



**SIPA** has a mission:

- o to aid public awareness of how the investment industry operates;
- o to provide guidance to those who have a complaint about investments with a bank, broker, financial advisor, or other seller of financial products;
- o and to pursue improvement of industry regulation and enforcement.

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## **SIPA Sentinel**

The SIPA Sentinel is issued bi-monthly. From time to time we include articles and re-prints that offer opinions on subjects related to investing and regulation. These are meant to help increase investor awareness, and SIPA may not share these opinions.

## **Limitations Period Issue**

Since April SIPA has contacted all of the provinces and found that limitation periods have been reduced in several provinces including Alberta, Ontario, Newfoundland and most recently in May 2005 in Saskatchewan. Quebec has reduced the six-year period to three years. The remaining provinces still have a six-year limitation period but there may be situations that would precipitate reduced periods. The situation is far from clear, and small investors should be aware of this erosion of their rights.

In August a SIPA led delegation, comprising representatives of Canada's Association for the 50 Plus (CARP), the United Senior Citizens of Ontario (USCO) and SIPA, met with the Ontario Attorney General's staff to express concern and ask for re-consideration of the Ontario Limitations Act. Judy Cutler & Bill Gleberzon, Co-Directors of Media & Government Relations at CARP. Judith Muzzi, President USCO, and Stan Buell & Ken Kivenko of SIPA comprised our delegation.

In September, Stan Buell of SIPA was a guest on the Howard Green program on ROB TV to discuss the limitation period Issue. A film clip is provided on the SIPA website. Ken Kivenko also appeared on ROB TV to discuss mutual funds and mentioned the limitation period issue.

**Joe Tascona, official opposition critic to the Attorney General, has prepared a petition for presentation to the Ontario legislature later this year and a copy has been sent to members. If you have not already signed the petition, please support this initiative by making a copy (available on our website), completing and signing the petition and mail to SIPA, P.O.Box 325, Markham, ON, L6B 1A8.**

Thank you to all members who have signed and returned the petition and a special thanks to those who made the effort to get additional signatures.

*Jim Daw is a columnist for the Toronto Star and is a supporter for improved investor protection. He wrote an article on limitation periods prior to the Town Hall Meeting on May 31st and was one of the floor monitors at the event. He has just written another column on the limitation periods*

*issue. published in the Toronto Star on September 29, 2005. A copy of the article is re-printed below for members.*

Re-printed from the Toronto Star

Sep. 29, 2005

## **Stung investors need longer to sue Victims' crusader winning support**

JAMES DAW

The bitter lessons that Stan Buell learned during a legal dispute he settled out of court with a former stockbroker over the handling of his retirement savings help explain his dogged determination to protect others.

The founder of the Small Investor Protection Association, a retired engineer and now real estate agent, has done a splendid job of rallying support to recover for investors a longer time frame to launch a lawsuit.

As it stands now, Ontario investors who learned in early 2004 that they might have a cause of action against an investment adviser or dealer have only until early 2006 to file a statement of claim.

A new Limitations Act setting out the time limits for this and other types of legal actions came into effect on Jan. 1, 2004. Formerly, would-be claimants had six years to muster the resolve, emotional strength and money to mount a legal fight.

"We believe reduced limitation periods for Ontarians to exercise their right to start civil litigation to seek justice after they have been victims of wrongdoing is the most important issue facing Ontarians today," Buell argues.

"Seniors who have been devastated by a life-altering event need time to recover before being able to deal with issues. Also, it is quite common for retail investors to take more than two years to find their way through the financial industry's complaint-handling processes.

"This legislation must be reviewed with a view to providing relief for the victims of life-altering events."

Buell has provided a summary of the steps he and others have taken, and the influential endorsements their campaign has generated. Now it's up to Ontario Attorney General Michael Bryant and other cabinet ministers to decide whether to restore a longer limitation period. Since Buell wrote to Bryant on behalf of the protection association on April 29, there have been several developments.

David Brown, former chair of the Ontario Securities Commission, sounded a lot like Buell when he told the Senate's Committee on Banking, Trade and Commerce on June 16 that, "For a life-

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altering event such as losing a chunk of your life's savings, it takes time to come to terms with the problem.

"Attempting to obtain voluntary redress from a dealer or adviser can consume valuable time. Investors who pursue arbitration must relinquish the option of court action. For all of these reasons, we suggest to the Ontario government that it would be well advised to take another look at this two-year cut-off."

