

14 December 2007

Minister of Finance
The Honourable James M. Flaherty
Department of Finance Canada
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Dear Minister,

On October 12th, 2007 I participated in a 'Peer-to-Peer Roundtable' on a 'National Securities Regulator' in Toronto at which you were the guest panellist. Please find appended to this letter the question which I posed to you at that forum.

Your response to me, I believe, indicated a misunderstanding as to the substance of that question. I would like to take this opportunity to clarify that question by way of an introduction to the system which all consumer/retail investors across Canada are subjected to. In doing so, I am hopeful that you will be able to more adequately address my concerns and question.

In my question I used the term 'consumer/retail investor' which was to represent all individual investors, Canadian or otherwise, who participate in Canada's capital markets. In order to invest, except in the very few circumstances where the purchase is direct from the issuer/fund, retail investors are forced to utilize the services of a securities/mutual fund dealer. These dealers, across Canada, are required to be registered under prevailing provincial securities laws/regulations with the appropriate provincial securities commission/administrator.

Currently provincial policy dictates the delivery model for regulation within the Canadian securities industry. How it is applied, when it is applied, and the degree to which it is applied is of concern not only to industry participants but also to the retail investing sector.

The responsibility for the administration/enforcement of securities law should reside with government and its legislatively delegated agencies. It is at this point that our current system has failed to protect Canadians.

I am sure you would agree that when the provincial legislatures created the respective provincial securities acts that there was no intention to create a parallel and inferior system of regulation for the investing public which we are now subjected to.

Currently, aggrieved retail investors who present a legitimate claim of a contravention of a provincial securities act are directed by the securities commissions to contact a self-regulatory organization ("SRO"). The SRO, not being a creature of statute, regulates its members and those registrants employed by the member by contract. The terms of that contract are the by-laws and constitution of the SRO. The securities commissions have "recognized" the SROs for the purpose of regulating its members subject to those terms. The contract however does not extend to the public as they are not a party to that contract. Please find below an extract from a

'recognition order' of the Investment Dealers Association of Canada ("IDA"), an SRO, dated 14 December 1994;

WHEREAS the necessity for interaction between the IDA and the Commission results from:

b. the fact that the IDA regulates, by its by-laws and regulations, the conduct of its members and matters related to their trading in securities, areas which ultimately are the responsibility of the Commission.

In the Matter of the Investment Dealers Association of Canada (1994), 17 O.S.C.B. 5961, at p. 5961 (Ont. Sec. Comm.)

The requisite authority to either administer or enforce the Securities Act(s) and to provide a remedy for investors as contemplated under the Act(s) is not available to retail investors across Canada. As you have noted on a number of occasions, and again at the 'Round Table', securities regulation enforcement in Canada needs much improvement. This is one of the fundamental reasons why it needs improvement.

At the forum you stated;

"...if we don't confer remedies, a right without a remedy is rather useless, that includes rights of investors, investors individually and collectively, certainly in my view. And going over to the enforcement side, we have to do a much better job." (italics added)

I concur. The consumer/retail investor, with a valid claim, has the right to have their claim investigated and, if warranted, adjudicated by direct application of the relevant Securities Act and not by terms of a contract to which the consumer is not a party. To exacerbate the problem further is that there are no statutory remedies within the current regulatory structure available to the retail investing public even though it was contemplated and incorporated into the Securities Acts. As an example, the following can be found within the Ontario *Securities Act*.

128. (1) The Commission may apply to the Superior Court of Justice for a declaration that a person or company has not complied with or is not complying with Ontario securities law.

(3) If the court makes a declaration under subsection (1), the court may, despite the imposition of any penalty under section 122 and despite any order made by the Commission under section 127, make any order that the court considers appropriate against the person or company, including, without limiting the generality of the foregoing, one or more of the following orders:

13. An order requiring the person or company to compensate or make restitution to an aggrieved person or company.

Securities Act, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

The following is the Ontario Securities Commission's ("OSC") answer to a question posed by an investor with respect restitution. It is an extract from the transcript of the 2005 OSC Town Hall Forum Questions and Answers;

"The OSC does not, in fact, have the power to order a court to grant restitution. What it does have is the discretion under section 128 of the *Securities Act* to apply to the court for a declaration that a person has not complied with or is not complying with Ontario securities law. The court may then order a wide range of remedies, including an order for compensation or restitution.

The OSC has only used this redress mechanism once..."

http://www.osc.gov.on.ca/Investor/Forum/TownHall/th_20050614_q-and-a.pdf, Question 4, pg.1

As per the above, the Ontario Securities Commission ("OSC") has refused to make application to the court under this section other than on one occasion. However for the retail investor this point is moot since the retail investor is relegated to an SRO which can not make application under this section nor should they as a private contractual body. This is not only unacceptable to Canadians; it is in our view, unjust.

I also submit that the intent of the legislature was to confer a right upon the investor to seek remedy as contemplated under the Securities Act(s). However the current regulatory regime prevents such an occurrence - rendering the "right", in your words, "useless".

We need a remedy. It has been suggested to Canadians by the industry and their strong lobby groups that a remedy lies within their grasp by way of the IDA's arbitration program or via the Ombudsman for Banking Services and Investments. These are not remedies contemplated by the legislature. These two 'remedies' are industry sponsored, industry run and derive their existence from the industry. The only reason they exist is because the system does not work.

If the federal government implements the recommendation to create an independent tribunal, as espoused within the *Blueprint for a Canadian Securities Commission*; it should extend to all retail/investor consumers. For if it does not, the retail investor will continue to be denied the right to access the same judicial process as provided to corporate players within the securities regulatory regime. In turn this would indicate that the current government is in agreement with the status quo which is simply not acceptable to the retail investing public.

I hope that this letter has better explained my concerns and question. I look forward to your response in order that I may share it with the many consumer groups and retail investors who support this position and wish to share in your efforts for a viable common securities regulator. Should you require examples or specific details on how the current system has affected consumer/retail investors, I would be happy to provide them to you - there is a very wide selection to choose from.

Best wishes and good luck.

A handwritten signature in black ink, appearing to read "R. Kyle", written in a cursive style.

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- c. Mr. André Marin, President, Forum of Canadian Ombudsman and Ombudsman of Ontario

Transcript of Question dated 12 October 2007

"Good afternoon, my name is Robert Kyle and I am the Executive Director of InvestorVoice.ca.

Mr. Flaherty, earlier this year you spoke of the need to protect investors against breaches of securities laws and white collar crime stating that, I quote,

"stealing the investments or harming the investments of a retired senior is a serious crime and a crime with victims who are often vulnerable".

The Blueprint for A Canadian Securities Commission echoed those concerns but did not describe what mechanisms would be utilized to deliver those protections that are desperately wanting in Canada for those consumer/retail investors.

The Blueprint recommends that the Canadian Securities Act provide for the establishment of a Canadian Securities Tribunal as a separate agency from the CSC following the Osborne Report published in 2004.

Will the federal government ensure with the creation of this separate Tribunal that

- a) those consumer/retail investors will be able to file their complaints directly with the Canadian Securities Commission;
- b) that if the complaint warrants regulatory action that it will be adjudicated by the Canadian Securities Tribunal, and

lastly, will they have the power to order restitution and damages?

My concern, Sir, is that otherwise it would appear to be a two-tiered system - one system for corporate players and another for retail investors. Currently consumer/retail investor grievances are relegated to the existing SROs which have proven ineffective as they can only enforce their contracts with their members to which the investors are not a party to."