Alberta Court of Appeal affirms key decision regarding investor loss class actions

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On behalf of Richardson Wealth, BLG successfully defeated certification of a proposed investor loss class action before the Alberta Court of Appeal.

Background

The Alberta Court of Queen's Bench had previously declined to certify the proposed class proceeding, which involved a claim asserting that an investment advisor made unsuitable recommendations (largely in energy securities, some of which were private companies) and that the dealer failed to adequately supervise him. The claim alleged that the proposed class members' individual investment goals were disregarded, and that the advisors engaged in an unsuitable, one-size fits all investment strategy for the class members.

While the parties agreed that a number of issues in the action were common issues as defined by the *Class Proceedings Act*, SA 2003, c. C-16.5, there remained a number of issues, namely, the standard of care owed to clients by investment advisors and breach of that standard that fundamentally required individual inquiries and ultimately, individual trials, to determine both liability and damages.

The Chambers judge held that there was no identifiable class of two or more persons within the meaning of s 5(1)(d) of the *Class Proceedings Act* and that a class action was not the preferable procedure under s 5(1)(d) of the same. A number of common issues determined by the Court were determined to be elementary, such that their resolution would not materially advance the action. The plaintiffs appealed the decision.

The Court of Appeal's decision

In a unanimous decision, the Alberta Court of Appeal dismissed the appeal and again refused to certify the action as a class proceeding.

The Court of Appeal confirmed that there is an important distinction between the duty of care and standard of care in investor negligence cases, and the determination of the requisite standard of care may not be appropriately resolved as a common issue. In this instance, whether the standard of care was met by an advisor to discharge the duty owed to individual clients is a factual question that must be answered in every class member's claim. The answer for one class member will not advance the resolution of the other class members' claims where the relevant factual circumstances among class members are too variable.

Interestingly, the Court of Appeal found two disputed issues the Chambers judge deemed individual – whether the dealer breached industry standards or its own code of conduct, policies, and procedures in the way it supervised management and its advisors – to be common issues.

Nonetheless, the Court of Appeal concluded:

> "Even with the inclusion of two additional common issues, the questions that must be determined on a case-by-case basis remain overwhelming. It is evident that individual trials will be required to determine:

- whether fiduciary duties were owed;
- whether there was unauthorized or excessive trading in class member accounts;
- what standard of care the [advisors, supervisors, and dealer] were expected to meet in discharging the duties owed to individual class members;
- whether any of the respondents fell below the standard of care expected of them in the circumstances;
- and whether, in doing so, they caused the class members to suffer damages and if so, to what extent."

While the Court of Appeal did find the Chambers judge made an error in law in finding that there was not an identifiable class under the *Class Proceedings Act*, the above findings were determinative in the Court refusing certification and dismissing the appeal.

Why this decision matters

This decision affirms the principle that while an investment advisor must provide every client with suitable advice, and industry rules and regulations may be informative, suitability and the standard of care to be met by advisors and dealers is an individual issue dependent on each client's particular circumstances, and likely cannot be determined on a class-wide basis.

This decision has broad implications for securities dealers, as there had been conflicting Motions Court decisions on certification of investor loss class actions. This decision also provides important guidance on the preferable procedure consideration in class proceedings. Even where a number of issues are common among proposed class members, courts will be careful to assess whether the individual issues remain the most critical aspect of a particular action.

By

David Di Paolo, Loni da Costa, Curtis Fawcett

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blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749