

Presented by the Financial Loss Advisory Group of MBC Law Professional Corp.

The Complaints Process for Retail Investments in Canada

A Handbook for Investors



PROFESSIONAL CORPORATION / SOCIÉTÉ PROFESSIONNELLE

Disclaimer:

This handbook was drafted in the winter of 2017/2018. Updates may be posted to **www.mbclaw.ca**. This handbook is provided for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. Readers considering making a complaint should obtain legal advice relating to their specific issue by consulting lawyer.

TABLE OF CONTENTS

Introduction	4
Purpose of this handbook	4
Things to Consider...	6
Why is the investor making the complaint?	6
What time has elapsed?	6
Will the investor be self-represented?	7
Can an investor complain to multiple bodies?	8
What information should be gathered?	8
Preserving records	9
Keeping records of the complaint process	9
Complaints	10
Who can an investor complain to?	10
Internal Complaints:	
The Investor's Advisor – Asking what went wrong?	11
What to consider when reviewing a Dealer's decision	14
Internal Complaints: The Dealer's Internal "Ombudsman"	16
External Complaints: Ombudsman of Banking Services and Investments (OBSI)	18
Things to watch out for in the OBSI complaint process:	19
External Complaints: Regulators and Self-Regulating Trade Organizations	20
Regulators	20
Self-Regulating Trade Organization	21
What can a complaint to a Regulator or SRO generally accomplish?	22
External Complaints: The Civil Courts	23
PIPEDA	26
Appendix A – PIPEDA Request	28
Other Resources	30

INTRODUCTION

A problem faced by many Canadian investors is disappointment with their investments and financial planning results. This disappointment is often greatest when it stems from faulty investment advice. When are poor results the fault of the advisors? When does that faulty advice merit making a complaint?

Unfortunately, the complaint process can be unduly confusing – even in cases where there has been a clear breach of legislation, regulation or industry standards.

- Which level of government is responsible to oversee the financial services provided?
- Which regulatory body has authority to hear a complaint?
- What authority does each regulatory body have to punish, to warn and/or to compensate?
- What are the pitfalls of each?

When ordinary Canadians buy securities and mutual funds, they often receive advice from an advisor who is licensed by two regulators – one dealing with investments and the other dealing with life insurance. When more than one regulator is involved, there is even more room for confusion.

Purpose of this handbook

When seeking financial compensation for faulty investment advice or even fraud, investors are generally on their own. They must seek out information and advice about their rights and the possible options available to them to seek redress. Typically, regulators will provide general information to the public, however this information is often inadequate. Gaps in this information include landmines such as:

- Investors have limited time to make a claim with the courts. This time may lapse before or during the complaint process.
- Investors may make admissions that can be used against them by their former advisors and their Dealers.

- Investors may settle one problem, only to learn later that they are prevented from pursuing losses incurred from other problems that they did not know about.
- Investors may waive rights they did not realize they had.
- Investors may have to keep quiet about the misconduct of their advisors.

Canadian investors need more and better information to protect themselves both when they act on their own and when they retain lawyers. This handbook is intended to help Canadian investors better understand the choices they face when making a complaint and the impact of those choices. It can also serve as a guide to assist them when they work with lawyers, particularly those whose law practice does not focus on assisting Canadian investors in obtaining financial compensation.

No guide in this area can be complete; the investment complaint process is simply too complex and evolving too quickly to be fully addressed in a single complaints handbook. There are ten provinces and three territories and a federal government, each with its own authority and regime. This field is also rapidly changing due to the determined work of investor advocacy and political/regulatory leadership.

This handbook does not address complaints stemming from investments made through life insurance companies. The insurance industry is governed by a patchwork of distinct rules and processes unique to each province. ***This handbook does not address complaints arising from investments made in Quebec*** (which generally has its own complaint handling processes, distinct from those in place throughout the rest of Canada).

This handbook was written in the winter of 2018. Updates may be posted to **www.mbclaw.ca**.

THINGS TO CONSIDER...

Why is the investor making the complaint?

There are many different bodies to which a wronged investor may complain. Unfortunately, not all of these have the same obligations or powers. Some can make decisions that are binding, while others cannot. Some may be able to award financial compensations (generally achieved by starting a court action) while others can punish for misconduct and order costs or penalties. The investor must therefore determine what his goals are in making the complaint.

Generally, a complaint may try to accomplish one or more of these three objectives:

- Punish the wrongdoer.
- Avoid further misconduct.
- Seek compensation for the financial loss.

What time has elapsed?

