
CANADA / JUDGMENT

Turpin v. TD Asset Management Inc.

2021 BCSC 1830

COURT

Supreme Court of British Columbia

DECIDED

17 September 2021

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2021 BCSC 1830 Turpin v. TD Asset Management Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Turpin v. TD Asset Management Inc.,

2021 BCSC 1830

Date: 20210917

Docket: S194222

Registry: Vancouver

Between:

Dean Turpin

Plaintiff

And

TD Asset Management Inc.

Defendant

Before: The Honourable Mr. Justice Funt

Voir Dire - Ruling on the Admissibility of Mr. L. Bates's Proposed Opinion Evidence

Counsel for the Plaintiff:

P. Bates

J. Archibald

Counsel for the Defendant:

J. Yates

S.C. D'Souza

K. Hanowski

Place and Date of Voir Dire:

Vancouver, B.C.

September 16, 2021

Place and Date of Ruling:

Vancouver, B.C.

September 17, 2021

1. introduction

[1] The plaintiff seeks to call Mr. L. Bates to provide opinion evidence with respect to questions posed by plaintiff's counsel.

[2] For the record, I will first say that Mr. L. Bates and Mr. P. Bates, counsel for the plaintiff, are not materially related to one another. Matters may be best described as a simple coincidence of surnames.

[3] In this class action, the representative plaintiff, Mr. Turpin, says that the defendant, TD Asset Management Inc. ("TDAM"), overcharged investors in specified mutual funds for which TDAM was the trustee and manager.

[4] As an overview, Mr. Turpin, in his Second Amended Notice of Civil Claim, pleads:

3. Throughout the Class Period, the Defendant, trustee and manager of each of the Funds, represented to Class Members that it actively managed the Canadian Equity Fund. The Defendant charged the Canadian Equity Fund and the Portfolio Funds (which were invested in the Canadian Equity Fund) substantial fees for this purportedly active management

4. In truth, the Defendant, as manager of the Canadian Equity Fund, carried on a passive investment strategy designed to closely track or replicate, not exceed, the performance of the Canadian Equity Fund's benchmark index.

5. As a result of the Defendant's undisclosed investment strategy, the Canadian Equity Fund's performance (before management fees) has closely tracked the Benchmark and has never outperformed the Benchmark once the Defendant's management fees are taken into account. The damage to Class Members resulting from this strategy and the Defendant's unjustified fees for purportedly active management has been substantial.

[5] TDAM is a wholly-owned subsidiary of the Toronto-Dominion Bank.

- [6] The quantum of the claim is significant. Dr. M. Simutin, a professor of finance at the University of Toronto, Rotman School of Management, who was qualified to provide opinion evidence in this case, estimated the damages as a result of the alleged excess fees, excess transaction costs, and taxation to total \$1,318,073,000.
- [7] Returning to the questions posed by plaintiff's counsel, these read:
1. Who invests in mutual funds in Canada? What is/are the profile(s) of the typical mutual fund investor?
 2. What is an active investment strategy? Why do investors pay for active management when they buy mutual funds?
 3. What is a closet indexer?
 4. Do the investment objective and investment strategy as described in the TD Canadian Equity Fund's prospectuses and fund facts indicate that the manager uses an active investment strategy?
 5. How do the "return goals" described in the internal Investment Guidelines for the TD Canadian Equity Fund compare with the fund's "active" investment strategy and its objective and strategy as disclosed in its prospectuses and fund facts?
 6. For retailer investors, are there less expensive alternatives to closet indexers? What are they? How do they compare in terms of fees and performance?
 7. Is it possible for retail investors to detect closet indexing activity?
 8. Would disclosure of statistical metrics assist investors and their advisors in deciding to invest in a mutual fund (or to remain invested in a mutual fund), assuming the disclosure is accompanied by plain language explanations of those metrics?
 9. What is the impact of mutual fund management fees on investment returns over time?
- [8] Plaintiff's counsel also seeks to admit into evidence, as an expert report, a June 4, 2021 report Mr. L. Bates prepared.
- [9] In his curriculum vitae, Mr. L. Bates states that he is the author of a book published in 2018 titled, "Beat the Bank: The Canadian Guide to Simply Successful Investment".
- [10] Paragraphs 31 to 33, 36, and 39 of Mr. L. Bates's June 4, 2021 report read:
31. There is an expression in the industry that mutual funds are "not bought, they are sold". In other words, rather than seeking to buy certain mutual funds, individual Canadian investors generally accept the funds recommended to them by the advisor or institution.
 32. In 2012, a blog post published by Folio Investing, a U.S. investment firm, stated the following about the sale of financial products:

Critics of the financial services industry (often with good reason) frequently remind consumers that financial products are typically "sold" rather than "bought" and implore them not to fall into that trap. The concept here is that financial products are "sold" -- pushed upon a consuming public that doesn't understand them or perhaps even want or need them. Instead, the alleged basis for their continued vibrancy and ongoing sales is that advisors get paid big bucks to sell them.

33. The sale of mutual funds in Canada is no different. As I wrote in my book, *Beat the Bank: The Canadian Guide to Simply Successful Investing*:

The big Canadian banks - and by extension our entire financial industry - occupy a position of paternalistic authority that too many investors respect unquestioningly. The industry brilliantly capitalizes on the combination of poor understanding of fees, deep loyalty, and misplaced trust by charging Canadians the highest investment fees in the world.

