

## Canadian Securities Administrators Consultation Paper 33-403: A Step Towards a Potential Fiduciary Duty for Advisers and Dealers

BY THE QUEBEC SECURITIES LITIGATION GROUP

On October 25, 2012, the Canadian Securities Administrators (hereinafter the “CSA”) published the *Consultation Paper 33-403 – Exploring the Appropriateness of Introducing a Statutory Best Interest Duty When Advice is Provided to Retail Clients*. This Consultation Paper was prepared in light of the recent reforms affecting securities regulations, including the new Client Relationship Model.

### GENERAL PRINCIPLES

The CSA conducted a review of the general principles applicable to the legal duties and the standard of conduct imposed upon investment advisers and dealers across Canada. Although said duties differ in certain respects from one province to another, securities legislation generally provides that advisers and dealers must act in good faith, with honesty and fairness towards their clients. There is currently no consensus as to whether advisers and dealers should be obliged to act in the best interests of their clients when providing investment advice. In certain circumstances, Canadian courts may find that an adviser or dealer is bound by a common law fiduciary duty toward his client, notably when the facts indicate a relationship of trust and confidence with the client. In Quebec, according to both the general civil law and the *Quebec Securities Act*, as well as the *Civil Code of Quebec* provisions relating to the mandate, advisers and dealers are currently under a duty to act in the best interests of their clients.

### CONCERNS EXPRESSED BY THE CSA

The CSA has identified five key concerns with the current standard of conduct of advisers and dealers:

- 1) There may be an inadequate principled foundation for the standard of conduct owed to clients.
- 2) The current standard of conduct may not fully account for the information and financial literacy asymmetry between advisers and dealers and their retail clients.
- 3) There is an expectation gap because investors incorrectly assume that their adviser/dealer must always give advice that is in their best interests.
- 4) Advisers/dealers must recommend suitable investments but not necessarily investments that are in the client’s best interests.
- 5) The application in practice of the current conflicts of interest rules might be less effective than intended.<sup>1</sup>

## COMMENTS OF THE CSA

The CSA is considering imposing a fiduciary duty, rather than another policy tool, as this standard of conduct may be the most effective way of addressing the concerns raised by the CSA while providing enough flexibility to address most of the competing considerations. This fiduciary duty, however, would need to be qualified to take into account the circumstances and business models of particular categories of dealers. The CSA suggests the following formulation of the fiduciary standard:

Every adviser and dealer (and each of their representatives) that provides advice to a retail client with respect to investing in, buying or selling securities or derivatives shall, when providing such advice,

- a) act in the best interests of the retail client, and
- b) exercise the degree of care, diligence and skill that a reasonable prudent person would exercise in the circumstances.<sup>2</sup>

Although common law and civil law remain distinct legal regimes, the CSA is exploring the possibility of harmonizing the standard of conduct for advisers and dealers that should apply across Canada.

## FUTURE DEVELOPMENTS

The CSA states in the Consultation Paper that no decision on whether to introduce a fiduciary duty to respond to the above-mentioned concerns will be made without broad public consultation and discussion. However, the CSA notes that the United States, the United Kingdom, Australia and the European Union have either proposed or implemented a qualified legal standard which is essentially the equivalent of the fiduciary duty. It is therefore anticipated that these international developments will inspire our national regulators to follow a similar policy direction in order to harmonize financial regulations across the different countries that are members of the International Organization of Securities Commissions (IOSCO).

You can consult the CSA's Consultation Paper [here](#). Do not hesitate to contact our Securities Litigation Team for any question.

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<sup>1</sup> Consultation Paper 33-403, p. 34

<sup>2</sup> *Ibid.*, p. 40