Under Canadian law, investors who are victims of financial misconduct only have a limited time within which to initiate an action with the courts. In most Canadian provinces investors must initiate a court action for compensation ***within two years*** of when they first became aware that an advisor's poor advice or wrongdoing caused them to incur losses. This is called the Limitation Period. ***Once this Limitation Period has passed, investors may lose their right to pursue their action.***

Investors should be aware that, as a general rule, the Limitation Period will continue to run throughout the investigation of a complaint process started outside of the court system. This handbook will discuss the Ombudsman of Banking Services and Investments, however note that if a complaint is started with the OBSI the limitations period will stop running as against the dealer. ***Only the dealer.*** The limitation period will continue to run against any and all other key potential defendants.

Missing this limitation period deadline has serious and significant consequences. Allowing the limitation period to lapse without starting a court action dramatically reduces the chances of obtaining any compensation. In fact, undue delay is worse than a bad start. Often, even a poor effort will protect an investor's right to make the claim. Delay, however, can prove fatal to any prospect of compensation. Every investor should be aware of its province's limitation period.

Will the investor be self-represented?

People who opt to represent themselves rather than retaining lawyers experienced in representing investors, face challenges with many inherent obstacles:

- **Complaint checklist** - To qualify for compensation, there are several items the investor must cover. Like a checklist. Examples of these include: When did the investment begin? How much was invested? Who was the advisor? What did the investor tell the advisor? Every required item must be "checked off" (covered) before compensation will be paid. But what are those items?
- **Institutional resistance** - When dealing with either the advisor and or dealer, they have a strong incentive to deny compensation.
- **Confirmation bias** - The people tasked with reviewing complaints usually believe that their advisors is and has provided a good service. They may therefore be more likely to believe the advisor's side of the story.

How does an investor overcome these obstacles? Only by carefully preparing the complaint and tracking all efforts to get compensation. Here are the basic steps that should be followed when making a complaint:

- Start by gathering all relevant documents and records (see the later section in this handbook called **PIPEDA**).
- Keep and collect everything that comes from the advisor or the sponsoring Dealer, whether it be brochures, emails, correspondence, promotions for investment products, website pages etc.

- Present the information to the dealer. If initially rejected, consider approaching the Dealer's in-house Ombudsperson, if one is available.
- If unsatisfied with Dealer's response, consider whether to pursue a claim through the independent national Ombudsman (OBSI) or the courts (lawsuit).

When seeking financial compensation, the investor is often pitted against a big business with bureaucratic management and a team of lawyers experienced in this area of law. This is to be expected. Investment advisors and their dealers are in the business of making money. When a complaint arises, their immediate goal is to make that complaint disappear as quickly, quietly and cheaply as possible. To achieve this outcome, they employ strategies and tactics that best suit their own interests, not those of their former clients.

Can an investor complain to multiple bodies?

Yes. An investor can generally start a complaint with any and all organizations with jurisdiction to hear the complaint and conduct an investigation. All at the same time, or in a sequence that makes sense to the situation, and in addition to starting an internal complaint with the advisor and/or Dealer, an investor can and should also consider starting a complaint with the OBSI, the Dealer's Regulator or SRO and the Courts. In certain circumstances, the investor should also consider making a complaint with the local police.¹

What information should be gathered?

All records should be collected. There are two sources of investor records:

- The personal files that the investor has maintained; and
- The investor's files held by the advisor and or dealer.

An investor's personal records can be very helpful. This is especially true of any brochures, presentations, emails or letters, in which the advisor made promises

¹ A complaint to police should be made if the loss is a result of a fraud, theft or other Criminal Code offence.

that were not kept. For example, the advisor may have promised above average returns with no or minimal risk; or, the advisor may have promised capital preservation. Often the records reveal that the advisors do not discuss the risks associated with their recommendations, while at the same time exaggerating the potential benefits. Where the advisor breaches an obligation or misrepresents what the client can expect, a claim for compensation for losses exists.

Please see the section in this handbook named PIPEDA (***Personal Information Protection and Electronic Documents Act***) which sets out how to obtain records from the advisor and dealer within 60 days, at minimal expense. Some companies will try to further delay providing the investor with records. In most circumstances, the investor should not let them. This handbook also contains at “Appendix A” a sample PIPEDA request.

Preserving records

The investor should take care to preserve both the investor’s own records and the records obtained through PIPEDA requests without alteration. That means:

- Investors should not destroy or dispose of records in their possession or control;
- Investors should not mark up their records. If necessary, a second copy can be made, or sticky-notes can be applied to bring attention to parts of records.
- Investors should track which records are from their own files and which ones are the result of a PIPEDA request. These documents should not be co-mingled as their source may be key.

Keeping records of the complaint process

An investor should, as much as possible, keep written records of the complaint process itself. This includes all complaint-related communications with the advisor, the branch manager, the complaints person, the Dealer’s internal Ombudsperson and the Dealer’s lawyer. The investor should, as much as possible, attempt to have all communications be in writing and should avoid in person face-to-face meetings

COMPLAINTS

that are difficult to record. A complete record may be crucial to the inventor's success.

