* formulation: *Monarch Land Ltd v Pfaefflin*, 2023 ABKB 472 at para 43; *Boal* at para 112, rev'd on other grounds, 2023 ONCA 840.

[48] The four-element test, which I will use, requires establishing the following:

a. The plaintiff is the beneficiary of a trust or fiduciary relationship;

b. The trustee or fiduciary fraudulently or dishonestly breaches his or her equitable duty;

c. The defendant has actual knowledge of the fiduciary relationship and the fiduciary's misconduct; and

d. The defendant actively assists in the fraudulent or dishonest conduct.

C. Plaintiff as Beneficiary of Trust or Fiduciary Relationship

[49] Both knowing receipt and knowing assistance categories of liability require, as the first element, that the plaintiff be a beneficiary of a trust or fiduciary relationship. If that element is absent, an action for either knowing receipt or knowing assistance will fail.

[50] The lack of a trust was the basis (among others) for the failure of an action for knowing assistance in *1169822 Ontario Limited v The Toronto-Dominion Bank*, 2018 ONSC 1631 (commonly referred to as "*Seaquest*," after the name of the corporation operating the scheme), although the case was a judgment following trial. The plaintiffs, none of whom had direct dealings with the bank, were victims of a Ponzi scheme. They made investments in a business scheme which was a fraud. None of the plaintiffs could establish an express trust and Dunphy J. dismissed their trial statements as *ex post facto* characterizations of investments as trusts. It was noted that the plaintiffs' status as intended investors in loan transactions did not of itself "lead to

an inference that Seaquest thereby always received investor funds under an express trust"; Seaquest did not have a trust or escrow account with the bank, nor did it suggest to investors that it did. Investments can be made under any number of forms. The investor transactions were generally more consistent with other, non-trust arrangements: at paras 119-20.

[51] *Kherani* led to a different result at the certification stage, partly because it was expressly pleaded that putative class members gave money in trust to the operators of a fraudulent scheme: at para 114. "It is the intention of the settlor of a trust that determines its creation" and the representative plaintiff "genuinely intended that the investment money would be held in trust": at paras 107, 110. Likewise, in *Carl B. Potter Limited v Mercantile Bank of Canada*, [1980] 2 S.C.R. 343, which involved a tendering process for construction of a waste treatment plant, the "Bid and Performance Guarantee" required bidders to provide certified cheques for ten percent of their bids, which were to be placed by the project owner on deposit in a bank or trust company in the owner's name in a trust account containing no other funds. Clearly they were to be kept apart from other funds of the owner.

[52] Where a fiduciary relationship is relied upon, instead of a trust, the plaintiffs must show that their relationship with the alleged fiduciary falls within a relationship established in the authorities as categorically fiduciary or that the *indicia* of an *ad hoc* relationship are satisfied: *Boal* at para 85. The relationship between a client and an investment adviser is not categorically a fiduciary relationship; therefore, the test for an *ad hoc* fiduciary relationship applies. In a Supreme Court minority decision which has become influential, Wilson J. suggested the following criteria as a "rough and ready" guide:

> 1. The fiduciary has scope for the exercise of some discretion or power.
> 2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> 3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> [*Frame v Smith*, [1987] 2 S.C.R. 99 at 136]

[53] One of the controverted areas is what is meant by vulnerability. More is required than the beneficiaries' expectation, as observed in *Waters* at 1001, citations omitted:

> [A] fiduciary obligation generally rests on a voluntary relinquishment of self-interest by the fiduciary. The obligation cannot be unilaterally imposed by the expectations or the reliance of the beneficiary; trust cannot be reposed without the consent of the trusted.

D. Knowing Receipt

[54] The categories of knowing receipt and knowing assistance differ in their remaining elements and will be dealt with separately.

[55] The knowing receipt test includes two further elements: receiving property from the trust or fiduciary in a personal capacity and having actual or constructive knowledge that the property was transferred in breach of the trust or fiduciary duty.

[56] **Receipt of Property in Personal Capacity:** There are two lines of authority on the meaning of receiving property in one's "personal capacity" as it applies to bankers. In *Eaton v*

HMS Financial Inc, 2010 ABQB 635, Rooke J. (later A.C.J.) analyzed the point from the perspective of the knowing receipt action being "a kind of unjust enrichment and by nature of unjust enrichment . . . a creature of equity": at para 33. Thus, he held, it would be inequitable to allow a bank to reduce a party's debts to it (such as an overdraft or debt) using misappropriated funds, but there was nothing unjust about charging fees for the provision of banking services: at para 34.

[57] *Kherani* takes a very different position on this issue. After quoting from *Eaton* at length, Horkins J. stated that the question was not whether a charge was "unjust." "Whether one looks at a debt owing on an overdraft or service fee that an account holder owes the bank, both are legitimate fees that a bank is entitled to charge the account holder. In each case the account holder is contractually obliged to pay the debt in the case of an overdraft and pay service fees for the account": at para 140. The bank is enriched both by reducing an overdraft and paying its service fees, and "the wrong occurs when the bank has constructive knowledge of the breach of trust and uses the trust money to enrich itself": at paras 140-41.

[58] The judges in both cases observed that there was no other authority directly on the point. *Waters* tends to support the *Kherani* decision, without referring to either case, referring to "the general law of banking, which says that a bank receiving money into any account receives for its own benefit, becoming only a creditor to the customer in return": *Waters* at 595, n 459.

[59] **Constructive Knowledge of Trust or Fiduciary Relationship and Breach:** *Gold* established that because an action founded on knowing receipt of trust property is restitutionary in nature – that is, unjust enrichment of the defendant is the essence of the claim – actual knowledge of a breach of trust is not necessary. The question is only whether the defendant has taken property subject to an equity in favour of another; in other words, who has a better claim to the disputed property. There need be no finding of fault or legal wrong on the defendant's part. Thus, for this third element, only constructive knowledge is required: *Gold* at paras 784-90.

[60] The constructive knowledge element will be satisfied "if the circumstances were such as to put a reasonable person on inquiry, and the defendant made none, or if the defendant was put off by an answer which would not have satisfied a reasonable person": *Gold* at 790. The requirement was expressed in *Citadel General Assurance Co v Lloyds Bank Canada*, 1997 CanLII 334 (SCC) at para 49 as follows:

> In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

E. Knowing Assistance

[61] After the requirement that the plaintiff be a beneficiary of a trust or fiduciary relationship, the remaining three elements of the knowing assistance test are: the trustee or fiduciary fraudulently or dishonestly breached their equitable duty, the defendant had actual knowledge of the equitable duty and its breach, and the defendant assisted in the breach. I will address each in turn.

[62] **Trustee or Fiduciary Fraudulently or Dishonestly Breaches the Equitable Duty:** This criterion typically is not a contentious point. In *Air Canada*, the court noted this element involves the trustee taking a risk to the prejudice of another's rights, when the risk is known to be one which there is no right to take: at 826; see also *Gold* at 782.

[63] **Actual Knowledge of Trust or Fiduciary Relationship and Breach:** The defendant must have actual knowledge of both the trust (or fiduciary relationship) and that there was conduct in breach of that trust (or relationship): *Air Canada* at 811-12. Actual knowledge extends to recklessness or wilful blindness as "a person shutting his eyes to the obvious is in no different position than if he had kept them open" *Air Canada* at 812, citing *Carl-Zeiss-Stiftung v Herbert Smith & Co (No 2)*, [1969] 2 All E.R. 367. High standards apply to recklessness or wilful blindness because they are considered to be morally equivalent to actual knowledge – in effect, knowledge of the clear probability of fraud: *Seaquest* at paras 132-37.

[64] The type of knowledge required of a trustee's or fiduciary's breach is based on the notion that a constructive trust will be imposed only in circumstances that indicate a 'want of probity' on the stranger's part, meaning a lack of honesty: *Air Canada* at 812-13; *Bikur Cholim Jewish Volunteer Services v Penna Estate*, 2009 ONCA 196 at para 43. The higher degree of knowledge is required for knowing assistance to ground culpability as the defendant has not received trust property for its own benefit: *Citadel* at para 48.

[65] There must be actual knowledge for this type of liability, as opposed to constructive knowledge which suffices for knowing receipt. Constructive knowledge is different and is more akin to carelessness, which is is usually insufficient to bind the stranger's conscience: *Air Canada* at 812-13.

