

Justice Relies on Timeliness

by Ellen Bessner

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There are no limitation periods specified in the Investment Dealers Association's registered bylaws with respect to disciplinary actions, and to date the IDA has seemingly proceeded on the basis that it was not governed by any limitation period.

The IDA was prosecuting claims involving events that occurred years in the past, some dating back as far as the 1990s. Consequently, member firms and investment advisors could not only be prosecuted for recent events, but could be disciplined for events that occurred in the distant past. Those in the industry simply assumed the IDA had jurisdiction to do what it was doing, and never questioned or challenged the association in that regard.

The practice of self-regulatory securities organizations such as the IDA or the Mutual Funds Dealers Association may change as a result of a recent decision rendered by an IDA hearing panel on Oct. 1 of this year. By way of background, the Notice of Hearing in that case was issued on May 14, 2007. The violations were alleged to have occurred during the period from March, 1999, to February 26, 2001. As a result, all of the violations allegedly occurred at least six years, and sometimes as long as eight years, in the past. The hearing was set to begin on Sept. 17, 2007.

Shayne Strukoff, the Vancouver lawyer who successfully represented the brokerage firm, introduced a novel defence. Mr. Strukoff's basic contention was that "as a matter of public policy, provincial legislatures have implemented various Limitation Acts in order to protect people from stale claims, and investment advisers and brokerage firms should be entitled to rely on that legislation just like anyone else in society."

The hearing panel agreed and concluded that the IDA was precluded from prosecuting any action that would otherwise be barred by statute under the *Limitation Act*. At page 12 of its decision, the hearing panel described the rationale for limitation periods in these words:

In *Markevich v. Canada*, supra the Supreme Court of Canada addressed the Minister of National Revenue's contention that applying a limitation period as sought by the taxpayer would undermine the equitable collection of taxes. The Court observed at paragraph 20:

"The evidentiary rationale recognizes the desire to preclude claims where the evidence used to support that claim has grown stale. The diligence rationale encourages claimants "to act diligently and not 'sleep on their rights'."

At page 13, the IDA hearing panel relied upon a decision that addressed the issue of delay by a administrative tribunal, which provided, in part, as follows:

The oft-repeated statement that justice delayed is justice denied is no less applicable to administrative and quasi-judicial bodies than to courts of law.

The IDA Panel also noted that in British Columbia, the Securities Commission itself was bound by a six-year limitation period, and that it would be incongruous if the IDA, as a subordinate body in the securities regime, were able to prosecute one of its members for an alleged violation when the B.C. Securities Commission, the appellate body for any decision from such prosecution, would itself be barred by statute from doing so. The Ontario Securities Commission is also bound by a six-year limitation period.

What does this mean for regulators, advisors and their clients? Mr. Strukoff believes it will have wide ramifications, since "the IDA will now have to review its regulatory matters across Canada to ensure they are complying with provincial Limitation Acts, and member firms and investment advisors may have a new defence that, at least, ensures that not all of their past will come back to haunt them."

A client complaint that is made years after the events complained of may preclude regulators from investigating and prosecuting the alleged actions.

"Your past may come back to haunt you" may now be less of an issue for investment advisors, dealers and securities and may have far-reaching implications for Canadian, self-regulated organizations, including IDA and MFDA registrants and their advisors. My reaction: It's about time!