At any meeting where the Dealer's lawyer is present, the investor should attend with someone they trust, preferably with a professional or someone with a business background. The dealer will have witnesses to record what happened, so the investor should have one too.

Who can an investor complain to?

For the purposes of this handbook, a complaint is any effort made by a retail investor to redress a wrong that caused the investor to incur a loss in the financial markets. A complaint can take many forms and can be made to many different organizations. It should be noted however, that the power of these organizations to enforce or provide compensation varies greatly.

Internal Complaints

- to the investor's advisor directly;
- to the sponsoring Dealer;
- to the Dealer's Internal "Ombudsman";

External Complaints

- to the Ombudsman for Banking Services and Investments (**OBSI**)² ;
- to the Regulator including the securities regulators from each of the 10 provinces and 3 territories in Canada and the Canadian Securities Administrators³ is represents their combined efforts to protect Canadian investors.

² <https://www.obsi.ca/en/index.aspx>

³ <https://www.securities-administrators.ca/>

⁴ <http://mfda.ca/>

⁵ <http://www.iiroc.ca/Pages/default.aspx>

- to the Self-Regulating trade organization including the Mutual Fund Dealers Association (MFDA)⁴ or the Investment Industry Regulatory Organization of Canada (IIROC)⁵;
- to the civil Courts.

Internal Complaints:

The Investor's Advisor – Asking what went wrong?

The first step in a complaint process is generally to raise the complaint with the financial advisor. If the advisor is unable or unwilling to resolve the investor's complaint satisfactorily, the investor should escalate it.

Technically, advisors must report any investor complaints to their sponsoring Dealers. Often, advisors delay making the report and prefer attempting to deal with the investor's complaint alone. If the advisor and investor can agree on satisfactory redress, then the advisor's failure to report the complaint is of little concern to the investor. If the advisor fails to address or adequately redress the complaint, the investor should escalate the issue to the Dealer.

A very important legal point is the advisors and their sponsoring Dealers cannot offload the suitability determination on their clients. Online discount brokers are excepted. The account opening form contains the Know Your Client information the Dealer must obtain and review before making recommendations. These forms contain the information that Dealers use to evaluate what the clients need, and how much risk of loss they can accept. The judgment calls regarding investment objectives and risk tolerance dictate what investments the Dealer should recommend. This is the suitability requirement in the regulations, and cannot be offloaded to the clients.

Here are some tips to improve the investor's odds of a quick and satisfactory resolution with the advisor:

An investor should attempt to better understand the situation:

- The investor should be prepared to clearly and concisely explain the issue. Often however, the investor only knows that there was an unexpected loss. Consequently, communicating with the advisor to find out more information may be beneficial. In any meeting with the advisor, the investor should ask open-ended questions using “How, Why, When, Where and Who” to obtain as much information as possible. An investor should allow the advisor to explain and actively listen to the answers being provided. The investor should take notes of the meeting or communication for their own later review and to possibly obtain a second opinion.
- It may also be beneficial for an investor to involve a trusted third party in any communication or meeting. This is especially true if the investor recognizes that they are likely to become upset or emotional. Nothing good will come from a meeting where an investor is angry or anxious.

An investor should ask for documentation:

- Particularly, the investor should ask for any documentation proving that he/she agreed to incur the risk that led to the loss. If this does not exist, or if the investor takes the position that the document in question was not adequately explained to them, there may be a good case for compensation. For example, “Account Opening Forms” are typically completed by the advisors. These forms include the subjective evaluations of the advisors. Where the forms indicate that the investor is willing to accept risk, this does not relieve the advisors of culpability if the risk was not suitable for the investor. Some investors cannot afford the loss. It is up to the advisors to evaluate suitability.

An investor should search their records for advice and guarantees made by the advisor:

- If the advisor promised preservation of capital, then there is rarely a justification for lost capital.
- If the advisor said there was low risk and a large loss occurred, then the level of actual risk was not low.

- If the advisor promised a financial plan, but only provided a template that was not customized, then the advisor did not do what was promised and may be liable. Customization does not mean filling in a few blanks on a standard form or report.

An investor should consult industry organizations to become familiar with their standards:

- These industry organizations include the Financial Planning Standards Council⁶ and Advocis⁷. The investor could then determine if the services provided were in line with basic industry standards for financial planning.

An investor should seek a second opinion from a professional:

- This professional should be independent from both the advisor and the sponsoring Dealer. The investor should also be wary of asking the advisor for a referral.

Ultimately an investor should be cautious when making a complaint to their advisor. An advisor is often someone the investor has spent years cultivating a trusting relationship and may have become, or act like, a close friend. However, when complaint arises, the teamwork between investor and advisor may break down in the face of a conflict of interest.

