THE ISSUE OF CREDIBILITY IN INVESTOR LOSS LITIGATION

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Claims asserted by investors against their financial advisors and dealers seeking to recover investment losses frequently require an adjudication of the credibility of the parties. Given the personal nature of the relationships between retail investors and their financial advisors, the applicable regulatory and common law duties, and the intersect of consumer rights and commercial practices, it is not surprising that the issue of credibility permeates many of the issues central to investor loss claims. This study of 73 court cases across Canada in the period 2000-2011 analyzes issues arising in investor loss proceedings where credibility factors have come into play, and makes recommendations regarding dispute resolution of investor loss claims in light of the conclusions of the study.

Les actions intentées par les investisseurs à l'encontre de leurs conseillers financiers et leurs courtiers en valeurs mobilières afin de recouvrer des pertes suite à de mauvais placements exigent souvent que l'on procède à une évaluation de la crédibilité des parties en litige. Étant donné la nature personnelle de la relation entre les investisseurs individuels et leurs conseillers financiers, les obligations découlant des règlements pertinents et de la common law, ainsi que la conjugaison des droits des consommateurs et des pratiques commerciales, il n'est pas surprenant que la question de crédibilité soit omniprésente dans le cadre de nombreuses questions qui sont au cœur des réclamations des investisseurs en recouvrement de leur pertes. La présente étude de 73 décisions judiciaires rendues un peu partout au Canada au cours des années 2000 à 2011 analyse, dans un premier temps, les questions qui surviennent lors des procédures relatives aux pertes subies par les investisseurs dans lesquelles des facteurs liés à la crédibilité entrent en jeu. Dans un deuxième temps, et à la lumière des conclusions tirées par l'étude, des recommandations sont proposées quant au règlement des différends dans le cadre de réclamations pour pertes encourues par les investisseurs.

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1. Introduction

This paper focuses on the extent and importance of the issue of the credibility of parties and witnesses in the adjudication of investor loss claims.[1] The study reviewed 73 court decisions across Canada made in the period 2000 through 2011. Of these, 54 contain credibility findings by the trial judge that had an impact on a range of issues raised in the litigation.[2] Arguably, in many of these cases, the credibility findings were determinative of the result of the case.

Investor loss litigation tends to be fact-driven, and factors such as the duration of the relationship between investor client and sales representative/financial advisor, the number of transactions conducted in the various investment accounts at issue, and the extent of communications between the parties may result in lengthy and expensive trials. Given the costs of litigation and the commensurate risks involved (including not only losing the case but being subject to an adverse award of costs), different initiatives and measures have been introduced to seek resolution of these disputes without a trial of the issues. Within the judicial system, this has included promotion of a resolution through settlement at mandatory mediations, pre-trials and settlement conferences.

Outside of the judicial system, the Investment Industry Regulatory Organization of Canada (IIROC) Arbitration program, available to investor clients of IIROC member firms, offers arbitration for claims up to a $500,000 monetary limit, with retired judges and experienced counsel serving as arbitrators.

As well, securities regulators have compelled their member dealers to offer to their clients the services of the Ombudsman for Banking Services and Investments (OBSI) for claims of not more than $350,000. The OBSI,

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1 This study was initiated in 2002, with the thought that a review of investor loss court decisions would reveal both the frequency of credibility issues in these proceedings and that the majority of credibility determinations would favour the investor and not the sales representative/advisor. The initial research was conducted by Ms Ali and, while confirming the first thought, showed the second to be incorrect. Our view at that time was that some of the cases we were looking at were too dated and that there was an insufficient database of more recent cases. In 2008 Ms Bobkin revisited the study and added in a number of more recent decisions, in addition to researching and writing on the issue of credibility generally. Finally, in 2011, analyzing further cases from Mr Wiesenfeld's broker/dealer legal reference case law database published by Carswell, we finalized the study, with the conclusions as set out in the paper.

2 Listed in Schedule "A" are those cases with credibility issues and listed in Schedule "B" are those cases that did not contain credibility issues.

on receipt of a client application, conducts an investigation and makes a settlement recommendation, which both parties are free to accept or reject. A rejection of an OBSI recommendation by the dealer can result in the OBSI publicizing the dealer's rejection, to the detriment of the dealer's reputation. In assessing investor loss claims, the OBSI of necessity must make credibility determinations, as credibility issues are frequently at play in this type of dispute (one of the conclusions of this study). The OBSI, which essentially performs an adjudicative function, does not have sufficient qualifications and expertise to deal with what the Supreme Court of Canada has characterized as "a notoriously difficult problem."[3]

Our conclusion is that assessing credibility in investor loss claims and resulting litigation or alternative dispute resolution mechanisms is an important and difficult process requiring judicial or experienced securities litigation counsel expertise, whether in the context of litigation (involving pleadings setting out the alleged material facts and allegations, discovery of relevant documents and parties, and a trial of the issues), or in the context of a mediation or arbitration or other form of alternative dispute resolution.

2. The Study

We were not able to locate any database or record of the total number of investor loss cases or other cases where credibility of the sales representative or dealer personnel was pitted against the credibility of investor clients, so as to gain a fuller appreciation as to whether the 73 cases reviewed for this study represented a significant proportion of all such cases during the relevant time period. The study did not include an indeterminate number of cases decided in Quebec where the decisions were rendered in French. Our own case compilation gathered from counsel and dealers across Canada and various legal reports indicates 37 additional decisions during the period 2000 through 2011 which were either investor loss cases or involved investor loss issues, but which were not reviewed for the purposes of this study. Nevertheless, the cases reviewed for the purposes of this study appear to represent a significant proportion of cases decided during the relevant time period.

