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The Fall-Out from the OCA decision in *Timminco*

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A year ago, in February 2012, the Ontario Court of Appeal interpreted the interplay between statutory limitation periods and the tolling effect of s. 28 of the *Class Proceedings Act, 1992* (CPA) in *Sharma v. Timminco Limited.*[1] The decision came as a shocking surprise to many class counsel who believed that the s. 28 CPA limitation period toll applied to claims for secondary market misrepresentation under s. 138.3 of Part XXIII.1 of the Ontario *Securities Act* (OSA) as soon as the statement of claim was issued, so long as the claim articulated an intent to bring a motion for leave to proceed with the s. 138.3 OSA claim. Not so, the Court of Appeal determined. The Court of Appeal applied a literalist interpretation to the language of both statutes, thereby inviting legislative reform, if this strict interpretation of the limitation period for commencing secondary market claims was not the intent of the Legislature.

Since *Timminco* was decided, there have been several other cases decided by the Superior Court in which relief from the harsh effects of the Court of Appeal decision have been granted. Two of those cases, *CIBC* and *Imax,* have now been scheduled to be heard together in May 2013 by a five judge panel of the Court of Appeal. The Court of Appeal convenes a five-judge panel when it is asked to reconsider and to reverse one of its earlier decisions. The final word on limitation period issues in securities class actions, therefore, remains to be seen.

In the mean time, the *Timminco* decision provides guidance and a warning to class counsel that (at least for now) they must pursue with diligence any claims that include a statutory precondition to commencing a legal proceeding – whether it be obtaining leave under the OSA, lifting a stay in CCAA proceedings, or delivering a notice to the intended defendant. At the same time, it provides some certainty to corporations regarding the duration of their potential exposure to a class proceeding for misrepresentations in the secondary market.

[1] 2012 ONCA 107 (CanLII)

In *Timminco*, the plaintiff commenced a proposed securities class action in May 2009, alleging misrepresentations were made in the secondary market between March 17, 2008 and November 11, 2008. The plaintiff asserted common law claims in negligence and negligent misrepresentation. In addition, the claim stated that the plaintiff would be seeking an order granting leave to assert a misrepresentation claim under s. 138.3 OSA. At first instance, Justice Perell applied a purposive interpretation of s. 28 CPA and concluded that s. 138.3 OSA 3 year limitation period was suspended once the class action was commenced. The Court of Appeal disagreed, and concluded that there was no s. 138.3 OSA action to which the CPA could apply until leave was granted to proceed with the secondary market misrepresentation claim.

Section 138.3 OSA was enacted to facilitate class actions for negligent or fraudulent misrepresentation by secondary market purchasers as against public companies. At common law, the plaintiff must establish reliance as one of the constituent elements of a misrepresentation claim. This has proven difficult to establish on a common basis, depending on the nature of the claims alleged. Recognizing the difficulties that plaintiffs in class actions were facing to certify a common issue arising from issuer misrepresentations, the Legislature enacted s. 138.3 OSA, which includes a deemed reliance provision.

However, there are substantial constraints built into this Part of the OSA which provide protections to public companies, and which are meant to ensure that the statutory cause of action does not leave the company open to crippling damages claims or "greenmail" actions that are devoid of real merit. These restrictions include both a damages cap, and a three year limitation period within which to commence an action.

At first blush, it may appear that a three year limitation period is more generous than the standard two year limitation under the Ontario *Limitations Act.* However, unlike the *Limitations Act,* the limitation period in s. 138.14 OSA does not run from the date the damage is discovered, i.e. when the fact of the misrepresentation is revealed. Inexplicably, the limitation period runs from the date when the misrepresentation was first made[2]. This means that if the company does not correct the misrepresentation immediately after it was made, then it enjoys the benefit of the limitation period elapsing in its favour without the injured shareholders being any the wiser. Surely the intent of the Legislature was not to confer such a benefit on negligent or unscrupulous public companies.

While one may speculate that the assumption which lead to this curious legislative anomaly was an assumption that public companies would meticulously comply with their disclosure obligations, and accordingly, and material misstatements would be corrected without undue delay, this assumption is based upon a false premise. In reality, there are sometimes situations of fraud, conspiracy or hidden negligence in the higher reaches of companies, and it may well take several years before the fact of the prior

[2] *ibid*, at para. 10, referencing s.138.14 OSA

misrepresentations are unearthed. Take for example the case of Laidlaw/Safety Kleen. It announced in 2000 that the financial statements of the company were not accurate going back until 1997. Under s. 138.14 OSA, those shareholders who bought at an inflated value in 1997 would have had but a few months within which to investigate and draft the claim, prepare a motion record with sufficient evidence to demonstrate that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff (given the many defences open to the issuing company and its officers and directors), to bring the motion for leave, and to obtain the leave decision[3]. This historical example demonstrates the harshness of the current legislation as interpreted in *Timminco* and why it warrants review and revision.

The strict time limitations established by s. 138.14 OSA can be softened where the defendants are prepared to enter into "tolling agreements" – agreements where the parties agree among themselves that the statutory limitation period will be halted or "tolled" for a specified period of time. It remains to be seen whether these tolling agreements are strictly enforceable[4]. Unlike the *Limitations Act*, which includes an express provision allowing parties to suspend or extend limitation periods established under that Act, no such qualifying language has been included in the OSA. The literalist could argue that the three year limitation period is, therefore, absolute. There are, of course, rules of professional conduct that would constrain counsel from challenging the validity of a tolling agreement that they made, but one cannot predict what a court might do on its own motion. Again, this lacuna in the legislation should be addressed through amendment.