Internal Complaints: The Advisor's Sponsored Dealer

The next step in the complaint process is generally bringing the matter to the attention of the advisor's sponsoring Dealer. Regulations allow 90 calendar days for the dealer to respond to an investor complaint. The Dealer's response to the complaint must be in writing and include:

- an explanation of how the complaint was reviewed;
- the amount of compensation, if any, being offered as a result of this review, and
- the alternatives available to the investor if still unsatisfied.

⁶ <http://www.fpsc.ca/>

⁷ <http://www.advocis.ca/>

The Dealer must investigate the investors complaint “fairly, honestly and in good faith”⁸. Unfortunately, in practice, the Dealer’s complaint response may be dismissive.

Though the Dealer’s decision should be read and considered, this does not mean that an investor must agree with the conclusions reached. This is especially true, if the Dealer’s justification for reaching the decision appears to be flawed and without consideration of facts the investor knows to be true. A Dealer’s decision should be thorough, transparent and fair.

What to consider when reviewing a Dealer’s decision

A Dealer is not an impartial party to your complaint. Though they must answer your complaint “fairly, honestly and in good faith”, the ultimate goal of the dealer, as with any other business, is to keep their business profitable, which unfortunately may mean protecting it from potential losses, including your complaint. As such, any decision that is reached by them should be critically reviewed by the investor making the complaint.

Some ideas the investor should consider when reviewing the Dealer’s decision are:

- What weight did the Dealer accord the advisor’s version of events?
- What supporting documents (or other evidence) did the Dealer consider in reaching their decision?
- Has the investor ever seen these documents?

⁸ See section 2.1 of OSC Rule 31-505 Conditions of Registration; section 14 of the Securities Rules, B.C. Reg. 194/97 [B.C. Regulations] under the Securities Act (British Columbia), R.S.B.C. 1996, c. 418 [B.C. Act]; section 75.2 of the Securities Act (Alberta) R.S.A. 2000, c.S-4 [Alberta Act]; section 33.1 of the Securities Act (Saskatchewan), S.S. 1988-89, c. S-42.2 [Saskatchewan Act]; subsection 154.2(3) of The Securities Act (Manitoba) C.C.S.M. c. S50 [Manitoba Act]; section 160 of the Securities Act (Québec), R.S.Q., c. V-1.1 [Québec Act]; section 39A of the Securities Act (Nova Scotia), R.S.N.S. 1989, c. 418 [N.S. Act]; subsection 54(1) of the Securities Act (New Brunswick) S.N.B. 2004, c. S-5.5 [N.B. Act]; section 90 of the Securities Act (Prince Edward Island), R.S.P.E.I. 1988, c. S-3.1 [P.E.I. Act]; subsection 26.2(1) of the Securities Act (Newfoundland and Labrador), R.S.N.L.1990, c. S-13 [Newfoundland Act]; section 90 of the Securities Act (Nunavut), S.Nu. 2008, c. 12 [Nunavut Act]; section 90 of the Securities Act (Northwest Territories), S.N.W.T. 2008, c. 10 [N.W.T. Act]; and section 90 of the Securities Act (Yukon), S.Y. 2007, c. 16 [Yukon Act].

- Are these documents that the investor may have signed?
- Did the investor understand the significance of those documents before signing them?

When reviewing a Dealer's decision, the investor should be weary of any complex industry terms or legal wording. Reliance on jargon may indicate that the Dealer has no substantial defence to the complaint being made. Dealers will raise and highlight technical defences whenever they can. Investors should also look out for any reliance the Dealer is making on fine print contained in certain documents. Though this fine print may confirm or deny specific positions or arguments made, the Court and OBSI may not necessarily place the same level of importance on these.

Following their review of an investor's complaint, the Dealer may offer to settle your complaint through some financial compensation. Generally, the amount offered will not include the full amount of the loss. In some instances, the Dealer will attempt to make a nuisance settlement.

This is a token amount to ensure that they are no longer troubled by the complaint going any further. This offer to settle may occur even in those situations where the wrongdoing is obvious, and the damages can be readily determined. It is up to the investor to determine whether their complaint is likely to succeed, and the continued resources they are willing to use to pursue their complaint.

An investor who accepts a Dealer's decision, brings an end to the complaint process. It is therefore important for investors to be convinced that the outcome is in their best interest. If an investor is not satisfied with the Dealer's decision, they may, in some situations commence a complaint with the Dealer's internal Ombudsman, as explained in a later section of this handbook, or commence a complaint through an external source:

- Lodge a complaint with the Ombudsman for Banking and Investments (OBSI), as explained in the later section of this handbook.