The decided cases represent only a small subset of complaints and litigation proceedings commenced by investor clients against their dealers and sales representatives seeking compensation for investment losses. It is well known that greater than ninety per cent of commercial litigation does not conclude by way of an adjudicated decision, with most such cases settling prior to or during trial and some being abandoned without any

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3 *R v Marquard,* [1993] 4 SCR 223.

formal conclusion at all. Settlements occur for many reasons, including the parties' views of the merits in respect of issues such as their respective credibility and their ability to prove or rebut the allegations set out in the pleadings.

3. Credibility Generally

Credibility has many definitions. In its common usage it means that a person is believable, plausible or trustworthy. However, in the legal decision-making process it takes on a different meaning. Barry Morrison and Warren Comeau say the following about the varying meanings:

> In common parlance, credibility means truthfulness. The law however, dictates that it means something more. The law sees credibility as including reliability. Credibility includes truthfulness as well as demonstrated powers of observation, memory and accuracy in recounting what happened.[4]

Other commentators note that credibility is less about truthfulness and more about accuracy, and that there are notions of credit and credibility tied up in legal decisions.[5]

In litigation, decisions about credibility are made by judges and juries. In Canada, commercial cases are generally tried by a judge without a jury. Numerous judges and scholars have stressed the special duty of the "trier of fact" (that is, the judge) to evaluate credibility on a level beyond general assessments. The consensus appears to be that assessing credibility is an important, difficult and fallible process which ought to be approached with a great deal of care.

Anderson J of the Ontario High Court commented upon the difficulty of this process, stating the following:

> A trial judge is seldom more conscious of his responsibilities and his frailties than when it is necessary to make findings of fact upon conflicting testimony and when the conflict must be resolved largely upon conclusions as to credibility. The judge is aware that such findings will in most cases be final. The judge is likewise aware that he has no special insight, nor any supernatural power, such as to enable him, unerringly, to discover truth and to detect falsehood. If he errs, it is entirely likely that one or more of the participants in the trial will know that he has done so and will be understandably dismayed. None of these considerations, forbidding though they are,

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4 Barry R Morrison and Warren Comeau, "Judging Credibility of Witnesses" (2002) 25 Advocates' Q 411 at 415.

5 Judge Gerald TG Seniuk, "Judicial Fact-Finding and a Theory of Credit" (1992) 56 Sask L Rev 79 at 96.

> can relieve the trial judge of *the responsibility imposed by the nature of the office*. He must proceed with care to use to the best possible effect such skills as he has and the experience he has had, and to express his conclusions accordingly.[6]

What Anderson J expressed is mirrored in other decisions, as well as commentary on the issue of credibility. A judge, by nature of the job, has a particular responsibility in making credibility assessments. The same is true for a jury which is appointed to decide a case. This is the reason why the Supreme Court of Canada has ruled that expert witnesses should not testify on issues of credibility. As McLachlin J stated in *R v Marquard*, "[T]he expert who testifies on credibility is not sworn to the heavy duty of a judge or juror."[7] The overriding concern of courts is that persons making assessments of credibility have undertaken a particular duty with regard to making such assessments and also have had an adequate opportunity to observe the testimony of individuals they are assessing.

Appellate level courts are reluctant to vary a finding of credibility made by a trial judge, respecting the sanctity of the decision. In the 1934 Supreme Court of Canada decision in *Betcherman v EA Pierce & Company*, Lamont J stated the following regarding the role of the appellate judge in reviewing assessments of credibility of the trial judge:

> In whatever language the rule has been stated in the many judgments in which it has been discussed, the judgments all agree that the trial Judge, who has seen the witnesses and heard their testimony, and observed their demeanour in the witness-box, is in a much better position than an Appellate Court Judge to pass upon the credibility of those witnesses. Therefore unless it appears that the trial Judge has misunderstood the evidence or overlooked the weight and importance of facts either undisputed or indubitably established by documents or otherwise, his findings of facts based upon the credibility of the witnesses should not be set aside.[8]

In the case of *Stein v "Kathy K"*,[9] the Supreme Court of Canada overturned the decision of the Federal Court of Appeal, which had reversed the trial judge's decision on a different assessment of credibility. Ritchie J, speaking for the Court, stated that in cases where credibility is at stake, the appellate court is not in a position to evaluate the evidence on a balance of probabilities because it did not have the opportunity to observe the witness directly.[10]

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6 *Paquette v Chubb* (1986) Carswell Ont 2268 at paras 9-10 (HC) [emphasis added].

7 *Supra* note 3 at para 49.

8 [1934] 2 DLR 449 at 453.

9 [1976] 2 SCR 802.

10 *Ibid.*

4. Credibility in Investor Loss Litigation

Credibility factors permeate many of the issues central to investor loss proceedings. This is not surprising given that the factual context of the dispute involves the profiles of the investor client and the sales representative/advisor, the nature of their relationship over a period of time, the interactions and communications between them, their conduct generally, and the resulting duties and responsibilities each to the other.

When an investor suffers losses in his or her investments, whether capital losses or opportunity losses, and seeks compensation from his investment advisor/salesperson and dealer, proof of that claim requires information to create an accurate picture of the relationship and resulting duties between the parties, and to assist in the determination of the allegations of negligence or other wrongdoing causing the loss and the resulting damages. This is true whether the claim is based on causes of action as diverse as breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, conversion or fraud. It also applies whether the conduct at issue is investment advice or lack thereof, giving rise to issues respecting the securities transactions themselves, trade execution (for example "I instructed a purchase, the securities instead were sold"), lack of authority to conduct the trades, and so on.

Resolution of these issues involves assessment of information, without which one can only form conclusions based on allegations, assumptions and biases. Information that has a foundation, that has integrity, is said to be credible. Information comes in many forms, for example, in electronic, computer, telephone or clerical records, tape recordings of conversations, oral recollections, notes and other written documents.

