SIPA Sentinel

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Small Investor Protection Association - A voice for small investors

In this issue:

LIMITATION PERIOD DISCOVERABILITY

By Caroline Garrod

Deciphering "Discoverability": Can An Investor Sue After Two Years Are Up?

Many people are aware that the Limitations Act, 2002 contains a two-year limitation period, which means that a prospective plaintiff must commence a lawsuit no later than two years after the date that the injury or loss occurred. While that sounds simple, the date the limitations clock starts ticking is often hotly contested, especially in the investment loss context.

For instance, if an investor loses 50% of his investment on September 10, 2015, does that mean that he has until September 10, 2017 to commence a claim? In this example, the investor believes that the investment loss was due to market forces. However, the investor in question then reads in the paper on June 22, 2017 that the advisor in question has been fired from the bank after complaints of fraud or negligence. The investor then becomes suspicious and makes a complaint to the bank, requesting internal documents from the compliance department. After receiving the documents on October 1, 2017, the investor discovers that his advisor had altered the Know Your Client forms to misrepresent the investor's risk tolerance or level of sophistication. The investor now knows that his investment loss has been caused by someone's fraud or negligence and that a lawsuit is a possible avenue.

However, the investor is now past the two-year anniversary of the actual loss itself. Can he still sue, or is his lawsuit statute-barred?

What Does it Mean to "Discover" a Claim?

Section 5 of the Limitations Act, 2002 demonstrates that the discoverability analysis (i.e. when did the Plaintiff actually know of his or her claim) is more complex than simply counting two years from the date of the investment loss. Discoverability is a two-step inquiry that contains both a subjective and an objective component, asking both what the Plaintiff actually knew, and what a reasonable person in the Plaintiff's circumstances should have known.

Section 5(1) of the Limitations Act, 2002 states that a claim is discovered on the earlier of the day when the claimant knew, or a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known, of the following four elements of a claim:
(a) that the injury, loss or damage had occurred,
(b) that the injury, loss or damage was caused by or contributed to by an act or omission,
(c) that the act or omission was that of the person against whom the claim is made, and
(d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

Investment Loss is Not Equivalent to a Legal Loss

The term "loss" itself can be misleading in the investment loss context. "Loss" in the discoverability context can't be equated to an investment loss. Simply losing money (and understanding that you have lost money) does not necessarily mean that an investor appreciates that he actually has a claim against someone. For instance, an investor could lose money because of a market downturn or other forces that are outside of his advisor's control. Additionally, simply because an advisor recommends an investment that loses money, this does not actually mean that an advisor has caused the loss through negligence or fraud.

It is not enough to simply know that you lost money to know that you have a viable cause of action. You also need to know that someone caused your loss through their act or failure to act; you need to know the identity of the person who caused your loss; and you need to appreciate that a lawsuit is an appropriate remedy.

Conclusion

Because all four of the factors identified in s. 5(1) of the Limitations Act, 2002 must be present in order for a claim to be discoverable, the investor in our example actually does have a viable argument that he did not know in his claim until October 1, 2017. However, he will likely face strong opposition from the Defendant(s), who may seek to strike out the pleadings for no cause of action or bring a motion for summary judgment, arguing that the claim is statute-barred. Such motions are difficult, but possible, for a Plaintiff to successfully resist.

In order to succeed in demonstrating that he did not appreciate his cause of action before October 1, 2017, the Plaintiff's lawyer will need to have a strong understanding of the law on discoverability. The Plaintiff will need to demonstrate that the specific circumstances of the case are such that he discovered that his loss was caused by his advisor's negligence or fraud on a different day than the day the loss occurred.

Understanding the Limitations Act, 2002 is crucial for any investor considering a lawsuit based on an investment loss. The most important principle for any plaintiff or their lawyer to understand is that of "discoverability". Many prospective plaintiffs are advised not to sue, or never even seek legal advice, because they know that their investment loss occurred more than two years ago. However, there are many situations where the investor actually has a viable lawsuit because he or she did not know a lawsuit was the correct remedy for years after the loss itself occurred.

Caroline Garrod is a lawyer practicing commercial litigation at Milosevic Fiske LLP. A large part of her practice involves investment loss claims, particularly those arising out of negligence or fraud.

