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**ONTARIO COURT OF APPEAL'S REVERSAL REMOVES AN IMPEDIMENT TO
SECURITIES CLASS ACTIONS**

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The Ontario Court of Appeal has taken the unusual step of reversing a previous decision it had made regarding the limitation period for commencing an action under the Ontario securities legislation that provides for civil liability for a misrepresentation in an issuer's disclosure in the secondary market. The latest decision took the form of a judgment, released on February 3, 2014, following the simultaneous hearing of appeals of three cases: *Green v. Canadian Imperial Bank of Commerce*, *Silver v. IMAX Corp.* and *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.* The Court of Appeal's earlier decision in *Sharma v. Timminco Limited* had interpreted the limitation period in a manner which would have created significant practical difficulties for plaintiffs, calling into question the utility of a statutory regime that had come into effect at the end of 2005 after considerable securities industry study and consultation.

The Limitation Period and Related Legislation

The issue in the three cases turned on the interpretation of the interplay among the requirement for leave to commence an action under the secondary market liability regime, the limitation period, and the provision of the Ontario *Class Proceedings Act, 1992* (CPA) that suspended the limitation period under specified circumstances.

Under section 138.8 of the Ontario *Securities Act*, no action may be commenced under the legislation for secondary market disclosure liability without leave of the court. Under section 138.14, no such action can be commenced, in the case of an alleged misrepresentation in a document, later than three years after the date on which the document containing the alleged misrepresentation was first released. (The limitation period may be shorter if leave to commence a comparable action has been granted in another province or territory of Canada.) These two sections read together would, in the absence of an exception, disqualify any action where leave was not granted within three years of the release of the document containing the alleged misrepresentation. The issue in the three cases in the appeal, insofar as the limitation period was concerned, was whether the CPA provided that exception.

Under section 28 of the CPA, "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding." The limitation period then resumes under certain circumstances such as the opting out of the class proceeding by the class member or the discontinuation of the class proceeding.

Earlier Application of the Legislation by the Courts

The plaintiff in *Timminco* commenced a class proceeding on the basis of allegations of misrepresentations under common law. The statement of claim included a statement that the plaintiff

intended to move for an order permitting the plaintiff to assert the statutory cause of action. The common law action was commenced within the limitation period applicable to the statutory claim, but leave to commence the statutory action had not yet been granted as the end of the limitation period approached. The plaintiff moved for an order of the Ontario Superior Court of Justice declaring that the limitation period was suspended by section 28 of the CPA. The order was granted but the Court of Appeal reversed the decision.

The Court of Appeal determined that the statutory cause of action in respect of secondary market disclosure could not be “asserted” within the meaning of section 28 of the CPA until leave was granted, because prior to that time the cause of action could not be enforced or invoked as a legal right. The plaintiff’s statement of intention in the statement of claim for the common law action did not, in the court’s view, constitute the requisite assertion of the statutory cause of action. Accordingly, the statutory claim was statute-barred if leave was not obtained within the limitation period.

The *Timminco* decision understandably caused a stir in litigation circles, as it created what was widely considered to be a potentially insurmountable hurdle for plaintiffs wishing to pursue the statutory remedy. The variety of delays that could crop up in the course of pursuing a leave application and obtaining a decision on the application threw the viability of pursuing the remedy into doubt.

In each of the three cases that were considered together by the Court of Appeal in the wake of *Timminco*, the statement of claim had been issued and filed within the three-year limitation period but leave had not been obtained to commence the statutory action within that time. The cases had been resolved in different ways at the Superior Court level.

In *Green v. CIBC*, the Superior Court had determined that it had no basis to accommodate the plaintiffs in light of *Timminco*, and that the statutory action was therefore time-barred. In *Silver v. Imax*, the leave motion had been heard within the limitation period, but the court had reserved its decision and later granted leave after the expiry of the limitation period (prior to the Court of Appeal’s decision in *Timminco*). In response to a subsequent motion by the defendants for dismissal of the statutory claims on the basis of *Timminco*, the Superior Court had instead made an order *nunc pro tunc*, deeming leave to have been granted on the last day of the hearing of the leave motion. In *Celestica*, the Superior Court had declined to strike the plaintiffs’ claims, applying the doctrine of special circumstances. The defendants had been defending the same claims in the United States during the limitation period and the court did not consider the defendants to be prejudiced by the passage of time.

The Court of Appeal’s Reconsideration

In revisiting the *Timminco* decision, the Court of Appeal concluded that, in light of the purpose and intent of the secondary market liability legislation, the court’s previous interpretation of the term “asserted” was incorrect. In the court’s revised view, a representative plaintiff, by pleading the statutory claim and the facts necessary to found it, was “making the claim” and “invoking the legal right” given by the statute, thereby “asserting” the cause of action for the purposes of section 28 of the CPA, even though subsequent leave would be required to enforce the claim.

Having made its interpretive finding, the court considered whether it should overrule *Timminco*. It decided to do so after applying the same approach to the question as it had in a previous decision, which was to focus on “the effect and future impact of either correcting [the error] or maintaining it.”

The court noted that the twin goals of the legislation were to facilitate access to justice for investors and to deter corporate misconduct. In the court's view, neither of these goals would be effectively achieved if the class action procedure was not a viable one, which was the effect of the court's earlier *Timminco* decision. Among other things, the earlier decision would take away a plaintiff's ability to control compliance with the limitation period, given the various factors, other than inaction by the plaintiff, that could cause the deadline for obtaining leave to be missed. In addition, the intended benefit of section 28 of the CPA would be lost where class members found it necessary to commence their own actions for fear that the representative plaintiff would not obtain leave within the limitation period.

Comment

In response to the Court of Appeal's original *Timminco* decision, the Ontario government's 2013 Budget, released in May of 2013, had included a statement that the government planned to propose "changes to update the *Securities Act* by...if needed, following current court cases that the government is monitoring closely, suspending the operation of the secondary market civil liability limitation period while leave to proceed is being sought." The subsequent overruling of *Timminco* by the Court of Appeal has removed the immediate urgency to address the limitation issue legislatively.

However, the fact that two panels of the province's highest court, each on a unanimous basis, arrived at opposite interpretations of the same legislation suggests that there is a level of ambiguity sufficient to justify statutory clarification. This has been accomplished in Manitoba, where the comparable legislation was amended in 2012 to provide that the limitation period is suspended when the application for leave is filed. Although, as noted by the Court of Appeal in its decision on the three appeals, the judicial authority in Canada is to the effect that ambiguity in a limitation provision should be resolved in favour of the person whose right of action can be truncated by the provision, the elimination of the ambiguity to remove any doubt is the preferable course of action.