- This is the Ombudsman officially recognized by securities regulators as the sole ombudsman for complaints involving investment and mutual funds dealers. Note that the OBSI does not have binding authority, that is, resolution can only be achieved by consent.
- Lodge a complaint to a regulator including the Canadian Securities Commissions (Canadian Securities Commissions)⁹ or its Provincial counterpart, as explained in the later section of this handbook. In some provinces, investors may seek financial compensation through their provincial securities commission.
- Initiate a court action as explained in the later section of this handbook. Depending on the dollar amount the investor would be claiming, this may be done in the Small Claims Court or in the regular Civil Court.

Internal Complaints: The Dealer's Internal "Ombudsman"

Some Dealers have introduced the idea of an internal "Ombudsperson", employed by the Dealer to help them resolve complaints. Despite the title, investors making a complaint should keep in mind that these individuals are employees of the Dealer who do not act independently of their employer. They are effectively a second-tier complaint-handling group. The value to investors making a complaint to the Dealer's internal Ombudsperson is unclear. The interaction certainly helps the Dealer as part of its risk reduction and defence-building processes.

Investors should be aware that making a complaint to the Dealer's internal Ombudsman is not mandatory and will delay their cases from being considered by independent agencies (the OBSI, Regulators, Self-Regulating Trade Organizations or the Civil Courts). Until recently, Dealers and even Self-Regulating Trade Organizations suggested that investor had to make a complaint to the Dealer's internal Ombudsperson before they could make external complaints. However, investors should be aware that this is not the case and that they do not have to make a complaint to the internal ombudsperson.

⁹ <https://www.securities-administrators.ca/>

Following their review of an investor's complaint, the Dealer may offer to settle your complaint through some financial compensation. Generally, the amount offered will not include the full amount of the loss. In some instances, the Dealer will attempt to make a nuisance settlement.

This is a token amount to ensure that they are no longer troubled by the complaint going any further. This offer to settle may occur even in those situations where the wrongdoing is obvious, and the damages can be readily determined. It is up to the investor to determine whether their complaint is likely to succeed, and the continued resources they are willing to use to pursue their complaint.

Investors should note that if they have retained a lawyer, the internal Ombudsman step may increase their legal costs.

The Dealer's internal Ombudsman is:

- not regulated;
- not fully transparent as their loss-calculation process is not disclosed;
- not subject to independent review;
- gathering information. Information or what is said by an investor can later be used by the Dealer to defend itself if an exterior complaint process is commenced.

Unlike in the OBSI process, (as explained in the later section of this handbook – to some extent) the provincial Limitation Period will continue to run while the internal Ombudsperson assesses the investor's complaint.

Why does the Dealer have an internal Ombudsman? The fact is that there are several advantages to the Dealer.

- If the investor hears the Dealer's position supported, this may be enough to persuade the investor to accept that position.
- The more steps in a complaint process, the greater chance the investor will give up and drop the complaint.
- The more time that is used up, the greater the chance that the investor will not start a claim within the Limitation Period, thereby greatly affecting his chances to even start a civil court action.
- If the internal Ombudsperson confirms the Dealer's position about the complaint, some investors will not be willing to start all over again with the independent OBSI.

External Complaints: Ombudsman of Banking Services and Investments (OBSI)

If an investor is not satisfied with the response received from their internal complaints, they may complain to the OBSI. ***It should be noted that though it was generally believed that investors had to have already used the internal complaint system of the Dealer before making a complaint with OBSI, this no longer appears to be true.***

The OBSI is an independent resolution service that is available at no charge to investors. It investigates complaints and offers non-binding recommendations, which may include recommending settlements to a maximum of \$350,000.00. Non-binding recommendations however means that Dealers do not have to follow OBSI's recommendations and are free to attempt to negotiate a lower settlement or outright refuse to follow a recommendation. When the OBSI makes a settlement recommendation, and the Dealer chooses to negotiate this amount with the investor, OBSI effectively becomes a mediator in the negotiation. Investors, unrepresented by a lawyer, are asked to negotiate with the Dealer's lawyers. And in some cases, the OBSI may recommend that an investor accept a Dealer's settlement offer even though it is less than the amount set out in its own recommendation.

It is very important that the investor very carefully prepare their complaint to the OBSI. The OBSI will typically only investigate the specific issues identified by the investor in their complaint. It is unlikely that OBSI will investigate other issues. It is therefore very important that the OBSI be provided with a very well drafted complaint containing pertinent and comprehensive information so that it can become a helpful partner in the complaint process. Their investigators are knowledgeable and professional. They are not, however, trained as lawyers.

Of the available options retail investors have to seek redress from their Dealers, OBSI is the most practical for those with claims that are not large enough to justify starting a court action.

OBSI, while imperfect, is the most investor-friendly alternative for those seeking compensation. Canadian securities regulators are taking a hard look at improving OBSI. Under consideration are rules that would make OBSI recommendations binding on Dealers, something multiple independent reviews have recommended. Until this happens, there remains a distinct possibility that a disaffected investor will not be properly compensated because of a complaint resolution system with no power of enforcement.