Where the integrity of the information provided by parties and non-party witnesses in litigation is important to the determination of the matter, then a credibility issue arises and a credibility determination is required. Usually this occurs in situations where the recollection of one person contradicts that of another, or contradicts documentary evidence of one sort or another. Credibility determinations factor into all aspects of litigation between investor clients and their dealers and sales representatives, including the profiles of the parties, suitability of transactions, provision of investment advice, client instruction, status of the investment account, and account documentation.

For example, in an investor loss case where the client alleges losses arising from unsuitable trades in securities, and the investment objectives and risk tolerance of the client is in dispute, the investment advisor may

testify at trial that the actual objectives of the client were far more risk-oriented than as set out in a "Know Your Client Form" filled out and signed by the client at the time of the account opening, or as testified to by the client. The "trier of fact" must then make a credibility determination regarding the investment advisor's evidence in order to analyze the suitability issue. That issue, and its determination, may be of paramount importance to the ultimate conclusion of the action.

In addition to litigation proceedings between investor clients and their dealers and sales representatives for investment losses, whether suffered in their accounts at the dealer or through off-book transactions based on the alleged advice or solicitation of the sales representative, credibility issues relating to the conduct of client accounts and their investments also sometimes arise in litigation between dealers and their sales representatives. For example, in *King v Merrill Lynch Canada Inc*,[11] the trial judge dismissed a wrongful dismissal action brought by two sales representatives against their former dealer on the basis that on at least some occasions the sales representatives had made discretionary trades in clients' accounts, and therefore the dealer had just cause to terminate their employment. In coming to this conclusion, the trial judge made credibility findings adverse to the two sales representatives and their assistant and in favour of two dealer management/compliance personnel. At trial, twelve of the investor clients credibly testified at the instance of the dealer that they did not receive, nor did they expect to receive, calls from the sales representatives regarding the trades at issue.

5. The Profiles of the Parties

A key issue in investor loss cases is the investor profile of the client. Securities regulatory requirements mandate that a dealer and its sales representative/advisor fulfill "know your client" and suitability obligations, to ensure that the investments of the client and the conduct of the investment account meet the client's investment objectives and risk tolerance. A client's ability to understand investment advice and to provide considered instructions regarding the purchase and sale of securities depends on the level of investment knowledge and experience and, to a lesser extent, the client's education and business experience. In claims asserted by investors, it is common to find a description of their investor profile that would lead to a conclusion that the investor was vulnerable and reliant, and without the financial means and intellectual acumen to be a real and driving force behind the decision making that led to the trades at issue. On the other hand, in pleadings delivered by dealers and their sales

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11 [2005] OJ No 5028 (QL) (Sup Ct) [*King*].

representatives/advisors in defence to investor loss claims it is common to find an entirely different investor profile of the client, as a person with considerable investment and business knowledge and experience, substantial financial means, and a risk-oriented and decisive personality, with the conclusion that the client was a sophisticated investor.

For example, in *Davis v Orion Securities Inc*,[12] a 2006 Ontario decision, an investor client with a history of high-risk short-term speculative investments through a number of dealers using the same sales representative claimed against the final dealer for losses suffered during the period September 27, 2000 to September 30, 2001 (after a previous period of large gains at other dealers), alleging the investments in issue were not suitable for him and therefore the dealer was negligent. The client was in his early 40s, employed as a technologist, with $59,000 income from employment and net worth stated as $200,000 in his Know Your Client Form. The client's experience in investments and securities was almost entirely through the sales representative during nine years at various dealers prior to the dealer defendant. The trial judge tested the credibility of the evidence of the client and the sales representative, which diverged markedly on issues such as the client's investor profile and the dynamic that existed between the two of them, by looking at their business relationship since 1991 at the prior dealers. The trial judge found from the evidence, including prior dealer account documentation and the trading in the client's accounts through those dealers, that the client was an experienced risk oriented investor with the objective of high-risk short-term speculative investments. The trial judge found that the sales representative acted honestly and in good faith and made credibility findings that resulted in his disregarding much of the client's evidence. The client's claim failed in its entirety, with the trial judge's adverse credibility findings against the client being a determinative factor in the result.

In *Smith v Scotia Capital Inc*,[13] another 2006 decision of the Ontario Superior Court, the trial judge found the dealer liable in negligence to the investor client for specific unsuitable transactions in his various accounts during the period mid-1998 through the spring of 2002, awarding damages based on the capital losses arising from the subject transactions, plus compensation for loss of opportunity. At the time of the opening of his accounts at the dealer in 1998, the client was 52 years old and employed as an elementary public school teacher. The client had very limited investment experience and his assets were limited to the ownership of his residence, a small registered retirement account, and insurance and death

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12 [2006] OJ.No 3198 (QL) (Sup Ct).

13 [2006] OJ No 5801 (QL) (Sup Ct).

benefits received on his spouse's death. The client retired in January 2001 and commuted his pension. The trial judge's liability analysis is based on an objective view of the client's investor and risk profile (imminent and post-retirement, limited investment experience, lack of understanding of risk) and the client's reliance on the sales representative's investment advice, together with a limited reliance on certain aspects of the account documentation (parts of which were found to be inaccurate and, as well, not understood by the client). The trial judge made credibility findings generally in favour of the client and against the sales representative, who was not a party to the action. The trial judge was critical of the sales representative's conduct, as he had only one face to face meeting with the client, with all other communications being by telephone. The sales representative's recollection of the meeting was poor, in that he relied on his standard practices in providing explanations to the investor client regarding matters such as risk and completion of the New Client Application Forms. The trial judge rejected the advisor's standard practices testimony in favour of the client's specific recollection on these issues.

6. Suitability

The issue of whether specific transactions conducted in a client's investment account, and the portfolio of investments in the account, were suitable for the investor client is common in investor loss litigation. Suitability is analyzed through the lens of the investor profile of the client, including investment knowledge and experience, appetite for risk and tolerance of loss, financial status, and the degree to which the client sought, obtained, relied or rejected investment advice from the sales representative/ financial advisor.