Larry M. Waite, president of the Mutual Fund Dealers Association, urged Bryant in a letter on Aug. 8 to reinstate the former six-year time window for commencing civil actions. Buell and association advisory committee member Ken Kivenko met with officials at Bryant's ministry on Aug. 11. They were joined in support of their presentation by representatives of CARP, Canada's association of the 50-plus, and the president of the United Senior Citizens of Ontario.

Susan Wolberg-Jenah, acting chair of the OSC, confirmed in an Aug. 30 letter that officials there appreciate that the constraints of the two-year limitation period, combined with existing dispute-resolution services, "may have unintended consequences for small investors.

"We have shared this information with the attorney general in a way that we believe is constructive and in the best interest of investors," she wrote. "We have also indicated our willingness to further discuss this matter with the government ...."

David Agnew, the new chief executive of the Ombudsman for Banking Services and Investments, confirmed Sept. 12 his office has also written to Bryant to outline some of the implications he sees for investors.

"We want to see investors treated fairly — not denied their rights because of overly restrictive time limitations, nor stampeded into unnecessary and expensive legal actions."

So far, however, Bryant has not signaled whether he is listening to all of this advice. Ministry spokesperson Brendan Crawley said yesterday he could only confirm that "the minister takes the concerns of small investors very seriously."

Small investors would not be able to take that comment to the bank, were they ever to lose most of their savings at the hands of a dishonest, unethical or merely incompetent financial adviser.

But they owe a debt of gratitude to Buell and his friends at the protection association for bringing this issue to the fore many months after the government quietly slipped through those changes to the Limitations Act.

### **Income Trusts**

Many small investors are now investing in income trusts because they believe they will receive a high rate of return in the order of 8% or 9% and that the principal is guaranteed. In this day of low interest rates and low rates of return the promise of an 8% annual return and a guarantee that the principle will be returned seems too good to be true.

One of our members reports that he had invested in one of the income trusts guaranteed by a major bank. At first all seemed well. Then the distribution was reduced from 9% to 4-½%. Later

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it was reduced further. This of course affects the current market value (Net Asset Value). The investor learned that if he wanted out he would have to sell at a considerable discount because the guarantee only applies if the units are held for the full ten years.

In this case what seemed too good to be true actually was.

Investors should be wary of investing in products unless they fully understand the risks involved. While income trusts, like mutual funds and hedge funds, may seem to be a good strategy for investing, not all products are equally sound. Although past performance is no guarantee of future performance, new products without any history can be highly risky.

*Ed DeToro, a longtime SIPA member told his story to Keith Kalawsky at the National Post a few weeks ago. On September 30<sup>th</sup> Kalawsky's column about structured products was published in the National Post. The article refers to Ed's experience and is re-printed below.*

## **Painful lessons in structured products**

### **Mulvihill launches new funds despite Pro-AMS setback**

**Keith Kalawsky** Financial Post

Friday, September 30, 2005

Everyone deserves a second chance, so the cliché goes. But Ed DeToro, a retired business owner living in suburban Toronto, isn't feeling so charitable towards Mulvihill Capital Management Inc.

In 2002, DeToro sunk more than \$188,000 into investment funds run by Mulvihill. Specifically, Pro-AMS U.S. Trust, a structured product, that invested in S&P 500 companies and wrote covered call options on these shares to generate more income.

The fund offered an attractive monthly yield of 9% on the original issue price of \$25 a unit. But distributions were halved a few months after DeToro invested, then halved again, then cut to zero. On one installment of \$60,853, for example, DeToro said he received four monthly distribution payments of \$468.75 each before they were cut to \$203.32, then to \$100, then to nothing.

DeToro will get his principal back -- Royal Bank of Canada guarantees investors \$25 a unit -- but only if he waits until 2011.

Mulvihill offered to switch Pro-AMS unitholders into other products, but DeToro refused because they didn't offer a similar guarantee. He can redeem his units at their current net asset value in December without paying a penalty. The units currently trade around \$21.50.

DeToro accepts some responsibility for not questioning his broker more thoroughly about the fact the distributions weren't guaranteed, as was disclosed in the Pro-AMS prospectus. But he's still incensed. "Maybe I should have got more information, but I trusted them. This is what the whole investment industry is about. It's about trust."