Things to watch out for in the OBSI complaint process:

1. OBSI Complaints and their effect on the Limitation Period

- While an investor is formally working with the OBSI, the limitations period (explained in an earlier section of this handbook) is paused, but **only as against the Dealer**. This represents a fundamental problem with the OBSI process. Often the Dealer is unwilling to settle without some contribution from the advisor, and the advisor is not represented in the OBSI process at all.
- Later, if an investor chooses to start a court action, it is possible that the investor's lawyer will suggest naming the financial advisor and possibly other parties to the action. These other potential defendants are not covered by the agreement with the Dealer to stop running the limitation period and as such the delay may seriously prejudice an investor's chances of starting a court action against these other possible parties.

2. Limited Disclosure

- Another limitation in the OBSI process is that it does not follow the rules of the court relating to investigative transparency. Investors who complain are not privy to all the disclosures and evidence the OBSI considers in reaching its decision. As a result, it is conceivable that the Dealer may tell the OBSI things and provide documents that the investor does not see and cannot verify.
- When using the OBSI, investors should be prepared for several months of investigation. In some cases, however, accepting the OBSI's recommendation may be the best resolution. This is especially true if the investor is unable or unwilling to start a court action.
- For more information about OBSI and how to make a claim, visit:
<https://www.obsi.ca/en/news-and-publications/print-materials.aspx>

External Complaints: Regulators and Self-Regulating Trade Organizations

Regulators

A Regulator is an organization appointed by a government to regulate a specific area of activity. In Canada, each of the ten (10) provinces and three (3) territories have their own regulator, and they have teamed up to form the Canadian Securities Administrators whose goal is to protect Canadian investors from unfair, improper, or fraudulent practices and to foster fair and efficient capital markets.

In most cases, a complaint to a regulator is different from an investor's court action for financial compensation. Most regulators do not have authority to order or provide financial compensation for the financial losses incurred by the investor. However, it is our understanding that at this time, the Securities Commissions of Manitoba, New Brunswick and Saskatchewan can, in appropriate cases, order compensation. This requires a preliminary finding of a regulatory violation which may take years to investigate and adjudicate. These orders are rare.

For more information on your provincial securities commissions and how to submit a complaint and on their ability to provide financial compensation, visit their website.

Self-Regulating Trade Organization

A Self-Regulating Organization (SRO) is a non-governmental organization that has the power to create and enforce industry regulations and standards. The following two SROs are the organizations¹⁰ most responsible for regulating advisors and dealer's behaviour.

The Mutual Fund Dealers Association (MFDA) is an SRO for the Canadian mutual fund industry. It is formally recognized by the provincial securities commissions (with the exceptions of Newfoundland and Labrador and Quebec). The MFDA is responsible for regulating the operations, standards of practice and business conduct of its members and their representatives with the view of enhancing investor protection. The MFDA's enforcement department investigates where their members may have breached requirements. An investor who wishes to make a complaint to the MFDA may do so using their online complaint form or by calling them. For more information about the MFDA visit the MFDA's web site.

The Investment Industry Regulatory Organization of Canada (IIROC) is an SRO which oversees all investment dealers and trading activity on debt and equity markets in Canada. IIROC sets and enforces rules regarding the proficiency, business and financial conduct of dealer firms and their registered employees. IIROC has a team that handles all incoming public investor complaints and inquiries. Their role in protecting investors is to investigate complaints of regulatory violations and to impose penalties on those who are found guilty. An investor who wishes to make a complaint to IIROC may do so by emailing them, using their online complaint form or by calling them.

¹⁰ Technically, IIROC and the MFDA are "Self-Regulatory Organizations" whose membership is comprised of the Dealers they regulate.

Neither of these SROs has any authority to order compensation to investors. They can order penalties, fines and costs, which are payable to the SROs and kept by them. These monies are not available to compensate the victims of financial abuse.

IIROC does however require all investment firms it regulates to take part in arbitration should the investor choose to. Arbitration is a process by which a qualified arbitrator – chosen in consultation with both the investor and the Dealer – hears both sides and makes a final, legally binding decision about the investor's complaint. The arbitrator acts as the judge and reviews facts presented by each side. Arbitrators can award up to \$500,000.00. For several reasons, beyond the scope of this handbook, this alternative is seldom used by retail investors.

What can a complaint to a Regulator or SRO generally accomplish?

A complaint to a Regulator or SRO can accomplish three (3) goals:

- It may clarify whether the advisors and their dealers have breached any laws, rules or standards;
- It may protect other investors from the same harm experienced by the complainant;
- It may punish the wrongdoers.

An exception is where the financial harm is the result of a criminal offence. A criminal court can order restitution, but it is rarely possible to collect damages from convicted fraudsters. It often proves easier to pursue compensation from the companies who sponsored these fraudsters or from any errors and omissions insurance contracts they maintained.

