



When an expert is not really an expert

BY [MEREDITH HAYWARD](#), AFFLECK GREENE ORR LLP.

A recent Ontario Superior Court decision serves as a strong reminder that counsel should ensure that their expert witness is in fact an expert and not merely an advocate dressed up as an expert. Mr. Justice Ducharme, in *Dulong v. Merrill Lynch Canada Inc.*¹, refused the testimony of a proposed expert on the applicable standards and practices of the retail brokerage industry after concluding that he did not have sufficient knowledge about the retail brokerage industry to qualify him to testify. Could this signal the end of expert testimony on the practices and standards of the retail brokerage industry in investment loss cases?

In *Dulong* the plaintiff sued Merrill Lynch and two brokers for \$6 million in losses suffered in the stock market and, as is typical in such litigation, called an expert witness to testify regarding the regulatory regime and standards applicable to the investment industry. Ducharme J. agreed with Merrill Lynch's position that, as trial judge, he was fully capable of interpreting the written policies, regulations and by-laws of the Investment Dealers' Association and the Toronto Stock Exchange himself without needing expert assistance. While Ducharme J. did find that expert evidence on the practices and standards of the brokerage industry was necessary and

appropriate, he did not accept that the proposed expert's background as a securities lawyer and senior OSC officer gave him sufficient expertise to testify on that issue, as he did not have any actual retail brokerage experience. Ducharme J. further rejected the expert's written report as it contained little or no opinion on industry standards and inappropriately advocated for the plaintiff.

This decision will not likely mean the end of expert testimony on the practices and standards of the retail brokerage industry in investment loss cases. Ducharme J. accepted that such testimony is helpful as long as it is not merely a recitation of the written regulations, by-laws and rules of the industry and is backed up by real, practical experience. What it does mean, however, is that courts may not be so quick to accept the opinions of academics, former regulators, securities lawyers and others held out as investment industry experts without having actual investment industry experience.

¹ For full text of the decision link to: <http://www.canlii.org/on/cas/onsc/2006/2006onsc10654.html>



For more information contact:

Meredith Hayward, Affleck Greene Orr LLP
Tel: 416-360-0121
Email: mhayward@agolaw.com