SIPA LETTER TO FINA RECOMMENDING THEY ASK FOR A PUBLIC INQUIRY

From: **SIPA** <sipa.toronto@gmail.com>
Date: Mon, Jun 19, 2017 at 8:38 AM
Subject: FINA Bank Inquiry
To: wayne.easter@parl.gc.ca
Cc: Stan Buell <StanBuell@gmail.com>

Honourable Wayne Easter.,

Firstly, thank you for inviting me to appear before the Committee. I was sorry that I was unable to meet in person. The Committee was faced with a difficult task and limited time but asked some great questions that were not always answered.

The Canadian public trusts the banks. Or at least they did until CBC Go Public started revealing the truth. Now more than ever before Canadians are asking questions. We notice a marked increase since the CBC GO Public program on the National of March 29th, 2017.

The Small Investor Protection Association has interviewed many hundreds of victims of financial wrongdoing over the last 20 years. Canadians are suffering great harm. Many are losing their life savings and some commit suicide. Just yesterday we received the following message from a dentist:

> *"I am currently involved in litigation with the Bank of Nova Scotia and am in possession of a bankers testimony, under oath, in which he admits to making material additions to my Summary of Personal Finances form without my knowledge or consent and then passing that form on to other Scotiabank employees as part of a loan application process (without advising those employees that the representations on that form, which were false and made at the banker's sole discretion, where made in the bankers own handwriting and not mine). That is,* ***this banker admitted under oath to all of the elements of the Federal crimes of forgery and the uttering (trafficking) of a forged document.****"*

Victims come from all walks of life. It seems those involved in healthcare are particularly susceptible as they themselves can be trusted and they expect no less from the banks. The banks as expected deny all the allegations in spite of the thousands of comments received by the CBC Go Public and by the Small Investor Protection Association. That is their behaviour illustrated in the many court cases over the years.

It would be a great disservice to the Canadian Public if the Committee allowed the Government to simply rely upon another review by the FCAC (which allows the banks to self-regulate) to gloss over the great injustice being visited upon Canadians.

If the Committee believes there is insufficient evidence available then a public inquiry should be the minimum recommended. It is the right thing to do.

It is time for the truth to be heard.

I sincerely hope the Committee will do what is right for the Canadian people.

To allow the current situation of self-regulation to prevail will lead to tragedy for many Canadians in years to come and destroy many lives.

Sincerely,

Stan Buell
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HOC FINANCE COMMITTEE WILL WAIT UNTIL 2018 FOR FCAC REVIEW

HOUSE FINANCE COMMITTEE ADOPTS ANOTHER MOTION ABOUT BANK SALES PRACTICES

Ottawa, June 21, 2017 -

On 3 May 2017, the House of Commons Standing Committee on Finance adopted a motion to examine the practices of Canada's Schedule I banks in relation to the sale of financial products and services to their customers. In particular, the Committee invited witnesses to discuss the four topics identified in the motion: sales practices and incentives for employees; opportunities for redress; codes of conduct; and penalties for breaches of codes of conduct.

"On June 5th, 7th and 12th, the Committee held public hearings during which we heard from the Financial Consumer Agency of Canada, as well as from two former financial sector employees and representatives of the Small Investor Protection Association, the Canadian Bankers Association and the country's six largest banks," said the Honourable Wayne Easter, P.C., M.P., Chair of the Committee. "As well, on June 5th, we had an in camera briefing from the Office of the Superintendent of Financial Institutions, the Department of Finance and the Financial Consumer Agency of Canada in order to discuss existing regulatory and oversight mechanisms."

Mr. Easter continued: "During our hearings, the Committee learned that the Financial Consumer Agency of Canada is currently conducting a thorough investigation into the extent to which Canada's Schedule I banks are complying with the Bank Act and certain codes of ethics, as well as the ways in which sales goals and incentives are contributing to practices that result in poor outcomes for their customers. We were told that the investigation should yield initial findings by the end of 2017, and should be completed by June 2018."

Mr. Easter concluded: "The Finance Committee continues to be interested in this topic and, on June 14th, adopted a motion regarding a meeting with the Financial Consumer Agency of Canada so that it can present its findings to the Committee. According to the motion, if required based on these findings, the country's six largest Schedule I banks will be invited to appear in order to discuss the measures that they will take to implement any recommendations that the Financial Consumer Agency of Canada may make."

