

Supreme Court considers limitation period for secondary market securities class actions

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Introduction

On December 4 2015 the Supreme Court of Canada released its highly anticipated decision⁽¹⁾ in a trilogy of shareholder class actions under the secondary market liability provisions of the Ontario Securities Act.⁽²⁾ At issue was whether Section 28 of the Class Proceedings Act, 1992⁽³⁾ suspends the limitation period applicable to a claim under Section 138.3 of the Ontario Securities Act when a plaintiff files a statement of claim or motion for leave under Section 138.8 of the Ontario Securities Act, or whether the limitation period is suspended only once leave has been granted.

A majority of the Supreme Court restored the Ontario Court of Appeal's previous decision in *Sharma v Timminco*⁽⁴⁾ that a plaintiff must obtain leave from the court to proceed with the statutory claim within the three-year limitation period under Section 138.14 of the Ontario Securities Act, and that it was insufficient simply to issue a statement of claim alleging that the defendants were liable under the act. The court also considered the application of *nunc pro tunc* ('now for then') orders to permit retroactively otherwise time-barred actions to proceed. In doing so, the court rejected a bright-line test for the application of limitation periods in secondary market class actions in favour of leaving motion judges with a residual discretion to permit otherwise time-barred claims to proceed.

Background

In *IMAX Corp v Silver* the Ontario Superior Court of Justice had already granted leave before the *Timminco* decision was released. However, after the release of *Timminco*, the defendants applied for summary judgment to dismiss the proceeding as time barred. The court dismissed the motion and granted leave *nunc pro tunc* as the limitation period expired while the case was under reserve by the court.

In *Celestica Inc v Trustees of the Millwright Regional Council of Ontario Pension Trust Fund* the Ontario litigation was held in abeyance as a parallel proceeding progressed through the US courts. The plaintiffs filed a notice of motion to seek leave after *Timminco* was released. The Ontario Superior Court of Justice applied the doctrine of special circumstances and refused to strike the claim as statute barred, determining that leave could be granted *nunc pro tunc* if the plaintiffs satisfied the test for leave.

In *Canadian Imperial Bank of Commerce v Green* the Ontario Superior Court of Justice would have granted the application for certification under the Class Proceedings Act, 1992 and leave to proceed under the Ontario Securities Act. However, on the penultimate day of the motion, the Ontario Court of Appeal released its *Timminco* decision. Consequently, the court dismissed the leave application and the statutory action as time barred by the three-year limitation period.

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On appeal, a five-member panel of the Ontario Court of Appeal determined that its previous *Timminco* decision was incorrect and had unintended consequences, as it deprived class members of an important benefit of the class action regime – that is, the suspension of the limitation period under Section 28 of the Class Proceedings Act, 1992. In addition, the Ontario Court of Appeal held that it had undercut the ability of investors to initiate class actions in compliance with the limitation period. The Ontario Court of Appeal therefore overruled *Timminco* and held that a plaintiff has three years from the date on which a misrepresentation is made to commence a secondary market misrepresentation claim (as opposed to three years both to commence a claim and obtain leave to pursue it).

After the Ontario Court of Appeal's *CIBC* decision, the Ontario Securities Act was amended to provide that the three-year limitation period is suspended on the date on which a notice of motion for leave to commence the action is filed with the court.(5) A similar provision can be found in the Alberta, Manitoba and New Brunswick Securities Acts.(6) However, the Supreme Court's decision is applicable in those provinces that have not yet amended their securities legislation in the same manner as Ontario.

CIBC

The Supreme Court delivered a complex and split decision based on competing interpretations of the interaction between Part XXIII.1 of the Ontario Securities Act and Section 28 of the Class Proceedings Act, 1992. A majority – comprised of Chief Justice McLachlin and Justices Rothstein, Cromwell and Côté – held that Section 28 of the Class Proceedings Act, 1992 does not suspend the limitation period for secondary market liability claims under Section 138.3 of the Ontario Securities Act, as it then stood, until leave to proceed with such claims is granted by the court.(7)

The same majority also held that an order granting leave to proceed with an action can be made *nunc pro tunc*, where leave is sought before a limitation period expires:

"The courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice."(8)

The dissenting view – adopted by Justices Moldaver, Karakatsanis and Gascon – would have affirmed the Ontario Court of Appeal's decision in *CIBC* overruling *Timminco* and held that Section 28 of the Class Proceedings Act, 1992 will suspend the limitation period once the plaintiff commences a class action and pleads the statutory claim for misrepresentation based on Section 138.3 of the Ontario Securities Act and the facts supporting the claim.(9) In that context, the dissenting justices decided that none of the class actions were statute barred.

Côté, writing on behalf of McLachlin and Rothstein, declined to grant leave *nunc pro tunc*. However, Cromwell – in a separate decision – would have exercised his discretion to grant a *nunc pro tunc* order for leave to proceed with the action, based on the following analysis.