[66] **Actively Assists in the Fraudulent Conduct:** Underpinning this element, as with the others, is the fault basis of the action for knowing assistance. There must be an intentional wrongful act on the part of the stranger or accessory to knowingly assist in the fraudulent breach of trust or fiduciary duty; "knowing assistance requires that the accessory 'participated in or assisted in the fiduciary's fraudulent and dishonest conduct'": *DBDC Spadina Ltd v Walton*, 2018 ONCA 60 at para 216, citing *Enbridge Gas Distribution Inc v Marinaccio*, 2012 ONCA 650 at para 23, aff'd 2019 SCC 30.

[67] The notion of fault means that merely being used as a conduit may not be enough: *DBDC Spadina Ltd* at paras 216-31. Simply being used by a fraudster in a fraudulent scheme does not equate to participation in that scheme: *DBDC Spadina Ltd* at paras 221, 230.

F. Pleadings on Constructive Trust

1. Plaintiffs as Beneficiaries of Trust or Fiduciary Relationship

[68] Turning to the pleadings, both knowing receipt and knowing assistance require as the first element that there be a trust or a fiduciary duty owed by the alleged fraudsters to the beneficiaries.

[69] The key paragraph regarding this element in the 2023 claim sets out that Mr. Fowler, TIE and various employees solicited subscription investments in TIE; and made express representations to the effect that (1) investors would have secure investments; (2) TIE qualified as a mortgage investment corporation under the *Income Tax Act*; (3) certain shares in TIE could be purchased; (4) TIE would use investment proceeds to invest primarily in residential mortgages, as well as other investment activities (giving TIE significant discretion in the use of

funds); and (5) TIE shares were RRSP-eligible (para 5). (Paragraph 7 of the 2024 claim is substantially the same.)

[70] The claim further alleges that in reliance on these representations, investors purchased TIE preferred shares by providing funds to Mr. Fowler or TIE or using an intermediary trust company (in the case of self-directed RRSPs) to transfer the funds to Mr. Fowler or TIE (paras 6 and 7). Paragraph 13 alleges that Mr. Fowler and TIE did not use the funds as represented or for any lawful purpose and misappropriated the funds for their own purposes.

[71] It is arguable that the 2023 claim does not set out facts supporting trust or fiduciary obligations *vis-à-vis* the plaintiffs. As held in *Seaquest*, "'investments' can be made under any number of forms": at para 120. The fraudulent entity in *Seaquest* did not have a trust or escrow account with the defendant bank and there was no evidence that it ever suggested to investors that it did: *Seaquest* at para 119.The same situation exists in this case, except the issue to be determined involves allegations in pleadings rather than evidence.

[72] Further, the relationship pleaded between investors and an investment organization has not been established as categorically fiduciary: *Hodgkinson v Simms,* [1994] 3 SCR 377 at 381; *Boal* at para 85. To establish an *ad hoc* fiduciary relationship requires evidence (or, at this stage, pleadings) that satisfy the indicia of a fiduciary relationship.

[73] The plaintiffs argue that paragraph 19(a) of the 2023 claim meets the need to plead breach of a fiduciary duty. It states that "at the material times RBC . . . knew, or should have known, or was reckless or wilfully blind to" among other things, that "Fowler was the sole director and operating mind of TIE and in that capacity he owed fiduciary, common law, or other legal or equitable duties to TIE and TIE investors." Also, the plaintiffs apply to amend by adding paragraph 21(f) of the 2024 claim – that RBC knew, or should have known, or was reckless or wilfully blind to the fact the monies deposited into TIE's account "were trust funds or were impressed with a resulting or constructive trust."

[74] The amendments, the plaintiffs argue, are permitted under section 6(2)(b) of the *Limitations Act*, which provides that a defendant is not entitled to immunity to any claim added to a proceeding previously commenced where the added claim is related to the conduct, transaction or events described in an original pleading.

[75] The leading authority on this provision remains *DeSoto Resources Limited v EnCana Corporation*, 2010 ABCA 110. It held that whether the new pleading arises from the same conduct, transactions or events "must be based on an assessment of the whole factual and legal context": at para 8. Among other things, it is relevant to consider whether the documents and other evidence needed to prove the new allegations would differ significantly from what would be required under the original pleading: at para 10.

[76] RBC has been unable to persuade me that the proposed paragraph 21(f) of the 2024 claim does not meet the test in section 6(2). Their argument merely is that it would set out a new cause of action, but of course section 6 assumes that to be the case because it applies "notwithstanding the expiration of the relevant limitation period": section 6(1).

[77] I conclude that the element of the plaintiffs being beneficiaries of a trust or fiduciary relationship has been adequately pleaded at least in the 2024 claim, which I would allow as an amendment under section 6(2) of the *Limitations Act*. In addition, as noted earlier, I am required to take a generous approach to pleadings which, according to the authorities, means taking into

account the plaintiffs' theory as articulated in their evidence, briefs and oral argument; and, taking these into consideration, what might be remedied by amendment. The pleadings are the basis for determining if the cause of action is made out; but they must be read in light of these other matters which give them background and context.

[78] Using this modern test for determining whether pleadings make out a cause of action, even the 2023 claim would suffice. It should be read in light of the plaintiffs' arguments that:

a) RBC would have known that commingling of certain investment funds and funds received by mortgage investment corporations was not permitted; this was based on legislative and regulatory requirements and a court case in which RBC was held liable as a defendant; and

b) A significant proportion of the cheques paid into TIE's RBC account have references to "trust," "trust account," "registered plan accounts," "RRSP," and "investment," or were received from a trust company, Olympia Trust.

Of course, I make no findings on the validity of these arguments; it is a question of how the pleadings should be understood.

[79] In conclusion, with or without the 2024 amendment, the pleadings adequately disclose the element of trust or fiduciary relationship according to the low bar applicable to class action certification proceedings. Therefore, on the element of whether the plaintiffs were beneficiaries of a trust or a fiduciary relationship, I conclude that the 2024 claim, as amended, pleads the necessary facts. The amendments should be allowed as falling within section 6(2) of the *Limitations Act*. That applies to paragraphs 21(f), 23(c) and 23(f)(which changes the acronym) of the 2024 claim.

2. Knowing Receipt

[80] The remaining two elements of the knowing receipt cause of action are: RBC receiving the property in its personal capacity and RBC having actual or constructive knowledge that the property was transferred in breach of trust or fiduciary duty.

[81] The pleadings allege that RBC received the funds in its capacity as TIE's banker, in an account in TIE's name. From these deposits, RBC benefited by "receiving account fees and other charges" and "using the funds while on deposit": paragraph 23 of the 2023 claim and paragraph 26 of the 2024 claim, therefore profited or benefited from Fowler's use of TIE's RBC account. As I indicated above, there is Ontario authority (with indirect support from *Waters*) holding that account fees are enough for the receipt of property in a personal capacity element of the knowing receipt action.

[82] "The novelty of a cause of action will not militate against the plaintiff establishing a cause of action for the purpose of certification; pleadings 'which reveal inarguable, difficult or important point of law' must be allowed to proceed": *Flesch v Apache Corporation*, 2022 ABCA 374 at 32, citing other authorities. Applying this standard, the plaintiffs' claim meets the requirement of establishing a cause of action for purpose of certification in so far as this element of the action is concerned. While Alberta authority is against it, there is contrary authority elsewhere and the point remains to be settled.

[83] Finally, if the elements of trust or fiduciary relationship and receipt of funds in a personal capacity are adequately pleaded, the requirement of actual or constructive knowledge is also

adequately pleaded. The facts that the plaintiffs rely on to make out the first two elements of the action of knowing receipt are set out in paragraphs 19 and 21 of, respectively, the 2023 and 2024 claims. In both cases, it is alleged that RBC knew or should have known or was reckless or willfully blind to them.

[84] In summary, the pleadings make out the action of knowing receipt. They plead the material facts needed to establish that TIE or Mr. Fowler were trustees or fiduciaries of the plaintiffs, who purchased preferred shares. The other two elements – RBC receiving property in its personal capacity and having actual knowledge that the property was transferred in breach of trust or fiduciary duty – are adequately pleaded for certification purposes.

3. Knowing Assistance

[85] The three remaining elements of the knowing assistance cause of action are: fraud or dishonest breach of trust or fiduciary duties, the defendant's actual knowledge of the relationship and its breach, and the defendant's active assistance in the fraudulent or dishonest conduct.

[86] It is pleaded that Mr. Fowler and TIE acted fraudulently or dishonestly, thus, the second element has been adequately pleaded.

