

## NEW RULING ON LIMITATION PERIODS IN SECONDARY MARKET MISREPRESENTATION ACTIONS

### Case Summary

In *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (“*Green*”), the Ontario Court of Appeal found that a class action for a misrepresentation in secondary market disclosure under s. 138.3 of the *Securities Act* is not time-barred if the Statement of Claim is issued within three years of the alleged misrepresentation.

The appeal arose from three class proceedings decisions relating to the limitations period for secondary market misrepresentations under section 138.14 of the *Securities Act*. This provision requires that an action must be “commenced” within three years of the day that the misrepresentation was made, regardless of when the misrepresentation was discovered.

The issue with respect to this limitation period arose with respect to the interaction of two provisions. On the one hand, section 28 of the *Class Proceedings Act* assisted class action plaintiffs by suspending the limitations period applicable to “a cause of action asserted in a class proceeding” when a class proceeding is commenced. On the other hand, section 138.8 of the *Securities Act* requires that a plaintiff obtain leave before commencing an action by showing, among other things, that they have a reasonable possibility of success at trial.

As a result of these provisions, class action plaintiffs took to asserting a secondary market misrepresentation action in their Statement of Claim and declaring that they would seek leave to commence such an action. The crucial question was whether section 28 of the *Class Proceedings Act* stopped the limitation period clock when such a Statement of Claim was filed, or whether the clock was stopped only when the plaintiff actually obtained leave to proceed under section 138.3 of the *Securities Act*.

In *Sharma v. Timminco*, 2012 ONCA 107 (“*Timminco*”), Justice Goudge, writing for the Ontario Court of Appeal, examined the language of the two provisions and concluded that the limitations clock only stopped when the plaintiff actually obtained leave under section 138.3 of the *Securities Act*.

The appeal in *Green* arose from three cases in which differing approaches were applied after *Timminco* with respect to the limitations period. In the first action, the claim was found to be time-barred by *Timminco* (*Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, per Strathy J.). In the other two actions, the motions judges allowed the claims to proceed by allowed by granting leave nunc pro tunc (*Silver v. IMAX Corp.*, 2012 ONSC 4881, per van Rensburg J.) and by applying the doctrine of special circumstances as an exception to the limitations period (*Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083, per Perell J.).

In *Green*, the Ontario Court of Appeal allowed the actions to proceed, but did so by reversing *Timminco* two years after it was decided. Justice Feldman found that *Timminco* should be overruled for four reasons:

- (1) The *Timminco* approach effectively denied one of the main benefits of the class action, the suspension of the limitation period for all members of the class;
- (2) *Timminco* undercut the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period;
- (3) Legislators in other provinces such as Manitoba had amended securities legislation to avoid the effect of *Timminco*, and Ontario had suggested that it would do the same if *Timminco* were not reversed; and
- (4) The *Timminco* decision was very recent and it was therefore preferable to correct the error now than in “letting it take root”.

As a result, the Ontario Court of Appeal has taken a more generous approach regarding whether a class action may proceed. Specifically, the *Green* decision seeks to prevent the situation cited by the Court of Appeal, in which:

... an investor only learns about the misrepresentation two years and eleven months after it was made, [and therefore] the investor would have only one month not only to commence the action, but to obtain leave to do so. Even if a representative plaintiff initiates the leave motion much earlier in the three-year period, there is no guarantee that the motion will be completed, an order made, and all appeals exhausted within time. This makes the entire class action an uncertain endeavor.

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