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Mulvihill is not some rinky-dink money manager. It has amassed about \$3.5-billion in assets, spread among structured products and mutual funds. Although Pro-AMS was a stinker, Mulvihill keeps cranking out new funds.

The company recently began marketing the "Top 10 Canadian Financial Trust," a structured product investing in the six largest Canadian banks and four largest Canadian life insurance companies. Mulvihill will cap the fund at \$150-million.

The goal is to provide unitholders with quarterly cash distributions equal to 7.5% of net-asset value per unit. Again, Mulvihill will count on dividends, capital gains and options income to meet its target.

The big difference between it and Pro-AMS is that the yield depends on the current net-asset value. The fatal flaw of Pro-Ams was that it tried to pay out 9% even as the value of the fund fell. As U.S. stocks fell during the bear market, there wasn't enough capital in the fund to write options. To escape this death spiral, distributions had to be cut.

Mulvihill says it has learned its lesson. If the NAV of Top 10 Trust falls, so too will quarterly distributions. "This variable distribution, based on the NAV, is the right thing to do in up and down markets so you don't put yourself into a box," said John Simpson, senior vice-president at Mulvihill Capital.

Top 10 Trust is actually a reincarnated version of a defunct one: Digital World Trust. At the end of 2004, the trust's largest holdings included technology and telecom companies such as ATI Technologies Inc. and Adobe Systems Inc.

That fund, created in 2000, initially distributed \$2.35 a unit but it was steadily cut to 40 cents by 2004 as its assets dried up.

Digital World racked up about \$66-million in capital losses, which will be carried forward into the Top 10 trust. That is supposed to allow future income distributed to investors to be tax sheltered. Investors in Digital World, who approved the change, can roll into the new fund at no penalty. Mulvihill is also shopping the fund to new investors.

"We were looking for ways to turn things around on this product that hadn't done very well," said Mr. Simpson.

"We were looking for a way to use those losses for clients so they could benefit."

He's confident the legacy of Pro-AMS won't dent sales of the Top 10 fund. Mulvihill has successfully launched other funds since Pro-AMS, he said.

"Some brokers, some advisors are not pleased with what has happened with Pro-AMS. We have to be honest on that," he said.

"I think what we're trying to do now is to say, if there are products that haven't done well because of the market, what we can we do to make them better?"

It's worth keeping in mind that a large group of brokers, including the big banks, signed on to sell the Top 10 fund for a 5% commission, plus trailer fees.

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Typically, commissions on these types of funds range anywhere from 3% to 5%. Mulvihill will pay brokers trailer fees of 0.3% of the net-asset value of units owned by their clients. Mulvihill also takes a management fee of 1.1%.

The sizeable sales commission makes you wonder if brokers know enough, or care enough, to ensure Mulvihill funds, or any other structured products, are actually suitable for their clients. It's easy to sell yields, but these funds can be extremely complicated.

In his defence, Mr. Simpson said Mulvihill educates brokers, but you can't prevent every problem.

"Certainly, we are hoping [brokers] are doing the right thing and giving it to the right client," he said, "It's hard to kind of make sure every financial advisor is using it appropriately for their clients. I don't know how you can do that."

Not everyone would give Mulvihill a second or third chance. Ross Turnbull, an analyst at Odium Brown Ltd. in Vancouver, doesn't like structured products. Whether sticking with Mulvihill is makes sense depends on the circumstances of individual clients, he said. But you can't ignore the Pro-AMS debacle.

As Turnbull said, "Long term, these people have not provided the stability or income they targeted and I would be unlikely to give them a second shot. Fool me once, shame on you. Fool me twice, shame on me."

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### **Investor Protection Milestone**

The Canadian financial services regulatory system claims to offer investor protection but the protection offered is preventative in nature and not remedial. That means if an investor loses money due to wrongdoing it will be difficult for the victim to recover his losses. The complaints handling and dispute resolution is largely left to industry and industry sponsored agencies such as the Ombudsman for Banking Services and Investments. The victim must litigate to recover. When the Standing Senate Committee on Banking, Trade and Commerce asked SIPA's opinion on the provincial securities administrators, SIPA offered the opinion that the Autorite des marches financiers in Quebec seemed the most socially responsible in their development. Now the AMF has taken the initiative to sue failed Norbourg Asset Management Inc. on investors' behalf. This is the type of initiative envisioned for a national Investor Protection Agency.