[87] For the third element, a defendant's actual knowledge of a trust or fiduciary relationship and breach of associated duties, the plaintiffs again rely on paragraph 19 of their 2023 claim. It states that RBC "knew, or should have known, or was reckless or willfully blind" to a number of facts. This meets the threshold of knowledge required for knowing assistance, which is actual knowledge including wilful blindness or recklessness. This is adequately pleaded in the 2023 claim for the same reasons stated in the knowing receipt analysis.

[88] Finally, knowing assistance requires evidence or, as here, pleadings to the effect that the defendant actively assisted in the fraudulent or dishonest conduct. Merely being a conduit is not enough.

[89] The authorities and authors emphasize that knowing assistance is concerned with subjective fault of the defendant, and thus the pleadings must establish that the defendant intentionally acted to assist or participate in the fraudulent and dishonest conduct: *DBDC Spadina Ltd* at para 216. As I construe the pleadings, assuming them to be true, RBC was acting in the usual course of a banker for a customer, as far as its intentional conduct was concerned. The pleadings do not show RBC actively assisting – it was acting as a banker, a conduit for the transfer of funds held by an account customer, not knowingly participating in a breach of trust or fiduciary duty, on the facts pleaded.

[90] Thus, this last element has not been met.

4. Summary of Conclusions on Constructive Trust Pleadings

[91] In summary, the pleadings (with the 2024 amendment I have allowed), adequately establish a cause of action for the constructive trust claim of knowing receipt. The claim for knowing assistance has not been made out on the pleadings.

VII. Conversion

A. Legal Principles

[92] The tort of conversion, in the banking context, "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": *373409 Alberta Ltd v Bank of Montreal*, 2002 SCC 81 at para 8, citing *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC) at para 31. It is a strict liability tort; although the dispossession must be a result of the defendant's intentional act, it matters not if the wrongful act was done innocently: *Bank of Montreal* at para 8; *Boma* at para 31.

[93] *Bank of Montreal* concerns the case of an individual, Mr. Lakutsa, who was sole shareholder and directing mind of 373409 Alberta Ltd ("373") and Legacy Holdings Ltd ("Legacy"). Mr. Lakutsa had received a cheque payable to 373 from a *bona fide* customer; he altered the cheque by adding "/Legacy" so that the payee contained the names of both companies. He deposited the altered cheque into Legacy's account at the Bank of Montreal, without endorsing it; the bank credited Legacy's account with the cheque proceeds and the funds later were withdrawn by Mr. Lakutsa – ultimately to the prejudice of 373's creditors.

[94] The bank was not liable for a conversion. "The owner of a cheque is capable of authorizing another party to collect the proceeds of the cheque and transfer those proceeds to a third party": at para 16. Mr. Lakutsa was the entire "ego" and "personality" of 373; his acts must be deemed authorized by 373; and "he could, as he did, authorize the Bank to deal with [373]'s cheque, and the Bank played no role in conversion. The bank would have been liable if Mr. Lakutsa had not been acting on behalf of 373."

[95] Thus, a bank's liability in conversion is predicated upon (1) payment upon a cheque being made to someone other than the rightful holder of the cheque; and (2) such payment not being authorized by the rightful holder of the cheque (or the funds): *Bank of Montreal* at paras 9-10. *Bank of Montreal* emphasizes that the impropriety of the corporation diverting funds from creditors does not undermine its principal's authority to deal with the funds on behalf of it; "the key question in determining attribution is whether that agent's action was within the scope of authority delegated to him or her by the corporation" – and Mr. Lakutsa, by acting within his scope of authority, his act of instructing the bank on where to deposit the cheque proceeds "must be attributed to the corporation": at para 23.

[96] *Bank of Montreal* draws a distinction to the case of *Boma*. There, a small company's bookkeeper had defrauded her employer by issuing fraudulent cheques to various individuals, named as payees on the cheque with names and initials similar to the bookkeeper's first husband. She was a signatory of the cheques, but could not be taken as acting for her employer (unlike single director and shareholder cases); the bookkeeper was authorized to sign cheques only for the purpose of discharging lawful obligations of her employer and only when a shareholder and officer was not available: *Boma* at paras 2-4, 56. The bookkeeper deposited the cheques to an account at her bank. The court held the general rule applied, whereby a bank that pays out a forged or unauthorized cheque is required to re-credit the account and bear the loss: *Boma* at para 44.

[97] A similar factual distinction led to a similar finding in *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51. An employee of a large company had authority to write cheques but only

for payment of the company's debts. He drew cheques in favour of payees his employer was not indebted to and deposited the cheques in his own accounts, including one at TD. The bank was liable in conversion, which would be consistent with *Boma*. (Much of *Teva* is concerned with whether it is significant for the *Bills of Exchange Act* that payees are fictitious or non-existing persons, which is a statutory defence to strict liability for conversion, and not at issue here.)

[98] *Teva* seemingly bases its finding on the notion that banks are better situated to handle losses arising from fraudulent cheques than individuals or small businesses which are victims of fraud: para 67. It cannot, however, be taken to stand for such a broad policy basis for determining conversion cases. *Bank of Montreal*, which squarely addresses the cause of action and sets out the governing rule, was not referred to in *Teva*. Further, as noted, *Teva* was factually different in that it involved an employee fraudulently acting without authority from his employer.

[99] The tort of conversion for a bank honouring cheques is one of strict liability, involving bills of exchange. The subject of the conversion is the instrument – such as a cheque: *Boma* at para 36. The legal formulation of a claim requires a factual foundation that reflects this principle.

[100] There are important differences among these three cases. In *Bank of Montreal*, the recipient of a cheque (payee) altered the cheque by adding another payee and the court considered whether by processing the cheque, the new payee's bank (collecting bank) converted it. *Boma* and *Teva* both involved providers (drawers) of cheques that were altered by persons without authority and the question was whether the collecting bank in each case was liable in conversion.

[101] A useful summary of this complex area, based on *Boma*, is that "a bank converts an instrument, including a cheque, by dealing with it under the direction of one not authorized, either by collecting or by paying it and, in either case, making the proceeds available to someone other than the person rightfully entitled to possession": Halsbury's Laws of Canada, vol 72, *Banking and Finance* at HBF-38 "Conversion" (2024 Reissue). Thus, there was no conversion in *Bank of Montreal*, because the payee's collecting bank dealt with the cheques under the direction of a person authorized to instruct it. In contrast, there was liability for conversion in *Boma* and *Teva* because in these cases the cheques were deposited in accounts of fraudsters' banks (collecting banks) by direction of unauthorized persons.

B. Pleadings on Conversion

[102] It must now be determined whether the pleadings can be read as alleging that payment upon the cheques was made to someone other than the rightful owner and that such payment was not authorized by the rightful owner (to paraphrase *Bank of Montreal* at para 10). If so, a cause of action against RBC has been pleaded – without regard to its "innocence."

[103] Remembering that the subject of conversion must be a chattel – cheques, in this case – there are three possibilities raised in the parties' arguments, implicit if not express in the plaintiffs' claims. They are the following:

a) Investors' cheques to TIE (2023 claim at paras 6 and 7);

b) Investors' cheques to Olympia Trust, and then Olympia Trust cheques to TIE (at para 7); and

c) Cheques written by TIE and drawn on TIE's account for purposes unrelated to the plaintiffs' investments (paras 8, 12, 13, 18, 19(f) and 21(c)).

[104] **First category:** The investors were the lawful owners (drawers) of the accounts on which the cheques were written. The investors (plaintiffs) authorized payment to TIE through the cheques. RBC, as collecting bank, facilitated the transactions with the money going to TIE. The pleadings do not allege that the cheques were used contrary to the plaintiffs' clear authorization; nor is there any allegation of alteration or forgery of the cheques.

[105] I have considered a possible argument that RBC converted the cheques because the investors' authorizations were limited to having them deposited into segregated trust accounts. In my view, that would be an unwarranted and unsafe expansion of the strict liability tort of conversion. A bank, for the purposes of this action, should be able to rely upon the face of the instrument.

[106] Thus, no cause of action for conversion is pleaded in the first category.

[107] **Second category:** Again, no allegations say that the plaintiffs were not the lawful owners of their cheques to Olympia Trust or that Olympia Trust dealt with the cheques under the direction of one not authorized. Likewise, no allegations say that Olympia Trust was not the lawful owner of the cheques it made payable to TIE or that RBC, as collecting bank, processed the cheques under direction of someone without proper authority.