An example of a trial decision in which suitability was in issue and the credibility of the findings determinative of that and other issues in the case was the 2008 Ontario decision in *Young v RBC Dominion Securities*.[14] In that case, the two clients were a mother, deceased by the time the action was commenced (with her estate represented by her two sons as executors), and one of the sons on his own behalf. The clients' accounts were in operation from 1988 through 2004. As of 2000, both the mother's and son's accounts held significant concentrations in technology stocks, which suffered losses following a technology stock boom bust. The mother was a widow, 87 years of age in the year 2000, and died in 2004. The son was 55 years old as of 2000, a practicing lawyer, whose practice focused on real estate, estates and wills.

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14 (2008), 46 ETR (3d) 14 (Ont Sup Ct).

The trial judge found that the dealer and sales representative were not liable to the estate of the mother or to the son regarding losses suffered in their respective accounts through investments in technology securities, on the basis that the sales representative had met his duty of care to his clients, and in those instances where there was a breach (in particular where the Know Your Client Forms should have been updated, as the information contained in the forms was not congruent with the investments in the accounts), such failures were not causative of any of the losses.

Given the trial judge's findings on the investor profile of both the mother and of the son, the trial judge found that their concentrated investments and holdings (in the son's case, on margin) in technology securities were suitable in the circumstances. The trial judge found that the son "was not forthright with the court on important points" and that his testimony was "evasive, argumentative and non-responsive."[15] These credibility findings went directly to key issues regarding the son's investor profile, the integrity of the sales representative's notes, the contents of communications between the sales representative and the son, reliance on investment advice, and the son's recollection of events. The trial judge found that the sales representative's testimony was corroborated on key points by his notes, and contrasted the sales representative's partial recollections of very dated communications with the son's ostensibly perfect recollections of the same conversations. The credibility findings were determinative in the trial judge's conclusion that the sales representative had conducted himself appropriately, particularly with respect to cautioning regarding issues of suitability, concentration and margin.

The trial judge set out guidelines for making credibility determinations, as follows:

> Credibility issues have come into play in this case. The evidence of Mr. Young and Mr. Houghton is opposed on significant issues. Credibility determinations must therefore be made. In making such determinations, I note as helpful the instruction that is given to juries in civil cases with respect to determining credibility. It provides: In determining the credit to be given to the evidence of a witness, you should use your good common sense and your knowledge of human nature. You might, in assessing credibility, consider the following:
> The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have

15 *Ibid* at paras 204-208.

some effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to color or tinge or shade his evidence in order to lend support to his cause.

Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?

It is always well to bear in mind the probability or improbability of a witness' story and to weight it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable?

Does the witness show any tendency to exaggerate in his testimony?

Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you consider more worthy?

Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.

In determining credibility, I am also mindful of the test set out by the British Columbia Court of Appeal in *Faryna v Chorny,* [1952] 2 DLR 354 at 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.[16]

7. Investment Advice

In an investor loss action, what is frequently at issue is whether the sales representative/financial advisor provided or failed to provide investment advice regarding the purchase or sale of specific securities and whether such advice, if given, was negligent. *In 820823 Ontario Ltd v Bruce Kagan*

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16 *Ibid* at paras 197-98.

et al,[17] a 2003 decision of the Ontario Superior Court of Justice, the investor (whose investments were through his holding company's account at the dealer) claimed against the dealer and sales representative for losses suffered as a result of not selling shares in a particular security and diversifying the account holdings. The trial judge dismissed the claim, finding that the customer had failed to accept investment advice from the sales representative to sell his shares in his large holding in one security and to diversify his portfolio. The evidence of the customer and the sales representative differed, resulting in what the trial judge termed "a major credibility issue in this case."[18] The trial judge preferred the evidence of the sales representative to that of the customer, finding the customer "to be partisan and contentious under cross-examination. It was apparent that he honestly felt wronged by the defendants, and believed, as he himself testified, that "somebody's got to be responsible for these losses," by which he meant "somebody other than himself."[19] The trial judge found that the customer's self-interest coloured his recollection of events so as to make his evidence unreliable. The trial judge accepted the sales representative's testimony that he had "consistently and from the beginning of their relationship advised Mr. Lavergne to sell his shares in Xcelera and to diversify his holdings …"[20] As such the trial judge found that the investor client "was the author of his own misfortune."[21]

8. Instructions

A quintessential example as to the necessity for and importance of a credibility finding is in a situation where the investor client and the sales representative/financial advisor are at odds over the details of the instruction provided for the purchase or sale of a security, or in fact whether there was any instruction at all. *The Alan Webster Family Trust v Midland Walwyn Capital Inc*[22] 2002 decision dealt with such a trade execution case. A sophisticated investor and an experienced sales representative differed on the instructions provided during a telephone conversation regarding the exercise of an option position in the client's account, the failure of which resulted in losses of $US 94,500. The call in question was lengthy (15 to 20 minutes) and the contents of most of it uncontested. The part in issue was whether the client gave the sales representative instructions to exercise the option position. There were no contemporaneous documents made by either the client or the sales

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17 [2003] OJ No 3425 (QL) (Sup Ct).

18 *Ibid* at para 49.

19 *Ibid* at para 64.

20 *Ibid* at para 67.

21 *Ibid*.