Information on the Committee's study of consumer protection and oversight in relation to Schedule I banks can be found on the Committee's website.

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For more information, please contact:

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RBC FACES SCRUTINY FOLLOWING A REPORT OF EXCESS INVESTOR FEES

MARK BLINCH/THE GLOBE AND MAIL JUNE 23, 2017
CLARE O'HARA/WEALTH MANAGEMENT REPORTER

The Royal Bank of Canada is under scrutiny after charging investors incorrect investment fees that, in some cases, went unnoticed for over a decade.

During a routine compliance review in January, 2015, RBC self-reported to regulators that they had found inadequacies in parts of their compliance systems which resulted in a number of RBC investors paying, directly or indirectly, excess fees they should not have been charged.

The Ontario Securities Commission (OSC) will hold a hearing on Tuesday to consider whether it is in the public interest to approve a no-contest settlement agreement between the OSC and RBC.

The amount of fees overcharged to investors has not been disclosed.

The excess of fees charged were found in client accounts at the investment dealer RBC Dominion Securities (RBC DS) and the bank's mutual-fund dealer Royal Mutual Funds Inc. (RBC MF), as well as asset manager RBC Phillips, Hager & North Investment Counsel Inc. (RBC PH&N).

Incorrect fees were also charged for certain fee-based clients at both RBC DS and RBC PH&N. (Fee-based clients are typically charged a single investment-management fee for all their assets held in the account. This fee is usually calculated on the amount of assets under management in the client's account.)

In some cases, clients who held certain investment products with embedded trailer fees were incorrectly charged between Jan 1, 2008, to Oct 31, 2016, (For RBC DS clients) and March 1, 2005, to Oct 31, 2016, (For RBC PH&N clients).

In addition, RBC clients who purchased, transferred from another mutual-fund dealer or already held mutual-funds managed by RBC were not advised that they qualified for a lower management expense ratio (MER) for certain mutual fund products. As a result, these investors indirectly paid excess fees when they invested in a higher MER series of the same mutual fund.

RBC has declined to comment until the settlement is approved by the OSC, says a spokesperson for the bank.

The OSC conducted its own investigation into the matter and has found no evidence of dishonest conduct by any of the RBC parties. The bank has reported its intention to pay appropriate compensation to all eligible (including former) clients who were affected, according to a statement of allegations posted on Wednesday.

As well, RBC is enhancing its procedures and controls, and supervisory and monitoring systems to prevent any recurrence of inaccurate fees being charged in the future.

RBC is not the first bank to be hit with compliance problems resulting in overcharging clients. Last year a number of subsidiaries of Bank of Montreal (BMO), Canadian Imperial Bank of Commerce (CIBC) and Scotia Capital Inc. were hit with similar compliance issues which resulted in no-contest settlements. In all four cases, the majority of the clients were fee-based investors. BMO paid close to $50-million in compensation to investors, while CIBC paid out $73-million and Scotia Capital paid approximately $20-million to investors.

If a panel of the commission approves the proposed no-contest settlement agreement with RBC next week, then the agreement will be made public and could release details such as the amount of investment fees that investors were overcharged.

Is the Committee not aware of the failure of regulators to find fault with the banks?

SIPA issued a *"Web of Deception"* report on March 29th, 2017 which details some of the many ways that Canadians are deceived into placing their savings in the hands of commission motivated sales persons when they believe they are dealing with financial advisers that have a responsibility to look after clients' best interests.

Ken Kivenko made the following remark:

"RBC was aware of the issue as far back as 2013. It is incredible that in all 3 RBC companies not a single manager, supervisor, compliance officer, auditor or "advisor" picked up on this issue for over a decade. If that isn't fraud or gross negligence amounting to fraud I don't know what would be. A similar TD case was settled in 2014 for a wrist slap "voluntary" payment.

