Five-Judge Panel of Court of Appeal to Consider Limitation Period for Securities Class Actions

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The Court of Appeal for Ontario announced this week that it will convene a special five-judge panel to hear appeals considering the statutory limitation period applicable to securities class actions for secondary market misrepresentations commenced under Part XXIII.1 of the Ontario Securities Act. The specially-convened panel underscores the importance of the issue and may well provide clarification in the area of securities class actions both in Ontario and across Canada.

This issue comes before the Court of Appeal by way of appeal from recent decisions of the Ontario Superior Court of Justice that took varying approaches to interpreting the Court of Appeal’s decision in Timminco. In Timminco, the Court of Appeal held that the limitation period in Part XXIII.1 requires a plaintiff to obtain leave to proceed with his statutory cause of action within three years of the date that the alleged misrepresentation is made – otherwise, the claim would be statute-barred. In CIBC, the first decision to apply Timminco, Justice Strathy found that the court has no discretion to extend the limitation period once it had expired. However, two subsequent decisions held that the court can grant relief against the limitation period in limited circumstances. In Imax, Justice van Rensburg held that the court has the authority to grant leave nunc pro tunc in appropriate circumstances such that the effective date of the granting of leave will be deemed to fall within the limitation period. And in Celestica, Justice Perell held that relief could be granted from strict application of the limitation period on a somewhat different basis, namely the discretion retained by the court pursuant to the common law doctrine of “special circumstances”.

The issue was to be considered before a three-judge panel of the Court of Appeal in the joint hearing of the appeals in CIBC and Imax. However, the Court of Appeal determined that it would adjourn the hearing until May to convene a rare five-judge panel. This may be due to the fact that the plaintiffs would be asking the Court of Appeal to take the unusual step of reconsidering its own decision in Timminco. The result of these appeals will be of considerable interest to issuers, directors and officers.

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Sharma v. Timminco Ltd., 2012 ONCA 107. The Supreme Court of Canada denied leave to appeal, thereby upholding the Court of Appeal’s decision. For a summary of Timminco, please see our Osler Update of August 2, 2012.

2 Green v. CIBC, 2012 ONSC 3637. For a summary of CIBC, please see our Osler Update of July 5, 2012.

3 Silver v. Imax Corp., 2012 ONSC 4881.


5 These decisions are also discussed in Osler’s recent summary of Class Actions in Canada in 2012.
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