22 [2002] OJ No 334 (Sup Ct).

representative, and the call was not tape recorded. At the end of a nine day trial, the Court made credibility findings in favour of the client and against the sales representative and a supervisor, and found the sales representative and therefore the dealer, liable in contract and in negligence for failing to execute the order. In assessing the issue of credibility, the trial judge stated as follows:

> Webster [the client] is a sophisticated participant in the market. He has made money and lost money over the years. The attempt of the defence to characterize Webster as a poor loser who wished to download his errors in predicting the market to his brokers by creating a fabricated story does not fit. The timing of the telephone call to Merit [the other dealer] and the attempt by Webster to contact Cappuccitti [the sales representative at the other dealer], who handled the exercise of options on Webster's behalf, serves to confirm Webster's version of events in this action.[23]

In *Chesebrough v Willson*,[24] a 2001 decision, at issue was whether the sales representative increased a client's stop loss price from $4.00 to $4.50 without the authority of the client. This was not a case of a loss in the usual sense of the word, but rather concerned a loss of profits in that the client's shares of Bre-X were sold through the mechanism of the stop loss order (at a profit) and might have been sold at a bigger profit had the stop loss mechanism not been triggered. The trial judge determined the credibility issue regarding whether the client had provided authority to the sales representative to increase the price of the stop loss on the basis that he found:

> … it more likely that Willson [the sales representative] did get the plaintiff's authorization to do this and I do not find it surprising that he would have no actual recollection of the conversation with the plaintiff. Why would he? This type of instruction is given frequently in Willson's daily routine, and industry standards would require that he act in a certain way, and I accept that he did as he said.[25]

In *Dulong v Merrill Lynch Canada Inc*,[26] a 2006 decision of the Ontario Superior Court of Justice, a successful and experienced businessman with significant investing experience through a number of dealers deposited a large number of shares in his then employer company in his account at the dealer. The shares were used as security for margin purposes, but ultimately the position was sold out because of margin deficiencies, leaving a debit balance which was the subject of a counterclaim by the dealer against the client. The client alleged against the dealer and its

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23 *Ibid* at para 98.

24 [2001] OJ No 940 (QL) (Sup Ct).

25 *Ibid* at para 24.

26 (2006), 2006 CarswellOnt 1662 (Sup Ct).

registered representatives that they had failed to sell the shares in breach of duties and obligations owed to him. The trial judge rejected the client's allegations that the registered representative then responsible for the operation of the account failed to follow the client's instructions to sell the shares, making adverse credibility findings against the client. The trial judge found as a fact that the registered representative had repeatedly recommended to the client sales of shares in the company and resulting diversification of the account. In making his credibility findings, the judge compared the consistencies and inconsistencies in the client's and registered representative's evidence, contrasted the client's actual investor profile with his evidence, and noted that both trade confirmations and month end statements sent by the dealer to the client contained a verification clause, and that the client did not question or complain to the dealer regarding the lack of sales of the shares at issue.[27]

9. Status of the Investment Account

In *Bulotano v Valkanas*,[28] a 2010 decision of the Quebec Superior Court, part of what was at issue in this action by an investor client against her sales representative/financial advisor concerned his representations to her regarding what happened with her investment funds. The monies in issue were purportedly invested in so-called Mortgage Certificates off book (that is, not within her account at the dealer). The trial judge made adverse credibility findings against the financial advisor regarding his contradictory versions as to what happened with the investment funds and granted judgment in favour of the investor client against the advisor personally.

In *Davidson et al v Noram Capital Management Inc*,[29] a 2005 decision, the trial judge found significant misrepresentations by the portfolio manager to his clients and granted judgment in favour of the clients for losses in investments in discretionary wrap accounts suffered in the period September 1993 to January 1998. The trial judge found that the portfolio manager was not credible, and preferred the evidence of the individual clients when it was in conflict with that of the portfolio manager.

10. Account Documentation

Contemporaneous documents evidencing the nature of the relationship between the parties, the investor profile of the client, and the conduct of the parties and of the investment account are frequently relied on by trial

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27 *Ibid* at paras. 5-9.

28 2010 QCCS 430, [2010] QJ No 884 (QL) (Sup Ct).

29 (2005), 13 BLR (4th) 35 (Ont Sup Ct).

judges in their assessment of the credibility of the parties. It is not uncommon in investor loss litigation for either party to distance themselves from the investor profile information contained in the New Client Application Forms. Investor clients not infrequently state that the forms were pre-populated by the sales representative at the time of signing (just sign here, without regard to the contents of the forms), or signed in blank. Sales representatives not infrequently state that the information contained in the New Client Application Forms (the Know Your Client Forms) was either wrong (the client intentionally misrepresented his or her financial state of affairs) or outdated. As such, the account documentation, instead of being corroborative of the credibility of one of the parties' different positions, sometimes itself becomes the issue.

The conduct of the parties through similar fact evidence is also sometimes relevant to credibility assessments of the parties. Whether a sales representative provided or did not provide similar investment advice to her other clients and her conduct of those other clients' accounts, can cast light on the sales representative's advice and representations to the litigant client and the conduct of that person's investment account.

Finally, whether or not the party testifies at trial can be of importance, with the trial judge drawing an adverse inference against a non-testifying party. This is what occurred in *Blackburn v Midland Walwyn Capital Inc*,[30] in which the trial judge made a positive credibility finding in favour of the male client, and drew an adverse inference against the two dealers and the sales representative for the failure of the sales representative and various dealer personnel to testify at the trial. As the Court of Appeal stated, in upholding the trial judge's apportionment of damages:

> It is important to note, on the issue of liability, that the trial judge drew an adverse inference from the failure of Georgiou [the sales representative] and employees of Midland and Levesque who had involvement with Georgiou to testify. It was open to him to conclude, as he did, that their evidence would have been damaging to the appellants.[31]

11. Dealer/Investment Advisor Disputes

Sales representative and investor client credibility issues also arise in disputes between dealers and their sales representatives relating to their employment and/or contractual relationship and dealings. Examples are in wrongful dismissal actions by the sales representative against the dealer

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30 (2003), 32 BLR (3d) 11 (Ont Sup Ct) [*Blackburn*], aff'd (2005), 195 OAC 181 (CA) [*Blackburn CA*].