*A Canadian Press article by Luann Lasalle is re-printed for members.*

Friday » September 30 » 2005

## **Quebec's financial services regulator to sue on behalf of Norbourg investors**

Luann Lasalle, Canadian Press

September 30, 2005

MONTREAL (CP) - In an unprecedented move to help 9,200 investors who've lost millions, Quebec's financial services regulator will sue Norbourg Asset Management Inc. on their behalf.

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The Autorite des marches financiers said Friday that \$130 million is missing from Norbourg and it decided to take the unusual step because of the seriousness of the situation and the number of investors involved. "The objective is to recover in their name the most money possible," said Jean St-Gelais, head of the provincial regulatory body.

"However, we don't want to create false hopes. We are very prudent and realistic in the eventual sum we will recover."

He described the situation the investors, most of whom are in Quebec, find themselves in as trying.

"Thousands of investors are living and will live with difficult situations in this context."

St-Gelais said he believes it's the first time in Canada that a financial services regulatory board will sue to recover money on behalf of investors.

"We will not do this in all cases. If you ask me if we will do this in all subsequent cases the answer is no," he said.

The lawsuit is also being undertaken because of "the potential impact on financial markets in Quebec," St-Gelais added.

Company president Vincent Lacroix has not been charged and has denied any financial wrongdoing.

Norboung, which offered different investment funds, had \$205 million assets under management as of July 31, 2005, but only \$75 million remains, leaving a hole of \$130 million.

Seventeen of its 29 funds held balances of less than \$300,000 and the main companies in the Norbourg group were operating at a deficit.

For these reasons, St-Gelais said the regulatory body agrees with the recommendation of auditors Ernst & Young to wind up the company.

Norboung isn't the only investment company under investigation. Quebec's financial services regulator is also investigating fund companies Zenith and Argentum for irregularities.

In Ontario, a court-appointed receiver is trying to figure out what happened to millions of dollars collected from investors by the Portus group of companies.

Investor advocate Robert Kyle called the decision by the Autorite des marches financiers an unusual tactic.

"I've never heard of that before," Kyle said from Toronto. "It's certainly a novel approach, perhaps one that needs to be explored better. Let's see what results we get."

However, he said Canada needs a separate body to deal with such cases in the securities, pension and insurance industries.

Kyle, a former broker who now runs a website with advice for investors, offered this advice:

"Make sure that you have a say in how the mutual fund company manages your money."

St-Gelais said the regulatory agency's decision to sue on behalf of investors will give them the advantage of legal expertise and financial resources.

A group of Norbourg investors have said they'll launch their own class-action suit. St-Gelais said there could be eventual co-operation between the agency and the investors involved in the class-action suit.

Meanwhile, Lacroix's father, Donald, was involved in a fracas with a Radio-Canada reporter and cameraman in Sherbrooke, Que., on Friday.

TV footage showed Donald Lacroix answering his front door and emerging with a baseball bat.

Reporter Stephanie Tremblay said she suffered a thumb injury after being hit.

Lacroix said he asked the two to leave his property and that they assaulted him.

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*For members wishing to take action we provide a sample letter for residents of Alberta, Ontario, Quebec and Saskatchewan to send to your M.P.P. asking for support to re-instate the limitation period to six years. Please also copy your letter to SIPA.*

Dear Sir;

I am a member of the Small Investor Protection Association (SIPA). In partnership with the Canadian Association of Retired Persons (CARP), SIPA recommended that the federal government establish a national Investor Protection Association to look after the interests of all Canadian investors.

There appears not to be any national authority that protects investors. This year SIPA is alerting the public that the limitation period has been reduced from six years to two years for civil litigation in several provinces. Small investors who have a complaint with the investment industry generally take at least a couple of years to deal with the industry's complaint handling process. When unable to achieve satisfactory resolution they must proceed to civil litigation.

Two years is not sufficient time to go through this process. The limitation period for aggrieved investors must be reinstated to six years or investment disputes must be exempted from the legislation.

The problem of small investors losing their life savings due to investment industry wrongdoing has been covered up for far too long. The market timing scandal, the collapse of hedge funds, and the bankruptcy of mutual funds indicate that the regulatory system is not protecting investors. The victims of wrongdoing have only civil litigation on which to rely. Most of the victims are seniors or widows.

Please support the re-instatement of the six-year limitation period for civil litigation regarding investment industry wrongdoing that results in Canadians losing their life savings.

Yours truly