A note on Québec:

In Quebec, the Autorité des marchés financiers (AMF) offers a free mediation service for investors who live in Quebec and are not satisfied with the response from the Dealer. The AMF will review the complaint and may help the parties reach a settlement. Participation in the service is voluntary and both the Dealer and

investor must consent to it. Investors can pursue other options if an agreement cannot be reached. For more information about the AMF mediation service, visit the AMF's website.

External Complaints: The Civil Courts

Generally, an aggrieved investor should consider starting a court action:

- When there is a regulatory breach. If the advisor is offside a rule/standard and the breach of this rule/standard caused the loss, then the investor has the grounds for a financial claim.
- When there is a breach of contract or misrepresentation. If the advisor said something important that was untrue, or promised something and failed to deliver, this may be a ground for a financial loss claim.
- When there is fraud. If the advisor stole from or deceived the investor, then the advisor's sponsoring dealer is often responsible.

An investor's decision to start an action will therefore certainly depend on the specific facts of the investor's case. An investor must however consider other circumstances including the fact that a court action is often time-consuming, unpleasant, lengthy, frustrating and requires both persistence and risk tolerance on the part of the wronged investor.

Once an investor has established valid grounds for an action, the next considerations must be the amounts of money lost and the likelihood that it can be recovered. Undertaking to start a court action must be worth the effort. The bottom line is that seeking financial compensation for investment losses is a major effort and investors looking to potentially start a court action should be aware of, and understand, the difficulties before starting it.

Court Action in the Small Claims Court

Where the losses suffered are relatively small, investors can start a claim with the

Small Claims Court (SCC). Each province has one. In Ontario, for example, the monetary limit that can be awarded by the SCC is \$25,000. In addition, modest out-of-pocket expenses directly related to the court claim and some legal fees may be awarded. Individuals do not have to retain a lawyer to bring a case in the SCC.

Though rules relating to representation in Small Claims Court vary by province, the investor should expect the advisor and Dealer to be represented by lawyers. They will likely be experienced counsel skilled at presenting their clients' case. Lawyers are educated, trained and experienced to be formidable opponents in a dispute.

Expect the SCC deputy judges to have common sense and experience in court procedure, but relatively little experience with respect to investment concepts and the standards and law related to them. The SCC's process seeks to level the playing field between represented and unrepresented parties, with mixed success. It encourages negotiated settlements. An actual trial is a risky matter for both sides, even in what appear to be strong cases.

Court Action in the Superior Court

An investor seeking compensation over the Small Claims limit will have to start an action with the Superior Court. Though investors may represent themselves in Superior court, it is strongly recommended that they hire a lawyer with experience and knowledge with standards applicable to investments.

It is important to note that many investment actions are started in the courts every year and very few reach trial. While some court actions are withdrawn, most are settled with non-disclosure terms. If the court action is "settled to the satisfaction of the parties", generally the payment is not disclosed. These settlements can return a large portion of the damages suffered by the investors.

A situation where there has been a substantial loss may justify the effort and cost of hiring a lawyer to evaluate the merits of a potential action on a cost-benefit basis. In certain situations, an experienced lawyer may be willing to offer an investor a contingency retainer agreement "CRA". With this type of retainer, the investor only pays the lawyer's fees if and when proceeds from a settlement or

judgement are received. The CRA may provide that the lawyer is paid an agreed percentage of the settlement or an increased hourly rate, plus out-of-pocket expenses. CRAs give access to justice to investors unable or unwilling to finance a court action. A hybrid agreement would call for the lawyer to bill at a lower rate, but then take a percentage of the compensation when paid.

It should be noted however that CRAs rarely call for the lawyer to pay the defence costs, if costs are awarded by the Court in a losing action. CRAs usually do, therefore, involve some level of risk for investors wanting to start a court action.

Some investors favour CRAs because they align the interests of the claimant and the lawyer. They are both paid from a successful outcome. The more the settlement payment, the more that both lawyer and claimant receive. However, there is a conflict of interest in that lawyers cannot advise the wronged investor about their own retainers. When presented with a proposed CRA, an investor should consider getting independent legal advice. Many investors have trusted family lawyers who can assist in this respect.

Investors should weigh two other factors when deciding whether to commence a court action. The first has to do with the stress and time commitment associated with a contentious lawsuit. The second is the cost of walking away from a loss and living with the ensuing regret. These are important considerations that each investor should evaluate.

Every province and territory has either adopted the federal Personal Information and Electronic Records Act (PIPEDA)¹¹ or has similar provincial legislation. The purpose of these laws is to give private citizens access to the records kept by businesses with which they deal. These laws are powerful tools in the hands of the investor.