It is interesting also that controversial SRO IIROC in over 12 years of sweeps and compliance reviews missed such a glaring investor abuse. CRM2 has forced these folks to reveal costs to *clients. Lack of compliance and enforcement certainly does not give investors confidence in capital markets."*

OSC to consider no-contest settlement with Manulife

By James Langton | Tuesday July 11, 2017 Investment Executive

Two Manulife dealer subsidiaries allegedly overcharged clients in fee-based accounts between 2005 and 2016

Toronto-based Manulife Financial Corp. is the latest large financial services firm set to agree to a no-contest settlement with the Ontario Securities Commission (OSC) amid allegations that it overcharged certain clients.

The OSC announced on Tuesday that it will hold a hearing on Thursday to consider a no-contest settlement with a pair of Manulife dealer subsidiaries, Manulife Securities Inc. and Manulife Securities Investment Services Inc.

According to the OSC's allegations, the firms self-reported weaknesses in their internal controls in 2015 that "resulted in certain clients paying, directly or indirectly, excess fees that were not detected or corrected by the Manulife dealers in a timely manner."

The alleged overcharging involved clients in fee-based accounts that also paid embedded advisor fees, resulting in some clients paying excess fees between 2005 and 2016. In addition, some clients were not told that they qualified for a lower-cost of certain mutual funds and paid excess fees when they invested in the version of the funds with higher management expense ratios.

The OSC alleges that the overcharging was the result control and supervisory inadequacies that amount to a breach of securities rules. It also notes that there's no evidence of dishonest conduct by the firms.

The allegations indicate that the dealers are paying compensation to the clients who were overcharged and that the firms have taken corrective action to bolster compliance and prevent similar issues in the future.

The terms of the settlement will only be revealed if the OSC approves the agreement; no-contest settlements allow firms to resolve enforcement allegations without admitting to misconduct.
The OSC has entered into no-contest settlements with all of the Big Five banks along with a handful of other firms since introducing this procedure in 2014.
The latest such agreement took place on June 27, when an OSC hearing panel approved a no-contest settlement with a trio of Royal Bank of Canada (RBC) that sees the firms pay $21.8

million in compensation to clients and almost $1 million to regulators to settle allegations that they overcharged clients in certain mutual funds and fee-based accounts.

Warren Buffett Invests in Canada, but Should You?

By GRETCHEN MORGENSON JULY 7, 2017

The forensic accountant Al Rosen, who founded the Accountability Research Corporation with his son Mark, wants people to be wary of investing in Canadian stocks.

When Warren Buffett acts, investors notice. And after he took a roughly $300 million position last month in Home Capital Group, a troubled Canadian mortgage underwriter, some investors saw it as a vote of confidence not only in that company, but also in Canadian stocks over all. Al Rosen takes a different view. A veteran forensic accountant and independent equity analyst who predicted the collapse of Nortel Networks, the Canadian telecom company, two years before its 2009 demise, Mr. Rosen has a message for people investing in Canadian stocks: be wary.

It is a mystery to Mr. Rosen why Mr. Buffett bought into Home Capital Group, a company that has been the subject of a titanic battle between the investors who believe in the company and other investors — short sellers — who do not. Certainly, Mr. Buffett expects to make money on his deal. But in an interview, Mr. Rosen said he thought there was more to the story than the markets yet know.

Mr. Rosen is certain of this: International accounting rules followed by Canadian companies since 2011 are putting investors in Canadian stocks — not just Home Capital Group's — at peril. Canada's rules, which are substantially different from the generally accepted accounting principles (G.A.A.P.) governing American companies, give much more leeway to corporate managers when it comes to valuing assets and recording cash flows.

…

Mr. Rosen provides forensic accounting services and also works with his son Mark Rosen at the Accountability Research Corporation in Toronto. The two men recently published a book called "Easy Prey Investors: Why Broken Safety Nets Threaten Your Wealth."

Read the complete article at: https://www.nytimes.com/2017/07/07/business/warren-buffett-investing-canada.html

IT IS ESSENTIAL THAT CANADIANS BECOME AWARE AND SPEAK OUT

- CBC Go Public has revealed the fraud and wrongdoing that exists in Canada's wealth industry
- HOC Bank Inquiry revealed that FCAC allows the banks to self-regulate
- OSC revealed that the regulators are ineffective in eliminating systemic wrongdoing and allow the banks to enter no-contest settlement agreements

Canadians need to wake up and speak out. Our futures will depend on your action.