

# THE SUPREME COURT OF CANADA RELEASES ITS DECISION IN THE *CIBC V. GREEN TRILOGY*

Posted on December 11, 2015

Categories: [Insights](#), [Publications](#)

The Supreme Court of Canada released its much anticipated decision in the *CIBC v. Green* trilogy of cases last week (the "**Trilogy Decision**").<sup>[1]</sup> The trilogy cases deal with various issues arising from Ontario's ten year old statutory liability regime for misrepresentations in the secondary securities market. These issues include the relationship between limitation provisions in the *Ontario Securities Act (OSA)* and the *Ontario Class Proceedings Act, 1992 (CPA)*, as well as the threshold test to be met before bringing an action under the OSA.

The impact of the Trilogy Decision is partly diminished by an intervening legislative change to the OSA affecting the operation of the limitation period for secondary market claims. However, the Trilogy Decision leaves some uncertainty as to the extent that class members will be protected from strict limitation periods following the amendment.

## The Statutory Scheme

Each of the three trilogy cases involves allegations of public misrepresentations giving rise to liability under Part XXIII.1 of the OSA. This Part was introduced in 2006, and in section 138.3 creates a new statutory cause of action for losses arising from secondary market misrepresentations in addition to traditional common law claims for negligent misrepresentation. As a mechanism to prevent the proliferation of frivolous "strike suits", section 138.8 requires plaintiffs to get leave of the Court before bringing their actions. Finally, section 138.14 imposes strict time limits for bringing actions that do not depend on a plaintiff's discovery of the potential claim.

Importantly, unlike common law claims, the statutory claims do not require claimants to prove their *reliance* on the misrepresentation. This makes statutory claims more suitable for class actions than common law remedies, since the existence and nature of reliance is often highly individuated and thus an impediment to class certification.

The relationships among the leave requirement under section 138.8, the limitation period imposed by section 138.14 and the general class action "tolling" provision in section 28 of the CPA was central to the Trilogy Decision. Section 138.8 provides that no action may be *commenced* without leave of the Court. Section 138.14

provides that no action may be *commenced* beyond the fixed limitation periods. Section 28 of the CPA provides that a 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. However, since leave is required to bring the statutory cause of action under the OSA, class action plaintiffs can only plead in their initial claims their *intention* to seek leave and to bring such an action.

It was not immediately obvious how the limitations rules under the two statutory schemes – the OSA and the CPA – would fit together. The securities litigation bar was largely taken by surprise in 2012 with the Ontario Court of Appeal's decision in *Sharma v. Timminco Ltd.* ("**Timminco**").<sup>[2]</sup> *Timminco* held that a pleaded intention to commence a statutory OSA claim did not amount to the "assertion" of that claim and thus that section 28 of the CPA did not suspend the OSA section 138.14 limitation period. Accordingly, leave to bring an action for secondary market securities misrepresentation would have to be granted before the expiry of that period, or else the proposed action, whether or not framed as a class action, would be out of time.

### **The Trilogy Litigation**

The effect of *Timminco* was that all three of the trilogy cases were time barred, which neither the plaintiffs nor defendants had expected, though the courts in each case considered (and sometimes applied) a variety of measures to mitigate that effect. The Ontario Court of Appeal heard all three trilogy appeals together in what amounted to a reconsideration of its decision in *Timminco*. A special five judge panel unanimously reversed its earlier (also unanimous) interpretation of the OSA in *Timminco*, holding instead that the legislature intended that the OSA limitation periods be subject to the CPA suspension.

At the Supreme Court of Canada, a thin 4-3 majority of judges reversed the Court of Appeal's decision in the trilogy and upheld the Court of Appeal's earlier interpretation of the OSA in *Timminco*. The Supreme Court split three ways on other issues, leading to mixed outcomes for the plaintiffs in the three cases. The actions in two of the three cases were rescued on other grounds, despite being time barred.