PIPEDA allows all individuals to obtain a copy of records containing their own personally identifiable information from businesses (including both the advisor and the Dealer), with limited reservations.

Investors should write to their advisors and Dealers using the law's specific words to request the relevant information and documents. Many of these documents would not be released, but for that specific wording of the law. Examples include the advisor's notes (if any exist) of each conversation with the investor, any recording of conversations with the investor, forms which may have been altered or created by the advisor, and internal questioning of recommendations of the advisor.

To exercise this right, the individual investor (not a company) must:

- Write to the Chief Privacy Officer of the firm; and
- Request all documents that eligible under PIPEDA.

We recommend that the specific provision of the PIPEDA law be referenced. In Ontario, the federal version applies and s. 8 is the key provision. (An example of this request can be found as part of "Annexe A" at the back of this handbook.)

Under the federal law, the advisor and Dealer have 30 days to respond to this request, which can be extended by 30 days (for a maximum total of 60) if requested in writing by the Dealer.

¹¹ PIPEDA can be found at <http://laws-lois.justice.gc.ca/eng/acts/P-8.6/> For an explanation see: <https://www.priv.gc.ca/en/privacy-topics/access-to-personal-information/accessing-your-personal-information/>

A small fee for this information may apply. This is not like a bank fee for getting your past statements, which can add up to hundreds of dollars. A key concept of PIPEDA is quick and inexpensive access to personal information. If the advisor or Dealer attempts to thwart the intent of the law through delays or excessive charges, investors are advised to contact the provincial or federal Privacy Commission for assistance.

Investors should retain a copy of their information request and proof of when it was sent, in case of a dispute. When the information is received, keep it intact. Do not mark up the documents with highlights or notes. This is key evidence that will be fundamental to getting compensation awarded.

Appendix A – PIPEDA Request

Date: *[Date of request]*

Address: *[address of the advisor or corporation]*

Attention: *Chief Privacy Officer*

Re: *Personal Information Request of [name of requester]
SIN [social insurance number of the requester]*

Dear Chief Privacy Officer:

I write to request access to, and a copy of, my personal information held by you and/or by you on behalf of your employer.

As of January 1, 2004 the Personal Information Protection and Electronic Documents Act (“PIPEDA”) has applied to all commercial activities in Ontario. The Act requires that every organization give an individual access to his personal information “held” by the organization in response to a request for that information for that individual. I wish to exercise my rights under PIPEDA.

If for any reason the above request is not adequate to obtain access to a copy of my personal information held by your and/or by you on behalf of your employer, then please consider this a formal request for assistance in my preparing this request pursuant to s. 8 (2) of the Act.

If there is a minimal cost for my request for access to, and a copy of, my personal information, then I hereby consent to said cost. Please forward an invoice as soon as possible.

If any of my personal information has been communicated to third parties, then please provide a detailed accounting of how my personal information has been disclosed and to whom it has been disclosed.

If any of my personal information has been or was in your, or your employer's, keeping and has been destroyed, then please inform me of the nature of the information that was held, the best available description of the information that was destroyed, when it was destroyed, why it was destroyed and if it was destroyed pursuant to a corporate records retention policy, then the information on (and a copy of) the policy.

I request a copy of any all applicable policies and practices concerning the management of personal information.

Please provide your response to me at the address below:

[Name of requester and address for reply]

I thank you in advance for your cooperation and efforts.

Yours truly,

[Name and signature of requester]

OTHER RESOURCES

These following websites contain useful information and guides concerning complaints:

FAIR Canada

(<https://faircanada.ca/>)

Small Investor Protection Association

(<http://www.sipa.ca/>)

Kenmar Associates

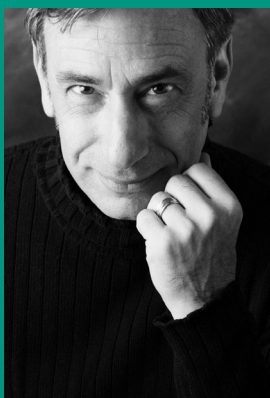
(<http://www.canadianfundwatch.com/>)

OSC

(<https://www.getsmarteraboutmoney.ca/>)

MBC Law Professional Corporation

(<http://www.mbclaw.ca/en/our-services/financial-recovery.html>)



Harold Geller

hgeller@mbclaw.ca

613-564-3009



John Hollander

jhollander@mbclaw.ca

613-564-3010



Margot Leduc Pomerleau

mpomerleau@mbclaw.ca

613-564-3012

Harold Geller is a lawyer with the MBC Professional Corporation, an Ontario based law firm that represents investors in securities, mutual funds and life insurance claims across Canada. Harold is the chair of MBC's investor loss practice group which includes John Hollander and Margot Pomerleau and other lawyers and clerks who have helped over 1500 Canadians obtain investment loss compensation.