[108] **Third category:** When considering the cause of action for conversion of cheques, the key question is authorization. Thus, the same principles apply as for category one. Cheques written by TIE were owned by TIE, as the drawer. The claims make no allegations that Mr. Fowler was not authorized to write and present the cheques to RBC for processing. Quite the contrary; as noted above, the plaintiffs plead in their 2023 claim that Mr. Fowler was TIE's operating mind and sole director (para 3) and was authorized as "the sole or primary person" to access RBC's account (paras 4 and 19(d)). Within the meaning of *Bank of Montreal* and *Boma,* he was authorized to deal with TIE's cheques.

[109] Perhaps the 2024 claim attempts to resile from this, by stating that "RBC authorized Fowler as the sole person to access" the RBC account (para 6), seemingly making RBC the active party. This is at best a meaningless amendment, which I decline to allow. It would have no significant legal effect: as a matter of common sense, it takes two parties to open a bank account – the bank and a customer. It does not change the essence of the allegation that Mr. Fowler, the person who presented the cheques, had sole authority to do so as TIE's agent. Further, there is no evidence that RBC was the party that authorized Mr. Fowler to deal with cheques owned by TIE.

[110] Another reason to disallow the amendment is that the plaintiffs possibly are attempting to withdraw what RBC considers an admission to a material fact.

[111] In support of their argument that because Mr. Fowler's acts were fraudulent they could not have been authorized by TIE even if he was the sole directing mind, the plaintiffs rely on *Scott v Golden Oaks Enterprises Inc*, 2024 SCC 32. It is not on point. There was a Ponzi-scheme in that case also, but the legal issues were very different. The bankruptcy trustee of the defunct corporate vehicle for the scheme sued (derivatively) the investors who had invested in the scheme hoping to earn very high interest and commissions.

[112] One of the issues was whether knowledge of the sole shareholder, officer and directing mind should be attributed to the company for a purpose of a limitation of actions defence. The court stated the corporate attribution rule applies to all corporations, regardless of whether they are one-person corporations; but the principles are flexible having regard to the purpose for which attribution is sought: *Golden Oaks* at para 63-65. However, the court made a clear distinction from *Bank of Montreal*: that case dealt with corporate *authority* not, as in *Golden Oaks*, corporate *attribution*: *Golden Oaks* at para 66.

[113] The tort of conversion is named for the first time in the 2024 claim, which states that "RBC is liable in conversion for its collection (acceptance) of TIEMC and its investors' funds via cheques made payable to cash, which funds it then made payable by bank draft to Fowler, Fowler's wife and SGI" (at para 24). This allegation names a cause of action but gives no new material facts to establish it. I do not grant the paragraph 24 amendment, because it is meaningless as being unsupported by allegations of material facts.

[114] In brief, with respect to the proposed amendments in paragraphs 6 and 24 of the 2024 claim, they are not allowed. I allow paragraph 5 (which changes "TIE" to "TIEMC" and adds "registered" to director); and paragraph 10 (which is an allegation that Mr. Fowler directed RBC to pay some funds to Southwell – a simple allegation of fact for which there is some evidence).

[115] Thus, the pleadings do not make out a cause of action for conversion regarding cheques in the third category.

VIII. Negligence

A. Legal Principles

[116] It is well established that "[t]he party alleging negligence must prove on a balance of probabilities that a duty was owed by the defendant and, having breached the appropriate standard of care, the defendant's substandard actions caused the plaintiff's injury": *McArdle Estate v Cox*, 2003 ABCA 106 at para 23, cited in *Ramias v Johnson*, 2009 ABQB 386 at para 26. In this case, the main issue is whether RBC owed a duty of care to third parties who wrote cheques to TIE and Mr. Fowler, which the latter deposited in accounts he controlled.

[117] It is also clear "that a bank owes a duty of care to persons suffering losses from a fraud perpetrated by a customer through use of the bank's accounts where it has actual knowledge of the fraud": *Jastram Properties Ltd v HSBC Bank Canada*, 2021 BCSC 2204 at para 11. The authorities do not establish a duty of care owed by a banker to third parties (that is, non-customers) based on constructive knowledge or carelessness. As held in *Lillico v Royal Bank of Canada*, 2024 SKKB 154, there are only very limited circumstances where a bank will owe a third party a duty of care. "[N]o court in Canada has found that a duty of care is owed by a bank to a third party unless there is knowledge, willful blindness or recklessness with respect to fraudulent activity of the bank's client" and "[t]his duty of care will only arise where the bank has knowledge of facts demonstrating fraudulent activity or proposed fraudulent activity": at paras 55, 65.

[118] *Ramias* at para 30 and *Kherani* at paras 154-56 likewise found no authorities recognizing a duty of care when negligence is grounded in constructive knowledge. To similar effect is *Seaquest*, where the court summarized the state of law as requiring proof of actual knowledge of the fraud (or willful blindness or recklessness) to find a bank's duty of care.

[119] In the absence of an established duty of care for a particular relationship, it is required to apply the two-step test from *Anns v Merton London Borough Council*, [1978] A.C. 728 (H.L.), adopted by *Kamloops (City) v Nielson*, [1984] 2 SCR 2, and confirmed in *Cooper v Hobart*, 2001 SCC 79.

[120] The first stage of the *Anns* analysis requires consideration of whether the harm sued for was a reasonably foreseeable consequence of the defendant's actions and whether there was a sufficiently proximate relationship between the parties for a duty of care to arise. Proximity considerations include whether it is just and fair to impose a duty of care on the relationship, which includes broad policy considerations: *Cooper* at paras 30, 34. If these elements are established, the court must go on to consider residual policy considerations, which include "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" *Cooper* at para 37.

[121] These requirements are difficult to meet, even where all of the circumstances are properly pleaded. Martin J. (now on the Supreme Court) dealt with the issue in one paragraph in *Ramias* at para 42, as follows:

> However, I reach a contrary conclusion in regard to the claim in negligence that BMO ought to have known that Johnson was conducting fraudulent activities, as the claim that financial institutions owe a general duty of care to third party investors of their clients is impossible. The alleged nexus is simply too remote and it is plain and obvious that such a duty must be denied on policy grounds. It fails at both stages of the Anns inquiry, because it raises the spectre of indeterminate liability to an indeterminate class, with a standard of conduct that cannot be articulated with sufficient, or any precision. The volume of transactions conducted daily by financial institutions is immense. To create tort duties to non-customers in relation to unknown underlying fraudulent transactions would impose a disproportionate and unwieldy burden. The banks cannot be asked to act as guarantors of the legality of their client's transactions when they lack actual knowledge of any impropriety.

She briefly noted in the following paragraph that her finding was in line with previous jurisprudence.

[122] The courts have taken two approaches to certifying causes of action where the first arm of the *Anns* test has been satisfied (that is, reasonable foreseeability and proximity) but a compelling case is not made out on the second arm, policy grounds. In *Kherani,* it was found that the first arm of the *Anns* test was established. However, the policy arm was left for determination on a full evidentiary record, and thus certification was granted for this cause of action: at paras 201-02. In contrast, in *Ramias,* allegations that the bank had actual knowledge of a customer's fraudulent scheme were sufficient to warrant the finding of a duty of care in favour of third parties, and thus was certified but the allegations that the bank ought to have known that its customer was conducting fraudulent activities and owed a general duty of care to third party investors was struck out: para 41.

B. Pleadings on Negligence

[123] There are no disputed amendments on the negligence claim. The only issues are whether the pleadings adequately make out a valid cause of action and considering RBC's application to

strike the negligence pleadings as hopeless. Effectively the two issues are the same, except that the plaintiffs bear the onus on the first, RBC on the second.

[124] With respect to RBC's various forms of knowledge relevant to negligence, in the 2023 claim the plaintiffs alleged that RBC "knew, or should have known, or was reckless or wilfully blind" to:

> c. the pattern, frequency, number or types of transactions reasonably expected to be processed through an account held by a mortgage investment company;
>
> . . .
>
> f. funds passing through the TIE RBC Account were Investment Proceeds from TIE investors, and were either fraudulently obtained or being transferred in furtherance of a fraud; and
>
> g. Fowler was and would be using the TIE RBC Account to perpetrate or facilitate a fraud upon TIE investors.

Confusingly, this paragraph blends RBC's actual or constructive knowledge with the underlying facts. Nevertheless, actual or constructive knowledge are both pleaded.

[125] The thrust of the allegations is that TIE's account, if subjected to any level of monitoring, would alert RBC to concerns about fraudulent activity.