31 *Blackburn CA*, *ibid* at para 14.

and, as well, in claims for losses asserted by dealers against their sales representatives relating to settlements by the dealers arising from investor client claims for compensation. Example are found in the *King*[32] case, and in *Pinto v BMO Nesbitt Burns Inc*,[33] another wrongful dismissal case.

In *Pinto* an investment advisor terminated for cause by her employing dealer sued unsuccessfully for damages for wrongful dismissal. At trial, the dealer was able to prove just cause for the dismissal, as the trial judge found merit to the allegations of unauthorized discretionary trading by the investment advisor based on a number of client complaints. The trial judge made credibility findings in favour of the clients and adverse integrity and credibility findings against the investment advisor. The dealer's counterclaim against the investment advisor seeking indemnity for the approximately $500,000 paid by the dealer to clients by way of settlement of their complaints was largely unsuccessful, with the dealer only proving to the satisfaction of the trial judge a damages entitlement of $490. Noteworthy in *Pinto* was the trial judge's conclusion that the investment advisor's notes were not made on the dates set out in the notes "but in fact were fabricated after the written complaint was made by the Kellys [clients of the sales representative and dealer], in order to mislead her employer into believing that she had instructions to make these trades. I am quite satisfied that she had no such instructions, and that these trades were unauthorized." And further, "My finding that Ms. Pinto was untruthful and fabricated evidence affects my view of her credibility in general, and not merely in respect of the Kelly complaint."[34]

12. Conclusion

There is a tendency in legal disputes involving relationships between commercial enterprises and individuals for the parties to imbue the litigation with a significant degree of emotion and rhetoric not otherwise found in contractual disputes. This is apparent and has come to define the polarized positions in investor loss litigation. The stereotypical view of the investment dealer and its sales representative (the "sale side" of the securities industry) of retail clients is that investor clients, having lost money in their investments through their own decisions and the fluctuations of the markets, are just seeking a "free put" in suing their advisors for compensation. Retail clients, on the other hand, stereotype sales representatives and dealers as greedy and rapacious, engaging in "financial assault" on trusting and vulnerable investors. Faced with utterly conflicting versions of what had at one time been a functioning

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32 *Supra* note 11.

33 (2005), 40 CCEL (3d) 293 (Ont Sup Ct) [*Pinto*].

34 *Ibid* at paras 40-41.

constructive relationship between investor client and sales representative, trial judges, as we have demonstrated, frequently have to make important credibility assessments of the parties in order to determine the issues arising from each individual case.

We will conclude with two decisions that are indicative of this paradigm. The first illustrates the dealer perspective, where more often than not, the investor client plaintiff, despite allegations to the contrary in the Statement of Claim, was in fact a sophisticated risk-oriented investor whose trading was directed by himself and whose misfortunes were authored by himself. An example of this sort of case is *Allen v Girard*,[35] a 2002 decision of the British Columbia Supreme Court.

In *Allen*, the trial judge dismissed with costs the investor client's claim against the dealer and its sales representative, finding a total lack of substance in the allegations of discretionary trading, negligence, failure of the defendants to "know your client," lack of suitability of the trades, and the dealer's alleged failure to supervise. In the judge's words, "credibility was a major issue,"[36] and he made credibility findings adverse to the investor client on all the principle issues relating to the client's investor profile and the trading in and conduct of the account.

Finally, there is a recent decision showing the investor client perspective. In *Gestion HC Ltée v TD Securities and Stéphane Rail*,[37] a 2011 decision of the Quebec Superior Court, the trial judge granted judgment pursuant to the rules governing mandates under the *Civil Code of Quebec*[38] against the sales representative and his dealer for losses suffered by the investor client in four of the five matters at issue. These were all off book dealings between the investor client and his sales representative outside of his account at the dealer. The matters at issue concerned a loan solicited by the sales representative for a company owned by a promoter with whom the sales representative had a relationship, a purported investment in barrels of oil, and share purchases in various companies. The trial judge made very strongly-worded adverse credibility findings against the sales representative, stating as follows:

> Au-delà de cette consideration. M. Rail n'est pas crédible! Son témoignage ne peut être retenu étant donné que la prevue non contredite démontre de façon prépondérante qu'il a fabriqué de faux documents en 1995 et 1998, en 2000, qu'il a menti à son employeur le 22 juin 2000 et qu'il n'a pas dit la vérité lors de son témoignage à

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35 2002 BCSC 1354, (2002), 5 BCLR (4th) 320 (SC).

36 *Ibid* at para 4.

37 2011 QCCS 1381, [2011] JQ no 2818 (QL) (Sup Ct) [*Rail*].

38 LQ 1991, c 64.

> l'audience le 5 mai 2009 au sujet du décès de M. Bouchard et des signatures de celui-ci que l'on retrouve sur les trois documents de la Pièce P-31.[39]

The Court awarded the client moral damages, punitive damages (as against the sales representative only) and extra judicial fees and costs, all under the Code.

This study explored whether the issue of credibility was evident in investor loss litigation, the specific issues in which credibility findings have been made by the trial judges, and the importance of such findings to the result of the litigation. Our conclusion is that credibility findings were made by the trial judge in approximately three of every four of the recent cases that we reviewed, that these findings were made on a range of issues raised in the investor loss litigation, and that the issue of credibility generally is important and indeed often determinative of the result of the case. Given the importance of the issue of credibility in assessing issues arising in investor loss claims, and the difficulty of evaluating credibility, it is imperative that credibility assessments be made by qualified persons through an appropriate process.

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39 *Rail*, *supra* note 31 at para 87.