First, the plaintiffs had been diligent in advancing their action. There was no doubt that they had intended to seek leave and that significant time and effort were invested in the development of their case.(10)

Second, neither the plaintiffs nor the defendants considered that the cause of action under Section 138.3 of the Ontario Securities Act would be statute barred if the certification and leave motion did not occur and leave was not granted before expiry of the three-year limitation period. It was only with the Ontario Court of Appeal's decision in *Timminco* that the parties faced the prospect that the plaintiffs' claim was irremediably statute barred.(11)

Third, extending the limitation period in this particular case would not undermine the purpose of

limitation periods. To the contrary, according to Cromwell:

"[h]olding that the plaintiffs' claim is irremediably statute-barred is to defeat that claim by allowing the defendants to take advantage of an after-the-fact 'gotcha'— a technical defence, the application of which in this case does not further either the purpose of the limitation defence or reinforce public confidence in the administration of justice."(12)

Fourth, the court has an obligation to protect unrepresented putative class action members. Until *Timminco*, it was reasonable for these class members to assume that their action was sheltered.(13)

Finally, the plaintiffs' statutory claim had a reasonable chance of success and should therefore be resolved on its merits, rather than as a result of an expired limitation period.(14)

In the result, the statutory claim in *CIBC* was permitted to proceed.

IMAX

In *IMAX* a majority of the Supreme Court believed that the statutory action was time barred. However, Côté – writing on behalf of McLachlin and Rothstein – would grant leave *nunc pro tunc* in favour of the plaintiffs who were parties to the original claim because they had agreed to suspend the limitation period while the leave application was under reserve. They would not grant leave in favour of the plaintiffs which were not plaintiffs when the argument on the leave application had concluded. In their view, granting relief to those plaintiffs in this context would undermine the strict limitation period set out in Section 138.14 of the Ontario Securities Act.(15)

Yet Cromwell, in a separate decision, took a different view and exercised his discretion to grant a *nunc pro tunc* order in favour of all plaintiffs, on the basis that the law in Ontario is currently unsettled with respect to whether parties can be added to an existing cause of action after the limitation period has expired in cases where the limitation period is contained "under another Act" (ie, not in the Limitations Act, 2002).(16) Cromwell indicated that recent commentary holds that discretionary jurisdiction may apply to other limitation periods contained in different legislation, such as the Ontario Securities Act in this case.(17)

In the result, the statutory claim in *IMAX* was permitted to proceed.

Celestica

In *Celestica* a majority of the Supreme Court held that the statutory action was time barred and would deny the *nunc pro tunc* order on the basis that no motion for leave was filed before the limitation period expired.(18)

Thus, of the cases decided by the Supreme Court, only *Celestica* was held to be time barred and prohibited from proceeding.

Comment

The Supreme Court determined by a narrow margin that Section 28 of the Class Proceedings Act, 1992 does not suspend the three-year limitation period that applies to the statutory cause of action under Section 138.3 of the Ontario Securities Act when an intention to seek leave is pleaded in a class action for common law misrepresentation. Therefore, under the Ontario Securities Act – as it then was – a representative plaintiff had three years both to commence a claim and to obtain leave of the court to pursue it.

While the Supreme Court restored the Ontario Court of Appeal's initial strict interpretation in *Timminco*, it also produced differing views on the courts' inherent jurisdiction to grant *nunc pro tunc* orders and ameliorate the harsh consequences of statutory limitation periods in class action proceedings. This is perhaps the most significant implication of the majority of the Supreme Court's decision and lower courts now face the challenge of refining the boundaries of the courts' power to effectively back-date an order or judgment.

While the trilogy of decisions dealt largely with limitation periods, the Supreme Court also confirmed its previous articulation of the test for leave to proceed with secondary market securities class actions in *Theratechnologies Inc v 121851 Canada Inc.*⁽¹⁹⁾ The Supreme Court further affirmed the Ontario Court of Appeal's decision in *CIBC* that, although a class action would not be the preferable procedure to resolve a reliance-based claim in common law negligent misrepresentation, certain issues relating to the intent and conduct of the defendant should be certified as common issues in order to advance the litigation.

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Endnotes

- (1) *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 [*CIBC*].
- (2) RSO 1990, c s5.
- (3) SO 1992, c6.
- (4) 2012 ONCA 107, leave to appeal to Supreme Court of Canada refused, [2012] SCCA No 157.
- (5) See Ontario Securities Act, *supra* note 2, s138.14(2).
- (6) Securities Act, RSA 2000, cS-4, s211.095(2); Securities Act, CCSM, cS50, s197(2); and Securities Act, SNB 2004, cS-5.5, s161.9.
- (7) *CIBC*, *supra* note 1 at para 53.
- (8) *Ibid* at paras 90 and 130.
- (9) *Ibid* at para 162.
- (10) *Ibid* at para 136.
- (11) *Ibid* at paras 137-139.
- (12) *Ibid* at para 141.
- (13) *Ibid* at paras 142-143.
- (14) *Ibid* at para 144.
- (15) *Ibid* at para 106.
- (16) *Ibid* at paras 151-152.
- (17) Cromwell citing Dentons' lawyers, Christina Porretta and Rahim Punjani's "The Clock Strikes: A Review of the Limitations Act, 2002, A Decade Later" (2015), 44 *Adv Q* 346 at 375 for this proposition.
- (18) *CIBC*, *supra* note 1 at para 111.
- (19) 2015 SCC 18.