[126] Paragraph 20 alleges that RBC owed a common law duty in tort to:

> d. monitor the TIE RBC Account and make all necessary and reasonable inquiries regarding any suspicious, irregular or unlawful activities in order to . . . prevent or minimize the likelihood that the TIE RBC Account could be used for fraudulent or unlawful purposes;
>
> e. if it was known or reasonably suspected that the TIE RBC Account was being used in furtherance of fraud or other unlawful acts, to immediately "freeze" or suspend all activity in the TIE RBC Account [.]

[127] Finally, paragraph 21 alleges that RBC breached its duties in that it:

> a. failed to implement or adhere to, or ignored, its own internal policies in respect of the detection and prevention of fraud, despite its having flagged TIE as a high-risk business at the inception of the TIE RBC Account which subjected it to enhanced due diligence and on-going monitoring which RBC did not do;
>
> . . .
>
> c. turned a blind eye to, failed to report or investigate, or permitted the movement of large sums of money from the TIE RBC Account into Fowler's personal accounts or the SGI TD Account or elsewhere, notwithstanding its knowledge as particularized herein [.]

[128] Applying the first branch of Anns, assuming these allegations to be true, it would be reasonably foreseeable that investors would suffer losses. Further, this is not a case of an indeterminate class of people that might have business dealings with RBC's customers, TIE and

Mr. Fowler. As in *Kherani*, "the class of people is restricted to those who were investing with [TIE] in what they thought was a legitimate business": at para 191. Thus, the requirement of proximity is satisfied.

[129] If foreseeability and proximity are satisfied, a *prima facie* duty of care arises. It is then required to conduct stage two of the Anns analysis, which involves residual policy considerations – in other words, whether the duty is negated by broader policy considerations: *Childs v Desormeaux*, 2006 SCC 18 at para 12. I agree with *Kherani* and cases cited at paras 201-02 that the policy considerations should not be undertaken without a full record. Thus, having found that foreseeability and proximity are established, the determination of whether policy concerns should dictate against imposing a duty of care based on constructive knowledge will be deferred to trial.

[130] I therefore conclude that the pleadings satisfy the cause of action in negligence requirement for certification purposes, both as to actual knowledge (including wilful blindness) and constructive knowledge of fraudulent activity by TIE and Mr. Fowler. RBC's application to strike the negligence allegations therefore is dismissed.

IX. Conclusions on Causes of Action

[131] The plaintiffs have adequately pleaded facts that make out causes of action for constructive trust based on knowing receipt and negligence, based both on actual knowledge (including wilful blindness) and constructive knowledge. The pleadings fail to make out causes of action for the constructive trust claim of knowing assistance and the action in conversion.

X. Identifiable Class of Two or More Persons

A. General Principles

[132] The second requirement for certification is that "there is an identifiable class of two or more persons" (section 5(1)(b)).

[133] The class definition must be based on objective criteria enabling identification of potential class members without reference to the merits of the claim; have a rational connection between the definition, causes of action and common issues; and not be so broad as to include persons who have no claim against the defendant, but not so narrow as to arbitrarily exclude persons with claims similar to those asserted on behalf of the proposed class: *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 38; *Warner* at para 22; *Windsor v Canadian Pacific Railway*, 2007 ABCA 294 at paras 18-19 (the latter decision aff'd Rooke A.C.J.'s decision in *Windsor v Canadian Pacific Railway*, 2006 ABQB 348, to which I will sometimes refer as well. I will distinguish them as *Windsor* (C.A.) and *Windsor* (Q.B.)).

[134] The importance of class definition is that it identifies the individuals entitled to notice, entitled to relief (if awarded) and bound by the judgment: *Dutton* at para 38; *Windsor* (C.A.) at para 18. "The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of the proposed class": *Windsor* (C.A.) at para 19.

[135] As with all requirements for certification, other than disclosing a cause of action, the plaintiff must adduce evidence to meet this requirement. This element cannot be satisfied by

pleadings or argument. While it is a "relatively low evidentiary standard," plaintiffs "have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified": *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at para 61.

B. Plaintiffs' Proposed Class

[136] The plaintiffs propose defining the class as "all persons (including corporations, partnerships and trusts) who subscribed for shares in [TIE] between 2002 and 2012" (first brief at para 70). The class would include 220 members, identified by reference to the inspector's report of May 6, 2013. There is an adequate evidentiary foundation for this class, based on the evidence (affidavits and questioning) of the proposed representative plaintiffs (including the inspector's report) and the plaintiffs' expert, Mr. D'Angelo.

[137] RBC fairly acknowledges that the proposed class definition may meet the low threshold criteria for an identifiable class. It raises a number of concerns about the class, which it acknowledges can be dealt with in subsequent proceedings if the other requirements for certification under section 5 of the *Class Proceedings Act* are satisfied.

[138] RBC's first concern is that some class members redeemed their investments in total. That can be addressed by either excluding them from the class definition or finding they have no damages. RBC is also concerned that some class members received proceeds and were therefore unjustly enriched to the detriment to others. In my view, that is not an unjust enrichment but only affects the calculation of their damages.

[139] RBC also raises the concern that some class members will be subject to a strong limitations defence, because of their involvement in the 1201 action. For reasons given when addressing the common issues, I find that there should be a subclass, as allowed in section 7 of the *Act.* It will include the definition given above, with the additional words "and who were plaintiffs in the 1201 action commenced on December 13, 2012." Thus, the members of the sub-class will be "all persons (including corporations, partnership and trusts) who subscribed for shares in TIE between 2002 and 2012 and who were plaintiffs in the 1201 action commenced on December 13, 2012."

XI. Common Issues

A. General Principles

[140] For the third requirement of certification, the plaintiffs must establish that "the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members" (section 5(1)(c)). As with other aspects of the certification test other than a cause of action, there must be evidence to show "some basis in fact" that the claims raise a common issue: *Pro-Sys* at para 99. In particular, there must be some basis in fact that the proposed common issue exists and can be answered in common across the entire class: *Todd v Bayer Inc*, 2025 ABKB 314 at para 36, citing *Batten v Boehringer Ingelheim (Canada) Ltd*, 2017 ONSC 6098 at para 14.

[141] As the section and the authorities state, the common question need not predominate over issues relating to individual class members although that is a factor to be considered in the "preferable procedure" inquiry. "Class proceedings," wrote Rooke A.C.J., "are not intended to solve all the efficiency problems encountered in complex litigation. . . . What they can do is

assist the parties and the Courts by shortening the process, even if only for hours or days over the course of a lawsuit": *Windsor* (Q.B.) at para 131. Similarly, in *T.L. v Alberta (Director of Child Welfare)*, 2006 ABQB 104 at para 133, Slatter J. (now J.A.) found that even though in the case before him the individual issues would substantially predominate over the common issues, and thus the overall benefits would be slight, "there is still some practical utility in deciding the common issues once."

[142] For an issue to be common, "[t]he underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim": *Dutton* at para 39. While common issues need not predominate over non-common issues, there must be "a substantial common ingredient to justify a class action": *Dutton* at para 39.

[143] A common issue need not result in the same answer for each member of the class, and success for one member does not necessarily have to lead to success for all: *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at paras 45-46. A question will be common "if it can serve to advance the resolution of every class member's claim": *Vivendi* at para 46.

[144] It is useful to formulate the common issues as precisely as possible at the certification stage, if the certification application is granted. However, issues regarding the precise formulation of common issues can be resolved after initial certification: *Warner* at para 34.

[145] Describing the common issues to be determined requires sufficient focus to ensure that the answer will have some meaning and serve the ends of fairness and efficiency: *Loveless v Ontario Lottery and Gaming Corporation*, 2011 ONSC 4744 at paras 63-65, 68; *Rumley v British Columbia*, 2001 SCC 69 at para 29. On the other hand, framing the issues too narrowly would risk constraining the fair determination of all the matters in dispute. I adopt the approach of Strathy J. (later C.J.O.) in *1250265 Ontario Inc v Pet Valu Canada Inc*, 2011 ONSC 1941, as the proper methodology for stating the issues according to the governing principles of class proceedings, at paras 3-4:

> My objective is to state common issues that fairly reflect the pleadings, the evidentiary record and the conclusions in my reasons [for certifying the action]. The common issues should be clear, neutrally-worded and fair to both parties. They should be phrased in such a way that their answers will advance the litigation.
>
> To serve these ends, the common issues should not be framed in overly broad terms. Nor should they be framed in overly narrow terms in a way that unreasonably constrains the ability of either party to prove or disprove the common issue.