Justice Côté wrote for herself and two others, upholding the *Timminco* decision and finding that the statutory claims were time-barred in all three trilogy cases. In her view, section 28 of the CPA cannot operate to suspend an OSA limitation period before leave is granted and thus before an OSA action is capable of being commenced. A plaintiff does not trigger section 28 by merely pleading its *intention* to seek leave to bring the statutory action. She held that allowing the limitation periods in the OSA to be suspended by the CPA in this way would circumvent a carefully struck balance in the OSA and the limits of the statutory causes of action intended by the legislature. The legislature intended the leave requirement to be a precondition to commencing an action. She also noted that allowing the CPA to suspend the strict limitation period would give class plaintiffs an advantage over individual plaintiffs who would still have to strictly comply with the limitation

period in the OSA.

Justice Karakatsanis wrote for herself and two others, upholding the Court of Appeal's decision in the trilogy. She held that the leave requirement is not an element of the statutory causes of action, but rather a procedural requirement. She also stressed that the majority interpretation would remove compliance from the plaintiffs' hands since court delays beyond their control could result in leave being granted after the limitation period expired. In her view, a pleading that sets out the relevant facts and an intention to seek leave is sufficient to "assert" a cause of action for the purposes of section 28 of the CPA. She also observed that statutory remedies under the OSA were intended for class proceedings, which supports the view that the limitation periods were meant to be subject to the CPA.

Writing for himself, Justice Cromwell agreed with Justice Côté as to the proper interpretation of the OSA, thus forming a majority of four judges on that point. However, he disagreed in the result. He held that the motion judges in two of the cases should have exercised their discretion to grant leave *nunc pro tunc*, thereby curing the expiration of the limitation periods by granting leave retroactive to the time it was sought. Justice Côté believed that the statutory scheme of the OSA did not permit any discretion to grant the orders *nunc pro tunc*. Justice Karakatsanis did not address the issue. The result was that two of the cases were permitted to continue even though four of seven judges held that they were time barred, and three of those four held that there was no room to avoid that result by making retroactive orders.

Importantly, the Supreme Court was unanimous on the question of the leave threshold applicable under section 138.8 of the OSA. The Court held that its earlier 2015 decision in *Theratechnologies inc. v. 121851 Canada inc.*,<sup>[3]</sup> which was decided under a similar provision of the Quebec *Securities Act*, was equally applicable to leave sought under section 138.8 of the OSA. On this approach, a claimant must show that their claim has a reasonable or realistic chance of success at trial, which requires some consideration of evidence at the leave stage. While the Court agreed that this threshold is low, it is more robust than a mere possibility of success.

### **Legislative Change to the OSA and Remaining Uncertainty for Class Proceedings**

Following the Court of Appeal decision in the trilogy, the Ontario and Manitoba legislatures amended the relevant sections of their acts to address how the leave requirement fits into the strict limitation periods. Section 138.14(2) of the OSA was added to provide that a limitation period in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court. The limitations clock resumes running once leave is granted (or denied), meaning that the time taken to obtain leave is effectively not "counted". This provision would have saved the two trilogy cases that were permitted to continue by the Supreme Court.

The amendment to the OSA achieves a result that neither the majority nor minority contemplated in the

Trilogy Decision. It removes the possibility that plaintiffs will lose their right of action because of delays at the leave stage that are outside of their control. However, it is not clear whether the amendment has the same effect as if section 28 of the CPA operated to suspend the OSA limitation period. Where it applies, section 28 of the CPA pauses the clock for all "class members", regardless of the outcome of the certification process, while the Court decides whether the case is suitable to be heard as a class proceeding. Under section 28 of the CPA, if certification fails, the limitation period for class members to bring individual actions simply resumes. The amended OSA only pauses the clock "in respect of an action" in which leave is sought. It is yet to be seen how courts will treat the wider group of class members in OSA actions where class certification is ultimately denied after the (un-paused) limitation period has expired, therefore barring new actions.

by Stephen Brown-Okruhli<sup>[4]</sup> and David Kent<sup>[5]</sup>

1 2015 SCC 60.<sup>[ps2id id='1' target='']</sup>

2 2012 ONCA 107.<sup>[ps2id id='2' target='']</sup>

3 2015 SCC 18.<sup>[ps2id id='3' target='']</sup>

4 Stephen is an Associate at McMillan LLP.<sup>[ps2id id='4' target='']</sup>

5 David is a Partner at McMillan LLP.<sup>[ps2id id='5' target='']</sup>

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2015