



Lawrence E. Thacker  
416-865-3097  
lthacker@litigate.com

August 6, 2015

## Novel action, settled law

Any action described by the Judge as novelty on steroids provides an opportunity for the Court to balance the opportunity to develop new law, with the importance of rigorously applying existing law. This duality arose in a motion in the class action *Fisher v IG Investment Management Ltd* (2015 ONSC 3525), recently decided by the Ontario Superior Court.

Any action described by the Judge as "novelty on steroids" provides an opportunity for the Court to balance the opportunity to develop new law, with the importance of rigorously applying existing law. This duality arose in a motion in the class action *Fisher v IG Investment Management Ltd* (2015 ONSC 3525), recently decided by the Ontario Superior Court.

The motion was brought by the plaintiffs in a post-certification class action proceeding. The defendants are managers of mutual funds, who are being sued for negligence and breach of fiduciary duty for allegedly "permitting" market timing to occur in mutual funds they managed. Market timing – which is not *per se* illegal – is an arbitrage on the fact that the price of a mutual fund is calculated only once per day, while the true value of its assets fluctuates during the trading day. As a result, the price of a fund does not always reflect its true value. The market timing investor captures an arbitrage profit, which in turn can adversely affect long-term investors.

The Class Members are long-term investors who alleged they suffered losses as a result of market timing. The novel aspect of that action is that it has yet to be determined whether mutual fund managers have a duty of care to prevent market timing, and if they do, what damages would flow. The plaintiffs' motion against AIC Limited and CI Mutual Funds sought to compel production of further documents, including mutual fund trading data, which they argued was necessary to determine aggregate damages.

The plaintiffs called an economics professor, Dr. Eric Zitzewitz, to give expert evidence on whether the information sought to be produced was relevant. In dismissing the motion, Perell J. disagreed with the opinion of Dr. Zitzewitz, because (a) it was outside his area of expertise, (b) evidence opining on the relevance of productions to an issue of domestic law is a legal question, and is therefore not admissible, and (c) Dr. Zitzewitz's substantive opinion and conclusions were not correct.

Perell J. found that the information sought to be compelled was

not relevant to any certified common issue. None of the liability issues arising from the claims for negligence and breach of fiduciary duty would be proved or disproved by the productions sought by the plaintiffs. The information was therefore outside the scope of the certified common issues that define what is relevant.

Despite the novelty of the class action, in dismissing the motion Perell J. rigorously applied the basic test of relevance to the certified common issues to circumscribe the scope of documentary production.

\*Research contributed by Kate Costin, 2015 summer student