(These remarks were made after the action had been certified and a subsequent hearing was held for submissions on how the common issues should be worded: see paras 1-2.)

B. Directed Common Issues

[146] I asked the parties to consider some of the common issues directed in *Kherani* at paras 221-74 because of the similarity of the issues between that case and this. The parties made their final submissions largely in line with the formulation of the common issues in *Kherani*, although I have not used their wording exactly.

[147] In the following, I direct four issues to be tried in this action, for the reasons given.

[148] **Common Issue 1: Did RBC engage in conduct between April 3, 2002 and December 13, 2012 that amounted to a knowing receipt of monies defrauded by Mr. Fowler from the class members including trust monies? In answering this question:**

a) Does it matter whether investor funds were received from an investor directly or through Olympia Trust?

b) If the funds were received from an investor directly, does it matter whether the cheque has a note from the investor with a reference to "trust," "trust account," "registered plan accounts," "RRSP," or "investment," or words to similar effect?

[149] As described above, there are three elements to the knowing receipt cause of action: the plaintiffs must be beneficiaries of a trust or a fiduciary relationship; the defendant (RBC) must receive property from the trustee or fiduciary in its personal capacity; and the defendant must have actual or constructive knowledge that property was transferred in breach of trust or fiduciary duty.

[150] There is evidence of some basis in fact to show that common issue 1 raises a common issue with respect to each of the three elements. Much of the evidence comes from the expert report of Mr. D'Angelo, on behalf of the plaintiffs, which may be summarized on relevant points as follows:

a) RBC knew that TIE was a mortgage investment corporation and thus would have operated as a real estate investment trust (at para 19).

b) The involvement of investors would be expected to create an awareness with a banker as to whether funds were being invested in trust for a specific purpose (at para 23).

c) Many investors' cheques bore notes that should have alerted RBC that Mr. Fowler was sourcing funds from investors to purchase preferred shares in TIE or other specific forms of investment (at para 45).

d) TIE also received funds from Olympia Trust acting as transfer agent for investors who invested in TIE through their RRSPs, which should have alerted RBC to the possibility that such deposits were subject to trust conditions (at para 46).

e) The RBC bank records show no evidence of principal and/or interest payments, raising the question of why substantial funds received by a mortgage investment corporation apparently generated no mortgage income (at para 47).

f) There was a pattern of Mr. Fowler sweeping proceeds of the TIE account either to himself or his wholly-owned corporation Southwell, by making deposits into the account and shortly afterwards having a bank draft prepared by RBC staff payable either to himself or Southwell (at para 50). Mr. Fowler also wrote cheques directly to himself and Southwell from the TIE account, representing self-dealing in addition to the bank drafts (at para 54).

[151] Much of this information is supplemented by the inspector's report with specific financial analysis based on records.

[152] The plaintiffs have not included evidence about fees charged by RBC. I infer from the evidence that RBC would have been paid its usual fees for providing banking services to a small business owner over the lengthy period of April 2003 through December 2012. As noted earlier, a line of authority holds that this is sufficient to constitute receipt of property in a personal capacity.

[153] I have added two subparagraphs to my description of common issue 1, to take into account factual issues that may or may not be determinative. How the issues will be tried to address these points may be the subject of further submissions from counsel before me. One possibility is that the common issues judge will use section 28 of the *Act* as a tool to determine some of these issues (a point to which I will return later). Another possibility is the use of one or more subclasses under section 7 of the *Act*.

[154] Subject to these procedural points, I conclude on the evidence that for resolution of each class member's claim it is necessary to determine the common issue of knowing receipt as I have defined it; and that, subject to the specific subparagraphs I have added, class members are similarly situated with respect to this issue.

[155] **Common Issue 2: Did RBC owe a duty of care to the class members with respect to (a) monies deposited into and/or paid out of the TIE RBC account between April 3, 2002 and December 13, 2012, and /or RBC's dealings with Mr. Fowler? If yes to either, was the duty of care breached?**

[156] These issues all focus on RBC's conduct and class members are similarly situated vis-à-vis RBC, in that they are not customers but had their monies deposited into an RBC account. To the extent that constructive knowledge is involved, the trial judge must complete the *Anns* analysis to decide whether a duty of care should be recognized.

[157] There is evidence of some basis in fact from the affidavits, including the inspector's report, that class members' monies were deposited into the TIE account directly or through Olympia Trust, as a result of the same fraudulent scheme. This evidence comes from the proposed representative plaintiffs (including the inspector's report as an exhibit) and the plaintiffs' expert, Mr. D'Angelo. For example, the inspector's report concludes that initial cash was provided by investors to either Olympia Trust for deposit into TIE's RBC Account or directly to the TIE RBC Account; the money was then moved out of the RBC Account primarily into the Southwell account (which was used by Mr. Fowler as a margin trading account; Southwell being entirely owned, controlled and operated by Mr. Fowler) and also to Mr. Fowler's personal accounts or to an outside source (paras 142, 111 and 112).

[158] There is also evidence of some basis in fact going to a common question of whether RBC owed a duty of care to TIE's investors and breached that duty. Primarily that comes from Mr. D'Angelo. Broadly speaking, his opinion can be summarized as follows:

a) As of October 2001, the Basel Committee on Banking Supervision established standards, including a "Know Your Client" ("KYC") policy that, among other things, was intended to reduce the likelihood of banks becoming a vehicle for fraud (supplemental expert report, paras 8 and 9).

b) RBC's job descriptions and financial review policies showed an expectation that full knowledge should be obtained of a customer's business cashflow and risks (para 16).

c) Based on its name, RBC knew that TIE was an investment mortgage corporation and its account was based on investments – but it knew nothing else about its business and made no inquiries (para 19).

d) RBC failed to take even the steps required for standard KYC due diligence, including inquiries to identify true ownership or economic interest, identification of third parties, the purpose of the account, its anticipated activity and the source of funds (para 22).

e) RBC was required, but failed, to undertake ongoing monitoring of the account. It failed to notice the unusual transactions brought before its customer service representatives by the fraudster in person (para 30).

f) Some investor cheques deposited to the TIE RBC account contained notes which should have alerted RBC to the fact that Mr. Fowler was sourcing funds from investors to purchase TIE preferred shares (para 45).

g) Deposits made by Olympia Trust acting as transfer agent for investors should have alerted RBC to the involvement of investors and the potential that such deposits were subject to trust conditions (para 13).

h) There was a pattern of Mr. Fowler sweeping proceeds of the TIE account either to himself or to Southwell, by making deposits into the account and shortly afterwards having a bank draft prepared by RBC staff payable either to himself or Southwell (para 50). Mr. Fowler also wrote cheques directly to himself and Southwell from the account, representing self dealing in addition to the bank drafts (para 54).

i) If RBC had done due diligence on account opening, likely they would have understood that TIE was raising money from investors through a mortgage investment corporation to invest in real estate (para 69).

[159] RBC's evidence, including the expert report of Sarah Joyce, disputes these conclusions. However, the evidence of the plaintiffs is sufficient to show some basis in fact for this common issue.

[160] It bears repeating that the trial judge will have to determine whether RBC had actual knowledge (including wilful blindness or recklessness) regarding fraudulent activity of Mr. Fowler and TIE; and if not, whether constructive knowledge on the facts of this case meets the second, or policy, arm of the *Anns* test.

[161] I conclude on the evidence that these questions of whether there was a duty of care and whether it was breached are necessary for resolution of each class member's claim; and that the class members are similarly situated with respect to these questions.

[162] **Common Issue 3: Are the claims of the plaintiffs in the 1201 action, or some of them, statute barred?** The parties agree that this should be a common issue, but it affects only the subclass.

[163] As I noted earlier, Mr. Edmunds and a number of other plaintiffs commenced action 1201 on December 13, 2012. The plaintiffs in that action comprise 35 investors who would fall within the definition of the class proposed in this case. The 1201 action was commenced on December 12, 2014, very close to the two year limitation period: this was two years less a day before this action was commenced.

[164] However, there is a reasonable issue about whether the 35 plaintiffs in the 1201 action (including Mr. Edmunds, a proposed representative plaintiff in this action) were aware *before* December 12, 2012 (two years before commencing this action) that the plaintiffs' injuries had occurred, that they were attributable to RBC's conduct and they warranted bringing a proceeding, within the meaning of section 3(1) of the *Limitations Act*. The statement of claim in the 1201 action and Mr. Edmunds' affidavit sworn December 11, 2012, confirmed that Mr. Edmunds was aware that the TIE investment was a Ponzi scheme and that TIE used RBC for its accounts.

