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Itâ€™s about time: Limitation Periods under the Ontario Securities Act

The past year has seen a flurry of interesting cases dealing with limitation periods. My colleagues and I have commented on them previously, including here and here. In *Pennyfeather v Timminco Limited*, the Court of Appeal for Ontario had the chance to weigh in on limitation periods under the Ontario *Securities Act* (“*OSA*”).

By way of background, in December of 2005, a new statutory cause of action for misrepresentation in the secondary securities market came into force as Part XXIII.1 of the *OSA*. This amendment created new opportunities for securities class actions.

To avail themselves of the *OSA* cause of action, plaintiffs are required to seek leave and to meet a three-year limitation period. But it took about a decade for the Supreme Court of Canada to settle the question of how the leave requirement and limitation period would interact with section 28 of the *Class Proceedings Act* (“*CPA*”).

Section 28 of the *CPA* suspends the limitation period of an asserted cause of action upon the commencement of a class proceeding. In *Green v Canadian Imperial Bank of Commerce*, a majority of the Supreme Court held that to “assert” the cause of action in the *OSA*, a litigant must actually be granted leave to bring the action. It would not be sufficient to simply file for leave within the three-year time period; in order to avoid being time-barred, leave to bring the claim must have actually been granted.

However, the Supreme Court also acknowledged that in certain circumstances, leave might granted retroactively, *nunc pro tunc*, to the date when the leave motion was filed. The effect of these retroactive orders would be to salvage claims that might otherwise end up being time-barred, due to mere irregularities.

In *Pennyfeather v Timminco Limited*, the Ontario Court of Appeal applied some of the principles announced by the Supreme Court in *Green* to uphold the decision of a motions judge denying a request for *nunc pro tunc* relief. As a result, the plaintiff's motion for leave to commence the statutory cause of action under the *OSA* was time-barred.

That case arose out of alleged misrepresentations made by Timminco Limited and their consultants in March, 2008. Mr. Pennyfeather, a shareholder of Timminco, was the representative plaintiff of the purported class action against the company. In addition to a statutory misrepresentation claim, the plaintiff sought to bring an action for misrepresentation in the secondary securities market, pursuant to Part XXIII.1 of the *OSA*. However, due to a strange confluence of factors, the claim ran up against the statute's limitation period. As a result, Mr. Pennyfeather made a request for *nunc pro tunc* relief.

Two main issues were argued before the Court of Appeal. The first issue was whether the *nunc pro tunc* relief was even available to the plaintiff, given the operation of a "red-line rule" articulated by the Supreme Court in *Green*. The second was whether the motion judge had erred in his discretionary decision to refuse the relief.

Relief not Barred by the "Red-Line Rule"

In *Green*, the Supreme Court had held that the earliest time an order for leave could be backdated *nunc pro tunc* was to the date when a leave motion was filed. The Court of Appeal in *Pennyfeather* called this the "red-line rule." Its purpose was to ensure that judicial discretion to grant retroactive orders did not trump the legislature's ultimate intent in enacting a limitation period in the first place. As a result of this rule, if a plaintiff filed their motion for leave after the three-year period had expired, even an order *nunc pro tunc* could not salvage the claim.

The Court of Appeal had to assess whether Mr. Pennyfeather's request for relief was barred by this "red-line rule," given that he had not technically brought a motion for leave within the requisite time period. Instead, on the motion judge's recommendation, plaintiff's counsel had brought a motion for "conditional leave" with only a few days left to spare in the limitation period.

In an *obiter* discussion, the Court noted that Mr. Pennyfeather's request may not have been barred by the "red-line rule" because the motion for conditional leave was brought within the requisite time period. However, the Court stressed that this issue was not determinative, as it went on to uphold the motion judge's refusal to grant *nunc pro tunc* relief.

Upholding the Decision to Deny Relief

On the second issue concerning purported errors in the motion judge's decision to deny *nunc pro tunc* relief, the Court stressed that deference is due to a motion judge's exercise of discretion. It ultimately found that none of the appellant's purported grounds for questioning the motion judge's decision were meritorious. The responsibility for delay was said to rest predominantly with the plaintiff, who had made a strategic decision to focus on settling the claim, rather than prosecuting expeditiously.

In the Court's view, granting *nunc pro tunc* relief in these circumstances would have been inconsistent with the purpose of the limitation period – to ensure that leave will be sought and obtained quickly.

Finally, in an alternative and novel argument on appeal, the plaintiff claimed that the limitation period had not actually expired because of an ongoing misrepresentation on Timminco's website. The Court of Appeal promptly rejected this argument, holding that the statute is clear: the clock started ticking when the document containing the misrepresentation was "first released." Subsequent or ongoing misrepresentations were of no consequence to the limitation period.

Though the history of this issue has wended its way through all levels of the Court and back again, one thing is abundantly clear: when it comes to misrepresentation in the secondary securities market, potential plaintiffs should apply for leave sooner rather than later.

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