

## Limitation Periods – the Stealth Bomber

### ***The Rule***

Since January 1, 2004, Ontario has legislated that all claims against people responsible for damages must be brought within two years of the date that the claim arose. Before 2004, different rules applied, and a claim typically could be brought within six years or sometimes longer.

Investors who suffered losses in 2008 and 2009 must act quickly to preserve their rights as against those who have wronged them. Failure to act quickly may result in a loss of all rights to recover their losses.

### ***When does the clock start to tick?***

The concept of when the claim arises is complex and investors should seek legal advice early to avoid the devastating possibility of a missed limitation period. At first, one must determine when the investor should have known all the “material facts” that give rise to the loss, which can be a difficult legal concept. The legal idea is that, before this date, the investor could not reasonably be expected to know of the right of legal action.

Must there be losses before the clock starts to tick? Typically, the answer is “yes”. Must all of the losses be known before the clock starts to tick? Typically, the answer is “no”. The gray area is between when losses first occur and when the full extent of the losses is known. When did the investor know enough to appreciate that a court action is an option?

While each case is different, and an article of this nature cannot state with certainty the conclusion in each case, the general rule will be that the limitation period starts to run when the investor knows that the misconduct of the investment advisor has caused the loss. This means that the investor must appreciate both that there was misconduct and that the misconduct caused a loss. Often, this appreciation will not arise until the investor consults another financial advisor, or a lawyer. Also, as with many areas of expertise, not all financial advisors and/or lawyers are able to identify an act of misconduct causing loss. Therefore, it is best to consult an expert: a missed opportunity to identify this causal relationship (whether the misconduct caused the loss) may result in an accidental but final loss by the investor of an opportunity to recover compensation for their losses.

### ***How time flies!***

In the field of investment advisory negligence, a growing field in today's economy, many investors have suffered substantial losses arising from the market meltdown of 2008. In some cases the accounts have regained most of their value with the market rebound of 2009, and hopefully, into 2010. For many investors the recovery will not occur, either because they panicked and sold at the market bottom (a predictable reaction, according to behaviourists) or because they misallocated their investment funds.

For those investors who gambled and lost, there is no right of recovery. For those who did the right thing, sought professional advice and still lost, then they may well have the right to recover all or part of their losses if there were mistakes by the financial advisor, the question is, therefore, when does their right to sue disappear?

### ***Complainers suffer for the complaint***

In some cases, the investor will make a written complaint to the financial advisor, to the compliance department of the investment firm, or to a regulator. In such cases, it seems likely that the investor

knew both of the “material facts”, namely that there was misconduct that caused the loss. Nonetheless, even when starting a complaint, some investors do not appreciate the nuances behind the misconduct. It is also possible that the investor did not know that the proof of misconduct was available, or that other misconduct was actually the cause of the loss. These are considerations that a court would take into account in determining when the clock starts to tick.

### ***How long is 2 years?***

It may appear that two years is a long time. However, (as we write this) we are already 16 months from the September 2008 meltdown date, and it is possible that the cause of action for some investors commenced on that date, or earlier.

The right to sue is usually exercised by hiring a lawyer. Even a lawyer who is an expert in financial loss recovery will usually require more than a moment's notice to assess the investor's right to sue and provide an opinion with respect to the practical merits of starting a court action or an alternative dispute resolution process. Usually, the lawyer will require a period of time to investigate the material facts and to determine whether the investor is on solid ground in making the allegation and whether a cost/benefit analysis supports loss recovery steps. Lawyers are well aware of the impact that a poorly framed or ill-founded lawsuit can have on the parties. Diligence before starting the lawsuit can reduce the risk of this result.

### ***Who benefits?***

Who benefits from the shortened time limitation period? In almost every investment loss case, the financial advisor and the investment firm. Imagine, if you will, the investment firm that typically has in-house legal counsel, available expert resources to determine whether the claim is well-founded, and access to witnesses who are trained to recognize what should have been done in any given case and to “spin” the case in the manner most favourable to the advisor.

Contrast this with the retail investor, who typically has none of the skills to determine whether a claim is worthwhile. The retail investor may well be suffering the emotional shock of losing substantial investment value, and be unable to objectively assess the merits of a possible claim. The contrast is very stark, indeed.

### ***Conclusion***

The new time limitations that govern financial loss recovery have been designed to lift the burden of claims against financial advisors and investment firms at the expense of investors. It is hard to imagine how society could benefit from such inequitable shifting of the burden, especially where this shift has the impact of rewarding misconduct. Even so, we have to deal with the current state of affairs. Investors should act promptly or risk losing their right to recover financial losses caused by poor professional advice by financial advisors.

Harold Geller  
Financial Advisory Group. Doucet McBride LLP  
100-85 Plymouth Street, Ottawa, Ontario, K1S 3E2  
Tel: (613) 233-4474 x 290 – Toll free: 1-888-460-4474 – e-mail: [hgeller@doucetmcbride.com](mailto:hgeller@doucetmcbride.com)