Since the Court of Appeal released its decision in *Timminco*, there have been several Superior Court decisions that have grappled with its unexpected effects. In all but one case, the Court has used its equitable powers to grant relief to the plaintiff and to resuscitate secondary market misrepresentation claims that appeared at first blush to be DOA. However, each of the decisions reached the result by a different route. Given that each of these cases deals with actions commenced prior to the *Timminco* decision, none of them will be of any particular precedential value in the future, and the mercy of the court will likely be less liberal.

Green v. CIBC[5] was the first case faced with applying the Court of Appeal's ruling in *Timminco*. In that case, the three year limitation period expired before the leave motion was argued. The plaintiff had clearly expressed his intent to seek leave to bring the s. 138.3 OSA claim, and to obtain an order permitting the leave to be granted *nunc pro tunc*, if necessary. However, simply pleading that intent, Strathy J. found, was not sufficiently special circumstances for the court to grant leave. He was unable to distinguish the case from *Timminco*, where the plaintiff had also expressed an intent to

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[3] Further delay could also arise in the event that there was a carriage fight between competing class actions.

[4] In *Gould v. Western Coal Corp.*, 2012 ONSC 5184, at FN1, Justice Strathy tacitly confirmed the validity of a tolling agreement that was approved and incorporated by reference into a court order.

[5] *Green v. CIBC*, [2012] O.J. No. 3072 (SCJ)

seek leave to bring the s. 138.3 OSA claim in his statement of claim. He held he was obliged to dismiss the action as time-barred but would have otherwise allowed the cause of action to be pursued and would have certified the action as a class proceeding.

In contrast, in both *Silver v. Imax*[6] and *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica*[7] the Court was prepared to exercise its equitable jurisdiction to relieve the plaintiff from the strict application of the statutory limitation period. In *Imax*, van Rensburg J. granted the order *nunc pro tunc* based upon the fact that the motion had been argued within the three year limitation but was under reserve when the limitation expired. She posited that *Timminco* does not foreclose granting leave after the fact "where the circumstances of the case would warrant such relief."[8] In that case, it was appropriate to grant the relief since otherwise the plaintiff would be unfairly prejudiced by the court's actions. It is unlikely that this decision will be of any particular precedential importance, given the unique circumstances in which the decision arose.

More interesting is the *Millwright* decision of Justice Perell. In that decision, he confirmed that there could be other situations in which a plaintiff can overcome the s. 138.14 OSA limitation. Those situations will include cases where the plaintiff can make out the special circumstances doctrine – which he found is applicable in the interpretation and application of the OSA limitation period.[9] He left for another day and another court the determination of whether any other common law defence to the application of the limitation period applies. Those defences, such as fraudulent concealment, mistake, waiver or estoppel must be pleaded with full particularity, which, in this case, they were not. Certainly, the door was left ajar for such defences to be successfully asserted in future cases.

Presently, the result of *Timminco* is that all secondary market securities class actions that seek to rely on the s. 138.3 OSA deemed reliance provisions should be pursued on a fast track. The plaintiff only has three years from the date of the misrepresentation to gather a sufficient record to meet the evidentiary burden of s. 138.8(b) OSA, and to obtain the order granting leave of the court to commence the s. 138.3 claim. It remains to be seen whether the fallout from *Timminco* and the subsequent decisions will result in lowering the evidentiary burden on plaintiffs for the leave motion because of the very limited time they will have to independently investigate the claim and marshal the relevant evidence on the merits, or whether class counsel will become more aggressive in seeking early discovery from the defendants through cross examination in the hopes of showing intentional concealment of the misrepresentation after the fact. Applying a

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6 *Silver v. Imax Corp*. 2012 ONSC 4881

7 *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083

8 *Silver v. Imax Corp*. 2012 ONSC 4881, at para. 41

9 *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083, at para. 129; further reasons at 2013 ONSC 1502 at para. 15

literalist interpretation to s. 138.8(b) OSA, there should be no need for the plaintiff to undertake substantial pre-discovery or to prepare a voluminous evidentiary record on the merits for the leave motion. The plain language of the section requires that the plaintiff only demonstrate a reasonable possibility that the action will be resolved at trial in his or her favour – and this should include resolution of a disputed limitation defence. Section 138.8(b) OSA has already been interpreted as setting a very low threshold,[10] and there is no reason why this threshold should be raised when a legitimate defence to a limitations argument is established on the record. Moreover, it would be contrary to the intent of the legislation - which is meant to facilitate class proceedings for secondary market misrepresentations – if undue burdens are imposed on the plaintiff before the claim is even out of the box, particularly in light of the short runway the limitation period provides within which to obtain leave.[11]

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[10] *Silver v. Imax Corporation* (2009), 66 BLR (4th) 222 at para. 25 (S.C.J.); *Dobbie v. Arctic Glacier Income Fund* et al., 2011 ONSC 25 (CanLII), 2011 ONSC 25 at para. 129; and *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (CanLII), 2012 ONSC 3637 at para. 373

[11] Justice Strathy recognized this legislative intent in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (CanLII) at para. 375.