

## **Small firms team up to win settlement**

### Stein & Stein joined forces with Kugler Kandestin to argue class-action

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*Friday, March 07, 2008*

The official RRSP contribution season for 2007 might be over, but thousands of Canadians - including many Quebecers - will receive an unexpected bonus this year following a class-action settlement reached by two Montreal law firms with an investment division of one of Canada's biggest banks.

Montreal's Stein & Stein Inc. and Kugler Kandestin LLP teamed up to investigate and prosecute a class action against CIBC Asset Management Inc. almost four years ago after they were approached by investment adviser Mark Rabinovitch about big losses by investors who owned units in the CIBC U.S. RSP Index Fund.

It was a David vs. Goliath case as the two small law firms joined forces to challenge CIBC and its lawyers from the big national firm of Stikeman Elliott LLP.

Behind the class action was the assertion that CIBC Asset Management had improperly exposed the fund to the risk of currency exchange-rate fluctuations between the U.S. and Canadian dollars.

Specifically, the class-action suit, Rabinovitch v. CIBC Asset Management Inc., charged that a new risk added to the index fund meant that any increase in the Canadian dollar vis-à-vis the U.S. dollar would negatively affect the performance of the fund but that unit holders were not advised of the change of direction when they should have been asked to formally approve such a change.

Indeed, as the Canadian dollar rose relative to the U.S. dollar beginning in 2002 and continuing into 2003, unit holders' losses mounted, reaching levels of \$22 million for at least 35,000 investors throughout Canada who had bought units of the fund before April 2002 to November 2003.

Following the \$20-million settlement mediated through Quebec Superior Court in December under Judge Brian Riordan, and amended only two weeks ago to provide a tax-free option for eligible class-action claimants, those who owned units of the CIBC U.S. RSP Index Fund will be able to recover an estimated 65 per cent (on a tax-free basis) of their losses, said Neil Stein, lead lawyer on the file for Stein and Stein, and Robert Kugler, lead for Kugler Kandestin.

The bank had moved for settlement, without acknowledgement of liability, only a month or so before what could have been a lengthy case, once the possibility of appeals was factored in.

"It was a very exciting case - a fun case," Stein said.

"We worked extremely hard and it was expensive to prosecute. The CIBC knew it was a difficult case and they did the right thing in the end for their unitholders."

Since law firms who represent plaintiffs in class actions work on contingency, usually taking a percentage of the settlement, if there is one, smaller firms team up to spread the risk and share complementary legal practices.

The Stein-Kugler duo took the position that there had been a fundamental change in the fund, while CIBC and its lawyers argued that the change from currency neutral to currency exposed was an investment strategy, not a fundamental change that would have required a vote of approval by fund unit holders.

Backing up their case was a mountain of forensic legal evidence culled from the "weeks on end" Stein spent combing through prospectuses at Quebec's financial market regulator, where documents are public but can not be borrowed.

Kugler stickhandled most of the litigation.

"The most outstanding thing about the case is the settlement," Kugler said, adding that before mediation lawyers had to go to court "on a number of issues a number of times."

"It is such a great settlement for people who had lost, whose RRSPs had diminished.

"Everyone is struggling these days, the markets are hurting everyone, and for everybody to now get this windfall, so to speak, is terrific. I am happiest about that. People are calling us and we are able to tell them they are going to get a substantial amount of money as a result of this settlement and they are thrilled."

Lawyers at Stikeman acting for CIBC before the court and overseeing settlement negotiations were lead Morty Freiheit, Marc-André Coulombe and Nathalie Mercier-Filteau.

Investors who had units of the fund can obtain more information about the settlement at [www.usrspindexfund.com](http://www.usrspindexfund.com) <http://www.usrspindexfund.com/>. Under the amendment to the settlement reached on Feb. 20, claimants can opt to have their claim deposited directly to their RSP accounts.

If you have any information to share about what is happening in the legal community, send it to [kleger@sympatico.ca](mailto:kleger@sympatico.ca)

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