Schedule "A"

List of cases with credibility issues

1. *2878852 Canada Inc v Jones Heward Investment Counsel Inc*, [2004] OJ No 3465 (QL) (Sup Ct), rev'd 2007 ONCA 14, [2007] OJ No 78 (QL)(CA).
2. *820823 Ontario Ltd et al v Bruce Kagan et al*, [2003] OJ No 3425 (QL) (Sup Ct).
3. *Allen v Girard*, 2002 BCSC 1354, (2002), 5 BCLR (4th) 320 (SC).
4. *Alan Webster Family Trust v Midland Walwyn Capital Inc et al*, [2002] OJ No 334 (QL) (Sup Ct); ruling on costs (2003), 64 OR (3d) 716 (Sup Ct); appeal on costs (2005), 200 OAC 270 (CA).
5. *Blackburn v Midland Walwyn Capital Inc et al* (2003), 32 BLR (3d) 11 (Ont Sup Ct), aff'd (2005), 195 OAC 181 (CA).
6. *Bulotano v Valkanas*, 2010 QCCS 430, [2010] QJ No 884 (QL) (Sup Ct).
7. *Chesebrough v Willson*, [2001] OJ No 940 (QL) (Sup Ct).
8. *Davidson et al v Noram Capital Management Inc et al* (2005), 13 BLR (4th) 35 (Ont Sup Ct).
9. *Davis v Orion Securities Inc*, [2006] OJ No 3198 (QL) (Sup Ct).
10. *Dolmen (1994) Inc. v Nesbitt Burns Ltée*, 2006 QCCS 3803, [2006] QJ No 3229 (QL) (Sup Ct).
11. *Dulong v Merrill Lynch Canada Inc* (2006), 2006 Carswell Ont 1662 (Sup Ct).
12. *Dyer v Cunningham (cob Cunningham & Associates Financial Services)*, 2007 SKQB, (2007), 303 Sask R 309 (QB).
13. *Edwards v BMO Nesbitt Burns Inc*, 2010 BCSC 1108, [2010] BCJ No 1568 (QL) (SC).
14. *Frost v Bassett*, 2006 BCSC 243, [2006] BCJ No 393 (QL) (SC).
15. *Gale v ScotiaMcLeod, A Division of Scotia Capital Inc*, 2008 NLTD 152, (2008), Nfld & PEIR 157 (NLSC (TD)).
16. *Gestion HC Ltée and Hermann Cloutier v TD Securities Inc and Stéphane Rail*, 2011 QCCS 1381, [2011] JQ no 2818 (QL) (Sup Ct).
17. *Goodman v Scotia Capital Inc,* 2003 CarswellOnt 6364; appeal allowed in part (2004), 191 OAC 265 (CA).
18. *Hayward v Hampton Securities Limited and Peter Deeb* (2002), 46 BLR (3d) 43 (Ont Sup Ct), aff'd [2004] OJ No 2346 (QL) (CA).
19. *Hunt v TD Securities Inc et al*, [2002] OJ No 474 (QL) (Sup Ct), rev'd (2003) 66 OR (3d) 481 (CA).
20. *IPC Investment Corporation v Sawaged*, 2010 ONSC 6611, [2010] OJ No 5510 (QL) (Sup Ct).
21. *Kent v May* (2001), 298 AR 71 (QB), aff'd 2002 ABCA 252, (2002), 317 AR 381 (CA).
22. *King v Merrill Lynch Canada Inc.*, [2005] OJ No 5028(QL) (Sup Ct).
23. *Labricciosa v TD Waterhouse Investor Services (Canada) Inc*, [2004] OJ No 584 (QL) (Sup Ct), aff'd (2005), 194 OAC 357 (CA).
24. *Laflamme v Prudential-Bache Commodities Canada Ltd,* [2000] 1 SCR 683.
25. *Loevinsohn v Les Services Investors Limitée*, 2007 QCCS 793, [2007] QJ No 1463 QL) (Sup Ct).
26. *Longstaff v Robinson*, 2008 BCSC 1488, (2008), 91 BCLR (4th) 307 (SC).