36. A closet indexer is a fund manager that aims to produce investment returns before fees close to those of a benchmark index, while demonstrating some variance in portfolio composition compared to the benchmark.
39. I described closet index funds in my book as follows:

In the Closet?

"Canada has become the world leader in a particularly insidious form of financial malpractice closet indexing."

Ian McGugan, *The Globe and Mail*, November 2015

[The traditional investment industry] justifies high fees by claiming their funds contain carefully selected combinations of stocks and bonds that are quite different than, and superior to, stocks and bonds represented in market indexes and the low- cost index ETFs that track them.

But many [fund managers] quietly accept the reality that they can't consistently beat the market. They know that...they are just as likely to produce below-average results as they are to beat the market and outperform the index. They also know Canadian investors are generally a patient lot and will only sell a fund if it underperforms the market quite badly. So many [fund managers] don't actually do much stock-picking anymore. They employ a simple strategy called 'closet indexing,' which is designed to consistently produce before-fee results that roughly match the index and 'post-fee' results that consistently fall short of the index, but not badly enough to ever get noticed. I know this strategy sounds crazy but, for [the traditional investment industry], closet indexing works like a charm. If you own mutual funds offered by the big banks, insurers, or fund companies, there is a good chance you own 'closet index' funds. They look a lot like index ETFs in terms of the stocks they hold, but they charge expensive mutual fund MERs. Similar product, but much higher price. Miserable result for the investor.

Here is the simple math: if you own a closet index mutual fund that carries 2.0 percent annual fees instead of a legitimate index ETF that charges 0.2 percent annually, you're losing ground at a rate of 1.8 percent annually, which can reduce your long-term investment gains by 40-50 percent. [Traditional investment industry] closet indexers continue to bet investors either won't notice their underperformance or won't consider it bad enough to sell.

Closet index funds are purpose-built both to create wealth for [the industry] and, relative to easily accessible low-cost index ETFs, to destroy wealth for Canadian Investors!

[Emphasis in original.]

2. The law

[11] The guiding authority for the admissibility of opinion evidence is the decision of the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("White Burgess").

[12] In *White Burgess*, Justice Cromwell, writing for the Court, stated:

[1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

[2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[35] The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *[R. v.] J.-L.J.*, [2000 SCC 51]: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at

the end of the day to weight rather than admissibility" (para. 28).

- [48] Once the expert attests or testifies on oath to this effect [to be fair, objective, and non-partisan], the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the [R. v.] Mohan, [1994] 2 S.C.R. 9] framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.
- [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[Emphasis added.]

- [13] More recently, in *R. v. Bingley*, 2017 SCC 12, Chief Justice McLachlin, writing for the Court, stated:
- [13] The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.). This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17-18.

The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

[Emphasis added.]

3. analysis

[14] I find that Mr. L. Bates is partisan to the plaintiff. I make this finding despite Mr. L. Bates stating, in his June 4, 2021 report, that he is aware of his duty to assist the Court and not to "advocate for any party". He states that he has written his "report in conformity with that duty".

[15] I find that Mr. L. Bates comes to this Court with an unshakeable bias against any "big Canadian" bank. This bias is specifically reflected in his quoting of a passage from his book at paragraph 33 of his June 4, 2021 report (as set forth above).

[16] The particular passage is inflammatory without a proper basis otherwise set forth in his June 4, 2021 report. In short, Mr. L. Bates comes to Court with a cause or "philosophical hostility": *United City Properties Ltd. v. Tong*, 2010 BCSC 111, para. 49.

[17] During the voir dire, Mr. L. Bates, in cross-examination, acknowledged various Twitter posts he authored. The key portions of some of his recent posts since the date of his June 4, 2021 report read:

September 15, 2021

Banks blatantly defy investor protection efforts.

September 15, 2021

Why do banks and mutual fund companies fight against rules that protect investors?

September 13, 2021

Respectfully I think you're missing the point. In house or third party, it's the relentless "tyranny" of high fund fees that ruin results for millions of trusting bank customers.

September 9, 2021

Doesn't much matter whether the funds are independent or in-house. Mutual funds with 2% + MERs are a disaster for millions of Canadians.

September 8, 2021

I think the industry minimizes any reference to fees, even if it might be perceived as in "returns are net of fees" because it reduces the likelihood of investor questions like "what's the return before fees?" and "what's the impact over time?"

- [18] During further cross-examination, when Mr. L. Bates was asked about the first September 15, 2021 Twitter post above, he testified: "I wondered if you would catch that".
- [19] Mr. L. Bates apparently views his proposed testimony as an expert witness as part of a game and not as a "key element in the search for truth".
- [20] In sum, I find Mr. L. Bates to be partisan to the plaintiff class members and is unable to be fair and objective. The current application is one of those "quite rare" cases where a proposed expert's evidence is ruled inadmissible.
4. conclusion
- [21] Mr. L. Bates will not be allowed to provide opinion evidence and his June 4, 2021 report will not be entered into the evidence for trial.

"Funt J."

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