Ontario Court of Appeal opens door to novel duty of care for fund managers

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In a recent decision (*Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337), the Ontario Court of Appeal expanded the scope of negligence claims for pure economic loss and made room for a potential new common law duty of care for investment fund managers.

Background and decision

Wright, a proposed class plaintiff, launched a claim against Horizons ETFS Management (Canada) Inc. (Horizons) for losses as a result of the collapse in value of one of Horizons' exchange-traded funds. The losses were due to volatility in the S&P 500 VIX Short Term Futures Index (the S&P 500 VIX).

Horizons created and managed a proprietary derivatives-based exchange-traded fund, known as the Horizons BetaPro S&P 500 VIX Short-Term Futures Daily Inverse ETF (the Fund). The Fund was a high-risk, speculative investment designed to provide daily investment results that attempted to correspond to the inverse of the daily performance of the S&P 500 VIX. The prospectus cautioned investors that the Fund was "not conventional" and was a "speculative investment tool[s]."

Wright, on behalf of the proposed Class, made two claims:

1. Horizons was negligent in designing and offering a financial product that was not adequately tested before launching. He alleged that the Fund was excessively risky, complex and doomed to fail. Wright also took the position that Horizons failed to explain the nature and extent of the risks of investing in the Fund; and
2. Horizons made misrepresentations in its prospectus, within the meaning of s. 130 of Ontario's *Securities Act*. Wright alleged that the prospectus failed to disclose the real risks attached to the Fund.

Justice Perell of the Ontario Superior Court of Justice denied Wright's motion for certification of a class action on behalf of investors in the Fund and dismissed the action. Justice Perell held that it was obvious there was no reasonable cause of action in negligence against Horizons. Specifically he found that, while the requisite degree of proximity existed between ETF investors and fund developers, the limited undertaking

assumed by the fund developer and manager negated a duty of care. He also held that Wright and the class members did not have a cause of action pursuant to s. 130 of the *Securities Act*. See our previous post for a summary of the Ontario Superior Court of Justice decision.

Thorburn J.A., writing for a majority of the Court of Appeal, allowed the appeal in part on the basis that the statement of claim disclosed a reasonable cause of action in negligence, and remanded the case back to Justice Perell for a decision on the remaining certification factors. The Court further held that there was no reasonable cause of action under s. 130 of the *Securities Act* as the claim was pleaded, but allowed Wright leave to amend the statement of claim to assert that he was the holder of a Creation Unit of the Fund and was entitled to a remedy under s. 130.

Negligence claim for economic loss

In order to determine whether Wright's Statement of Claim disclosed a reasonable cause of action in negligence, Thorburn J.A. first assessed whether the claim fit within or was analogous to a recognized duty of care. Wright made two arguments in this respect: either the claim fit within the established category of cases for pure economic loss resulting from the negligent supply of shoddy goods; or the claim fit within the category of cases for negligent performance of a service.

While the Court believed the action did not properly fall within the category of supply of shoddy goods, the present case was analogous to the claim in *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399. In that case, Strathy J. (as he then was) held that there was a reasonable cause of action against the creators and promoters of a tax avoidance program that the participants alleged was "negligently designed and … did not work" when they were told that it would.

Based on *Cannon*, the Court found that there was a relationship of proximity between Horizons and the proposed class, because Horizons aimed to create and sell a Fund that would be suitable for some investors and, on the pleading as drafted, it was not. Read generously, the pleading provided that there was a lack of information on the nature and extent of the risks and possible rewards in order for investors to make an informed decision.

The Court went one step further and considered that, in the alternative, a novel duty of care for investment fund managers existed under the framework established by the Supreme Court of Canada's in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.

Like Justice Perell, the Court of Appeal found that there was a legally proximate relationship between the Class and Horizons, but unlike Perell J., the Court found that the scope of Horizons' undertaking was broad. As a fund manager, it undertook to its investors to act honestly, in good faith and in the best interests of the investment fund. It also took on responsibility to exercise care and diligence as a prudent person would in the circumstances, as provided for in s. 116 of Ontario's *Securities Act*. Taking the pleading as true, the Fund managers arguably failed to meet their undertaking to investors and the risk of injury was reasonably foreseeable.

In the Court's view, it was not plain and obvious that policy considerations should negate the alleged *prima facie* duty of care, in part because no risk of loss could be addressed through contract since no vendor-purchaser relationship was involved.

Claim under s. 130 of the *Securities Act*

Wright framed his claim under s. 130 of Ontario's Securities Act(which provides a statutory cause of action for misrepresentations in a prospectus for funds distributed on the primary market) rather than under s. 138.3, which provides a statutory cause of action for misrepresentations for purchasers who acquire securities on the secondary market. Thorburn J.A. noted that there are distinct advantages to pursuing a claim under s. 130 rather than s. 138.3 of the Securities Act. Section 138.3 provides fewer remedies, includes a damages cap of the greater of five per cent of the issuer's market capitalization or $1 million for a responsible issuer, and a loser pays costs rule. In addition, a plaintiff who brings a claim pursuant to s. 138.3 requires leave of the court to commence an action, which is not required for a claim under s. 130.

The Court of Appeal disagreed with Justice Perell's conclusion that all units held by the Class should be treated as secondary market purchases, such that only s. 138.3 would apply.

Part of the Court's reasoning stemmed from the fact that an investor who purchases an ETF unit over an exchange does not know when purchasing the unit whether they will receive a Creation Unit (*i.e.* a brand-new unit on the primary market) or an ETF unit that has been in circulation previously on a stock exchange in the secondary market. In other words, the Class members would not have known whether a purchase involved a primary or a secondary market sale. This should not be a reason to disentitle Class members from remedies under s. 130 of the Securities Act.

Nevertheless, the Court accepted that Wright did not plead the material facts necessary to establish that he had a cause of action under s. 130, as he did not plead that he purchased one or more Creation Units. Thorburn J.A. granted leave to amend the Statement of Claim in this regard.

Takeaway

The Ontario Court of Appeal's decision does not speak to the merits of the claim and does not certify the Class. Wright will still need to satisfy the remaining certification criteria in order to have the action certified as a class action and to prove his claims at trial.

Nevertheless, practically speaking, the Court opening the door to recognition of a novel duty of care as between investment fund managers and investors expands the categories of potential available claims for pure economic loss and could have a wide-ranging impact on the entire investment fund industry.

To the extent such a duty of care exists between fund managers and investors, it raises questions about the nature of the relationships between manufacturers of investment products, the dealers who sell those products and investors. In light of the Court's decision, fund managers will be wise to scrutinize their current and proposed products to

ensure they understand how they will perform under a broad range of conditions and to identify the appropriate market for such products. Managers will also want to carefully review their disclosure documents to ensure they clearly identify the types of investors for whom a product is suitable (and not suitable), as well as the risks associated with such investment.

It will be interesting to see whether this decision emboldens disgruntled investors to bring more securities class actions framed to fit within this novel duty of care.

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