27. *Refco Futures (Canada) Ltd. v Keuroghlian et al* (2006), 22 BLR (4th) 97 (Ont Sup Ct), aff'd *Man Financial Canada Co v Keuroghlian et al*, 2008 ONCA 592, (2008), 240 OAC 300 (CA).*
28. *Markarian v CIBC World Markets Inc et al*, 2006 QCCS 3314, [2006] QJ No 5467 (QL) (Sup Ct).
29. *Mazzarolo v BMO Nesbitt Burns Ltée*, 2009 QCCS 274, [2009] QJ No 573 (QL) (Sup Ct).
30. *Mills v Merrill Lynch Canada Inc*, 2005 BCSC 151, [2005] BCJ No 210 (QL) (SC).
31. *Newman v TD Securities Inc* (2007), 31 BLR (4th) 215 (Ont Sup Ct).
32. *Northey-Taylor v Casey*, 2007 ABQB 113, [2007] 6 WWR 682 (Alta QB), aff'd 2008 ABCA 149, [2008] 9 WWR 112 (Alta CA).
33. *Osborne v Harper*, 2005 BCSC 1202, [2005] BCJ No 1849 (QL) (SC), supplementary reasons 2005 BCSC 1683, [2005] BCJ No 2625 (QL) (SC), supplementary reasons 2006 BCAC 51, [2006] BCJ No 47 (QL) (SC).
34. *Paciorka v TD Waterhouse*, [2007] OJ No 2890 (QL) (Sup Ct).
35. *Ron Parent et al v Merrill Lynch Canada Inc et al*, [2008] OJ No 2155 (QL) (Sup Ct).
36. *Pinto v BMO Nesbitt Burns Inc* (2005), 40 CCEL (3d) 293 (Ont Sup Ct).
37. *RBC Direct Investing Inc v Khan*, 2010 ONSC 3100, [2010] OJ No 2241 (QL) (Sup Ct); ruling on costs 2010 ONSC 5053, [2010] OJ No 3878 (QL) (Sup Ct).
38. *Robert v Versus Brokerage Services Inc (cob E*Trade Canada)* (2001), 14 BLR (3rd) 72 (Ont Sup Ct), additional reasons 2001 CarswellON 2128 (Sup Ct).
39. *Robinson et al v Fundex Investments Inc et al*, [2006] OJ No 2976 (QL) (Sup Ct).
40. *S Maclise Enterprises Inc v Union Securities Ltd et al,* 2008 ABQB 214, (2008), 57 CCLT (3d) 104 (Alta QB), var'd 2009 ABCA 424, (2009), 469 AR 131 (CA).
41. *Saks v Marleau, Lemire Securities Inc*, 2006 QCCS 5593, [2006] QJ No 13896 (QL) (Sup Ct).
42. *Shetty v Gill*, 2004 BCSC 451, [2004] BCJ No 268 (QL) (SC).
43. *Smith v Scotia Capital Inc*, [2006] OJ No 5801 (QL) (Sup Ct).
44. *Stein v Cartier Partners Financial Services Inc et al*, [2009] OJ No 5355 (Sup Ct).
45. *Stojanov v Holland*, [2001] OJ No 4586 (QL) (Sup Ct).
46. *Strand v Emerging Equities Inc* (2006), 30 BLR (4th) 198 (Alta QB).
47. *Straus Estate v Decaire*, 2011 ONSC 1157, (2011), 84 CCLT (3d) 141 (Ont Sup Ct).
48. *Sternberg v Boothe*, [1990] OJ No 2649 (QL) (HCJ).
49. *TD Waterhouse Canada Inc v Goodman*, [2005] OJ No 250 (QL) (Sup Ct).
50. *TechHi Holdings Limited v Merrill Lynch Securities Inc et al*, [2004] OJ No 2265 (QL) (Sup Ct), supplementary reasons [2006] OJ No 1278 (QL) (Sup Ct).
51. *Templeton v RBC Dominion Securities Inc*, 2005 NLTD 130, (2005), 249 Nfld & PEIR 170 (NLSC (TD)).
52. *Transpacific Sales Ltd (Trustee for) v Sprott Securities Ltd*, (2001) 13 BLR (3d) 78 (Ont Sup Ct), aff'd (2003), 67 OR (3d) 368 (CA).
53. *Young v RBC Dominion Securities*, (2008), 46 ETR (3d) 14 (Ont Sup Ct).
54. *Zraik v Levesque Securities,* [1999] OJ No 2263 (QL) (Sup Ct), rev'd (2001), 153 OAC 186 (CA).

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* Man Financial Canada Co. was the successor to Refco Futures (Canada) Ltd.

Schedule "B"

List of cases reviewed that did not contain credibility issues

1. *Aceti v TD Waterhouse Canada Inc,* (February 2, 2005) Toronto 03-CV-255087 CM3 (Ont Sup Ct).
2. *Albayrak v Nesbitt Burns Inc*, 2000 BCSC 1082, (2000), 4 CCEL (3d) 78 (BCSC).
3. *Chia v Wood Gundy Inc* (2000), 88 Man R (2d) 7 (CA).
4. *Dussault v Levesque Beaubien Geoffrion Inc*, 2008 QCCS 229, [2008] QJ No 531 (QL) (Sup Ct).
5. *Hadcock v Georgia Pacific Securities Corp*, 2005 BCSC 585, [2005] BCJ No 858 (QL) (SC), Supplementary Reasons, 2005 BCSC 738, [2005] BCJ No 1127 (QL) (SC), rev'd 2006 BCCA 536, (2006), 64 BCLR (4th) 308 (CA).
6. *Hanley v BMO Nesbitt Burns* (2006), 20 BLR (4th) 54 (Ont Sup Ct).
7. *Hawkenson v Rogers*, 2005 BCSC 318, [2005] BCJ No 456 (QL) (SC), var'd 2006 BCCA 177, (2006), 52 BCLR (4th) 44 (CA).
8. *Janic v TD Waterhouse*, [2001] OJ No 1476 (QL) (Sup Ct).
9. *Lockwood v Nesbitt Burns Inc*, [2000] OJ No 2857 (QL) (Sup Ct).
10. *Multipix Communications Inc v Midland Walwyn Capital Inc*, 2001 QCCS 3245, [2001] QJ No 6783 (QL) (Sup Ct) (liability only).
11. *Refco Futures (Canada) Ltd v SYB Holdings Corporation et al*, 2001 BCSC 1037, (2001), 16 BLR (3d) 243 (BCSC), rev'd 2004 BCCA 15, (2001) 192 BCAC 271 (CA).
12. *Richter & Associés Inc et al v Merrill Lynch Canada Inc et al*, [2005] QJ No 49 (QL) (Sup Ct), aff'd 2007 QCCA 124, [2007] RJQ 238 (CA).
13. *Rosenblum Estate v Altman*, [2005] QJ No 9999 (QL) (Sup Ct).
14. *Shoaga v TD Waterhouse*, [2006] OJ No 330 (QL) (Sup Ct).
15. *Srivastava v TD Waterhouse*, 2003 CanLII 16441 (Ont Sup Ct).
16. *Stack v Hildebrand*, 2010 ABCA 108, (2010), 477 AR 359 (CA).
17. *Venture Capital USA Inc v Yorkton Securities Inc* (2003), 66 OR (3d) 760 (Sup Ct), aff'd (2005), 75 OR (3d) 325 (CA).
18. *White Tower Burgers Ltd v TD Securities Inc*, [2004] OJ No 2986 (QL) (Sup Ct).
19. *Wynberg v Daley,* [2006] OJ No 2197 (Sup Ct).