[165] Thus, the common issues I identify are subject to there being a subclass of the 35 investors who commenced the 1201 action so that it may be determined whether RBC is entitled to immunity under the *Limitations Act* with respect to their claims.

[166] **Common Issue 4: Have the class members suffered loss or damages as a result of any of the conduct referred to above? If so, what is the appropriate measure or amount of such loss or damages?** RBC does not seriously dispute that loss or damage arising from liability in negligence, if proved, is a common issue. The evidence, to which I have already referred, shows that class members suffered a loss; they invested millions of dollars which can be traced from their payments through Olympia Trust or directly into the RBC account; and the money was then paid out to Mr. Fowler's solely-owned corporation Southwell Group Inc., to repay Mr. Fowler's credit card accounts, and to make funds available to Mr. Fowler personally (supplemental expert report of Mr. D'Angelo at paras 48-50, 53, 54, 62). More than $27 million dollars was invested by class members and was spent by Mr. Fowler, according to his directions, contrary to representations he and TIE made to obtain the funds; and there were no funds remaining that were accessible to the inspector (inspector's report at paras 12, 20, 22, 142, 159).

[167] Damages must be calculated individually for each class member because they invested different amounts, at different times, and some of them received part of their investments back, at different times. The common issues that the trial will need to determine include whether additional amounts may be compensable for a return on these investments, such as interest.

[168] The evidence satisfies me that all of the information necessary to make calculations is in the available records already examined by the inspector and experts. A modified litigation plan should address these matters in more detail. If necessary, these matters may be structured under section 28 of the *Act* which I will turn to shortly.

XII. Preferable Procedure

A. General Principles

[169] The fourth requirement for certification is that a class proceeding "be the preferable procedure for the fair and efficient resolution of the common issues" (section 5(1)(d)). As with the other statutory requirements for certification (other than the cause of action), the plaintiffs must show some basis in fact for establishing the preferability of class proceedings.

[170] Properly addressing the preferability requirement necessitates taking into consideration "all of the individual and common issues arising from the claims in the context of the factual matrix": *LC v Alberta*, 2017 ABCA 284 at para 32. The class action must be the preferable procedure for the resolution of the common issues in the context of the action as a whole: *AIC Limited v Fischer*, 2013 SCC 69 at para 21; *Hollick* at para 30.

[171] Section 5(2) states that in determining preferability of a class proceeding, the court may consider any matter relevant to that determination, but must consider at least five factors:

> (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
>
> (b) whether a significant number of the prospective class members 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.

I turn to those now.

B. Statutory Considerations

"Whether questions of fact or law common to prospective class members predominate over any questions affecting only individual prospective class members": section 5(2)(a).

[172] The common issues I have directed are whether RBC is liable to class members for the constructive trust of knowing receipt; whether RBC is liable in negligence to non-customers who invested in TIE; whether the claims of 35 of them who commenced the 1201 action in 2012 are time-barred; and what damages RBC must pay if liable. These issues heavily outweigh any others that may arise from the pleadings.

[173] RBC argues that there are numerous differences among proposed class members requiring individual proceedings. It identifies four of these differences, which I summarize with my comments as follows:

1. **Whether any proposed class member had direct contact with anyone at RBC, which would go to alleged fiduciary duties or actual knowledge of an express trust:** The plaintiffs have not alleged direct contact between any class member and RBC on matters relevant to this action, so there is no basis for concern that this will be relied upon. Of course, that is favourable to RBC's defences.
2. **Dates of investments made by and payments to any individual investors would impact whether each investor has a claim and if so, the net amount of the claim:** These are damages calculation issues,

which will be addressed in a litigation plan and, as necessary, by the trial judge. As noted above, these issues largely will be determined from the records already available and thus it is primarily the methodology that must be determined.

3. **The ways investor cheques were written out and how and by whom such cheques were cashed will substantiate or negate individual claims for conversion:** The cause of action for conversion has not been approved for certification.

4. **Dates each proposed class member (especially the plaintiffs in the 1201 action) knew or ought to have known of a claim against RBC is important to whether any claims are time barred:** RBC has not proposed a limitations defence as a common issue affecting all proposed class members. The plaintiffs and RBC agree that this is an appropriate common issue for a sub-class comprising of those who were plaintiffs in the 1201 action. It is possible some individual questioning (both pre-trial and at trial) may be required. However, the factual inquiry will be narrowly focused and the legal issues will be the same. Only 35 members of the general class are involved; it is not so significant as to militate against the benefits of a class proceeding.

[174] I consider also the possibility of factual issues affecting some but not all class members in determining the constructive trust claim of knowing receipt. That may reduce the ease with which common issue 1 can be tried, but it does not change the predominance of common issues over questions affecting only individual class members. Rather, it will require the court and the parties to find procedures within the scope of the *Act* to fairly and efficiently resolve the common issues.

[175] With respect to the knowing receipt, damages and limitation period issues, the *Act* allows the court to have individual issues determined before judges or by appointment of "one or more persons, including, without limitation, one or more independent experts" who conduct inquiries and report back to the court: section 28(1)(b). The court may give directions for procedures to be followed in conducting hearings and inquiries, and in doing so must choose "the least expensive and most expeditious method of determining the individual issues," including dispensing with procedural steps considered unnecessary: section 28(2) and (3).

[176] This flexibility is emphasized in *Bouchanskaia v Bayer Inc*, 2003 BCSC 1306 at paras 150-51; and an example of the type of procedures employed for expeditious resolution of individual issues is seen in *Lundy v VIA Rail Canada Inc*, 2016 ONSC 425, with an attached schedule entitled "Individual Issues Litigation Plan." The availability of such procedures addresses the preferable procedure concerns raised by RBC on the damages and limitations period issues.

"Whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions": section 5(2)(b).

[177] There is nothing to suggest that any members of the proposed class other than the plaintiffs are interested in controlling the prosecution of their own actions. This factor thus has little bearing on the preferable procedure.

"Whether the class proceeding would involve claims that are or have been the subject of any other proceedings": section 5(2)(c).

[178] There have been no other proceedings that would weigh against a class proceeding in this case. The 1201 action was commenced by 35 members of the proposed class, but was against Mr. Fowler and the companies through which he perpetrated his fraudulent activities. RBC was not a party.

"Whether other means of resolving the claims are less practical or less efficient": section 5(2)(d).

[179] The defendants have put forward no alternative means of resolving the claims sought to be certified. Preferability must be assessed in comparison with some other viable alternative. RBC has, quite properly from its perspective, focused on whether valid causes of action have been pleaded and questions of practicality and efficiency relating to the common issues.

"Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means": section 5(2)(e).

[180] RBC does not suggest that the plaintiffs' claims should not be certified in favour of some other proceedings – other than the possibility of investors each advancing their own claims in separate actions. Thus, it is a question of whether it is preferable to certify the proposed common issues or leave each of the proposed class members to their own, individual remedies. The latter, of course, obviously creates greater difficulties than a class proceeding structured to determine common issues.

[181] As I have indicated, there are common issues capable of being addressed in a class proceeding. To the extent there are individual issues, the procedures available under section 28 of the *Act* offer economy and practicability to the benefit of class members, RBC and the courts.

C. Any Matter Considered Relevant

[182] In addition to the required considerations listed in sections 5(2)(a) through (e), the court may consider any matter it considers relevant to determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. To assist in determining what considerations are relevant, regard must be had to the purpose of the "preferable procedure" inquiry, well set out by Martin J. in *Andriuk v Merrill Lynch Canada Inc*, 2013 ABQB 422 at para 149 as follows:

> The Court is required to take a purposive approach to the interpretation of these factors [as set out in sections 5(2)(a) through (e)], testing them against the objectives of the *CPA*. The essence of the preferable procedure inquiry is whether a class action represents a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims: *Hollick* at para 28. Furthermore, the Court must determine whether proceeding as a class action advances the policy objectives of access to justice, judicial economy, and behaviour modification: *Hollick* at para 27.

[183] An additional factor relating to preferability, where applicable, is whether the emphasis on proportional procedures in *Hryniak v Mauldin*, 2014 SCC 7, favours certification of all of the causes of action pleaded by the plaintiffs. *Hryniak* emphasized the need for a proper balance in litigation processes to ensure "simplified proportionate procedures for adjudication," at para 27.

