



## IMAX securities class action saved by nunc pro tunc order

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In a decision released August 27, 2012 in the [Silver v. IMAX](#) securities class action, Justice van Rensburg has ordered that leave to commence an action under Part XXIII.1 of the Ontario [Securities Act](#) (the OSA), which she previously granted in a decision released December 14, 2009, shall be deemed effective as of December 19, 2008, the last day of the original hearing of the leave motion. The purpose of this Order is to address the expiry of the limitation period to commence an action under Part XXIII.1 while the leave motion was under reserve.

Justice van Rensburg has taken an expansive view of the Court's inherent jurisdiction to remedy a perceived injustice in the limitation period set out in the OSA for secondary market securities class actions. This decision in *IMAX* contrasts with the recent decision in [Green v. CIBC](#) where, in similar circumstances, Justice Strathy applied the Court of Appeal's recent decision in [Sharma v. Timminco Limited](#) to deny a motion for leave to commence a Part XXIII.1 action on the grounds that the limitation period had expired. While there is a basis, set out below, for distinguishing the *IMAX* and *CIBC* decisions, it may be necessary for a higher court to consider the scope, if any, of the Court's inherent jurisdiction to circumvent the limitation period set out in the OSA.

For securities class actions involving claims of misrepresentation in public disclosure documents, section 138.14 of the OSA provides that such an action must be commenced within three (3) years of the alleged misrepresentations. In *IMAX*, the limitation period expired in March 2009. In February 2012, the Court of Appeal released a decision in the *Timminco* securities class action which found that the limitation period in section 138.14 of the OSA is not suspended by section 28 of the [Class Proceedings Act, 1992](#) (the CPA), which suspends limitation periods on behalf of class members on the commencement of a class proceeding, until a proposed representative plaintiff obtains leave from the Court pursuant to section 138.8 of the OSA and, with leave, commences an action under section 138.3 of the OSA.

*IMAX* was the first action under Part XXIII.1 to proceed to a hearing on the leave motion. The plaintiff issued a Statement of Claim on September 20, 2006, alleging misrepresentations by IMAX during the period February 17, 2006 to March 9, 2006. The leave motion, as well as a certification motion, was heard in December 2008. The Court's decision was not released until a year later, in December 2009. It would appear that the issue of the limitation period was not addressed by the parties or the judge at any point in the proceeding.

After the release of the Court of Appeal's decision in *Timminco*, the defendants amended their Statement of Defence to plead that the Part XXIII.1 claims were statute barred by section 138.14 of the OSA

because the Amended Statement of Claim pleading the Part XXIII.1 cause of action was first issued, with leave, more than three (3) years after the alleged misrepresentations. The defendants moved for summary judgment on this ground. The plaintiffs, in turn, moved for an order that leave be granted *nunc pro tunc*, “now for then”, meaning that the granting of leave to commence the Part XXIII.1 action would be retroactive to some date prior to the expiry of the limitation period.

A very similar issue arose in the *CIBC* securities class action, where Justice Strathy concluded that he did not have the authority to grant leave *nunc pro tunc* and, finding it had no reasonable possibility of success, he denied the motion for leave to commence the Part XXIII.1 action. One notable difference between the *IMAX* and *CIBC* proceedings is that the leave motion in *IMAX* was heard prior to the expiry of the limitation period whereas in *CIBC* the hearing of the leave motion was after the expiry of the limitation period, Justice van Rensburg nevertheless acknowledges that she is taking a “more expansive” view than Justice Strathy of the Court’s authority to grant orders *nunc pro tunc*.

Justice van Rensburg concluded that her authority to grant orders *nunc pro tunc* is based on the Court’s inherent jurisdiction to prevent injustice generally. In particular, she concluded that the doctrine of *actus curiae neminem gravabit*, meaning that a litigant should not be prejudiced by the conduct of the Court, justified granting leave *nunc pro tunc* in this case because the limitation period expired after the motion was heard and while the decision was under reserve. The *actus curiae* doctrine would appear not to apply in the *CIBC* proceeding as the leave motion was heard after the expiry of the limitation period, or for that matter, in the *Timminco* proceeding, in which the leave motion was not even served until after the expiry of the limitation period.

A further hurdle remained to address the expiry of the limitation period in *IMAX*. Typically the event that suspends a limitation period is not the fact that leave is granted but the actual issuance of a Statement of Claim. Justice van Rensburg concluded that the Court of Appeal’s decision in *Timminco* suggests that, where a Statement of Claim has already been issued stating an intention to seek leave to commence an action under Part XXIII.1, section 28 of the CPA suspends the limitation period in section 138.14 of the OSA upon the granting of leave and it is not necessary to issue a Statement of Claim actually asserting the Part XXIII.1 cause of action in order to suspend the limitation period.

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