[184] The five mandatory statutory factors cover the relevant matters regarding preferable procedures. Looking at the factors wholistically, I am satisfied that certifying the knowing receipt cause of action, negligence cause of action and, for a subclass, the limitation issue addresses the policy objectives. It would not be feasible for individual investors to sue a large, well-resourced institution like RBC on their own. A class action will be much more effective for the parties and the courts than individual actions, on the same legal issues. Finally, if the plaintiffs succeed, likely it will have a salutary effect on how large banks implement reasonable procedures to guard against fraudulent activities.

[185] The express considerations in the *Act* and the authorities guiding its purpose and interpretation persuade me that a class proceeding against RBC is the preferable procedure for the fair and efficient resolution of the common issues I have identified in this case.

XIII. Representative Plaintiff

[186] The final requirement for a certification order concerns the proposed personal representative. Pursuant to section 5(1)(e) of the *Act*, the court must be satisfied that there is a representative plaintiff who would fairly and adequately represent the interest of the class, has presented a workable litigation plan for advancing the litigation and notifying class members, and does not have a conflict of interest in the common issues. RBC argues that the proposed representative plaintiffs, Mr. Edmunds and Mr. Steciw, both fail to meet all three criteria.

[187] The authorities have added meaning to these requirements, emphasizing the importance of a representative's role in class proceedings. The principles are helpfully distilled from the cases in *Sullivan v Golden Intercapital (GIC) Investment Corp*, 2014 ABQB 212 at paras 43-62.

a) The function of a representative plaintiff is to direct the lawyer who conducts a class action. The process should be controlled by the client, not driven by a lawyer.

b) Thus, a representative plaintiff should not be a "passive figurehead," a "hollow puppet operated by a lawyer," or an "empty vessel controlled by a lawyer."

c) The representative plaintiff must have a basic knowledge of his or her role in the litigation, and demonstrate some general knowledge and understanding of the nature and form of class proceedings.

d) As elaborated by Slatter J. (now J.A.) in *T.L.* at para 123, "there are good reasons for requiring the self-appointed representative plaintiff to consult with other members of the class."

e) The proposed representative must satisfy the court that he or she will vigorously and capably prosecute the interests of the class.

f) On the other hand, the court may not require an ideal and sophisticated representative plaintiff with relevant skills, training or education – particularly as one may not be available from a particular class.

[188] RBC submits that Mr. Edmunds cannot adequately represent the class's interest, because (among other things) he has no knowledge or evidence about the experience of other investors

and their individual investment circumstances, such as how they made their investment (directly or through Olympia Trust) and to what extent other investors recovered some or all of their funds. Mr. Steciw, according to RBC, failed to adequately prepare for questioning on his affidavit, could not give information about how evidence was gathered, could not recall giving input into a litigation plan and had no information about other investors and their particular circumstances.

[189] I am not persuaded that the evidence shows these proposed representative plaintiffs are not adequate. Both of them have been involved in related litigation since December 2012, when the 1201 action was commenced and an inspector was appointed; they swore affidavits both in the 1201 action and in this action; they attended for questioning and cross-examination; and they gave undertaking responses. Mr. Edmunds deposed that since late 2012, he has led efforts by a group of investors to recover loss investment funds, including retaining and instructing counsel; and is willing and able to continue to do so for the sole purpose of prosecuting recovery efforts for shareholders. Mr. Steciw deposed to his continued involvement with Mr. Edmunds and counsel, and deposed that he had approved draft forms of litigation plan, long and short form notices and opt-out forms.

[190] The amount of knowledge of evidence and procedure in the action and of other class members required by representative plaintiffs is not extensive. As noted above, the representative must be willing and able to assume the required role and work for the benefit of the class as a whole; and seek and follow the advice of qualified counsel. The proposed representative plaintiffs in this case have been representing the interests of investors for many years and working with counsel throughout. I am satisfied that they could fairly and adequately represent the interests of the class, provided they have a valid cause of action.

[191] In rare cases a representative plaintiff may be someone who is not a member of the class. Section 2(4) of the *Act* allows the court to "certify a person who is not a member of the class as the representative plaintiff for the class proceeding . . . only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class." In this case, other class members would be available to act as a representative plaintiff, as confirmed by plaintiffs' counsel.

[192] The proposed representatives meet the definition of class members for the time being. However, they would be part of the subclass comprising 35 investors who commenced an action against the fraudsters in December 2012 and, at that time, were aware of the main elements of the fraud and RBC's role as the fraudsters' bank. For example, early proceedings in that action involved an application to freeze the TIE account at RBC, which was based on an affidavit in support by Mr. Edmunds. In addition to being involved in the 1201 action, Mr. Steciw received payments related to his investments through the account at RBC. Thus, Mr. Edmunds and Mr. Steciw are in a different position regarding limitations defences than most of the class members.

[193] However, in my view there is no reason to disqualify the proposed representatives at this stage. They have satisfied me that they meet the test of fairly and adequately representing the interests of the class. The existence of a limitations argument does not mean, until that is determined, they have no cause of action. If there is a pre-trial application on which RBC succeeds in striking out their claim, there will be enough time to consider whether they should be replaced as representatives. It would be premature to do so now, and given their history of involvement, potentially prejudicial to class members.

[194] There was no argument that Mr. Edmunds has a conflict of interest with other class members in respect of common issues. RBC argues that Mr. Steciw has a conflict, in that he received $240,000 from funds sourced from investments of other class members. This is not, however, a conflict of interest. The common issues include a determination of how to calculate damages, which presumes that class members who have received partial reimbursement will be entitled to recover only for unreimbursed investments.

[195] Finally, to be eligible as a representative, the proposed person must have "produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding": section 5(1)(e)(ii). RBC argues that the plan proposed by the plaintiffs is inadequate and unworkable when considered in light of the steps still to be completed.

[196] I agree with RBC that the proposed litigation plan is inadequate. Among other things, it must be modified and expanded to address the common issues as I have determined them. Also, RBC advises that it wishes to question other class members, which will require an application for permission and, if granted, directions on timing and procedure: *Act*, s 18.

[197] Inadequacy of a litigation plan is not a reason to disqualify a proposed representative or dismiss a certification application. The remedy is to order the representative to provide a revised plan: *Warner* at para 129.

[198] Accordingly, I direct that the parties prepare and exchange litigation plans. If they cannot agree on a plan within 30 days of these reasons, they are to schedule a case management conference at which determination of a litigation plan will be on the agenda.

XIV. Conclusions and Incidental Matters

[199] I therefore conclude that the criteria for certification have been satisfied and accordingly I grant an order certifying this proceeding as a class proceeding. The main class will be defined as:

> All persons (including corporations, partnerships and trusts) who subscribed for shares in TIE between 2002 and 2012.

There will be a subclass defined as follows:

> All persons (including corporations, partnerships and trusts) who subscribed for shares in TIE between 2002 and 2012, and who are plaintiffs in the 1201 action commenced on December 13, 2012.

[200] The common issues will be in the form of questions set out earlier in these reasons, reproduced as follows:

1. Did RBC engage in conduct between April 3, 2002 and December 13, 2012 that amounted to a knowing receipt of monies defrauded by Mr. Fowler from the class members including trust monies? In answering this question:
    a) Does it matter whether investor funds were received from an investor directly or through Olympia Trust?
    b) If the funds were received from an investor directly, does it matter whether the cheque has a note from the investor with a reference to "trust," "trust account," "registered plan

accounts," "RRSP," or "investment," or words to similar effect?

2. Did RBC owe a duty of care to the class members with respect to (a) monies deposited into and/or paid out of the TIE RBC Account between April 3, 2002 and December 13, 2012, and /or RBC's dealings with Mr. Fowler? If yes to either, was the duty of care breached?

3. Are the claims of the plaintiffs in the 1201 action, or some of them, statute barred?

4. Have the class members suffered loss or damages as a result of any of the conduct referred to above? If so, what is the appropriate measure or amount of such loss or damages?

[201] The plaintiffs and defendant may make further submissions regarding matters rising from these reasons, including class definitions and phrasing of common issues. They may also schedule a further appearance for other matters arising from this decision, including any disputes regarding costs.

Heard on the January 15,16, 2025, and April 1, 2025
Dated at the City of Calgary, Alberta this 17th day of December, 2025.

G.H. Poelman
J.C.K.B.A.

Appearances:

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