December 4, 2015

Securities Class Actions in Canada: The Supreme Court Weighs In

Earlier today, the Supreme Court of Canada released its highly anticipated decision in three Ontario securities class action cases: *Canadian Imperial Bank of Commerce v Green, Silver v IMAX Corporation* and *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v Celestica Inc.*[1] The decision had been on reserve since February 2015, when the Supreme Court heard oral argument in the three appeals together. The appeals were from a February 2014 decision of the Court of Appeal for Ontario.[2]

The Supreme Court's decision touches on the requirement that plaintiffs obtain "leave to proceed" with statutory claims alleging misrepresentations in a reporting issuer's secondary market disclosure, on common law negligent misrepresentation claims and on the three-year limitation period applicable to statutory secondary market claims.

The Test for Leave to Proceed

Under section 138.8 of the *Securities Act*, in order to obtain leave to proceed, a plaintiff must show that (i) the claim is being brought in good faith; and (ii) there is a reasonable possibility that the plaintiff will succeed at trial. The Court of Appeal, in its February 2014 decision, held that the second prong is "a relatively low threshold".[3] However, in its April 2015 decision in *Theratechnologies inc. v 121851 Canada inc.*,[4] the Supreme Court interpreted the Québec equivalent of section 138.8 somewhat differently. In that case, the Supreme Court affirmed that the "reasonable possibility" test is more than a "speed bump". The test requires the plaintiff to "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim". [5] Today's decision confirms that the Court's comments in *Theratechnologies* also apply to the test for leave to proceed in Ontario.[6]

This may be of some comfort to reporting issuers. In the period since *Theratechnologies* was decided, a number of lower court decisions on whether to grant leave to proceed seem to have examined more closely the merits of the proposed claims. With today's decision, there remains reason for optimism that the leave requirement will become the gatekeeping mechanism it was intended to be.

Negligent Misrepresentation Claims

Plaintiffs in secondary market misrepresentation class actions almost invariably pursue common law negligent misrepresentation claims, in addition to statutory claims. They do so because common law claims are not subject to the leave requirement or to the liability caps imposed by the Securities Act. However, to succeed in a negligent misrepresentation claim, plaintiffs must prove that they actually relied on the alleged misrepresentation. Reliance is traditionally regarded as something that can only be proved on an individual basis, not on a class-wide basis. Today's decision from the Supreme Court leaves undisturbed the Court of Appeal's holding that an inference of group reliance cannot replace the inquiry into individual reliance in the secondary market context.7 Specifically, plaintiffs cannot invoke the "efficient market" theory to establish reliance on a class-wide basis. The efficient market theory posits that investors who purchase securities in the secondary market necessarily rely on the issuer's public disclosure because in an efficient market all publicly available information is incorporated into the price of the securities. The Supreme Court also upheld the Court of Appeal's ruling that other than reliance and damages, issues relevant to negligent misrepresentation claims could be certified.8

The result is that certain issues relevant to common law negligent misrepresentation claims can be certified in securities cases. However, it is questionable whether negligent misrepresentation claims are economically viable, because even if the class members succeed at the "common issues" trial, each class member will then need to prove actual reliance and damages in an individual trial. Only class members with substantial individual claims will have the economic incentive to pursue such an individual trial. That being said, plaintiffs will undoubtedly continue bringing common law negligent misrepresentation claims in securities class actions in an attempt to exert leverage over defendants for settlement purposes.

Limitation Period: When Does the Clock Stop Running?

In today's decision, the Supreme Court held that the clock stops running on the three-year limitation period only once the plaintiffs obtain leave to proceed under section 138.8 of the *Securities Act*. That provision states that no statutory secondary market misrepresentation action may be commenced without the court's permission to do so (as discussed below). In so holding, the Supreme Court disagreed with the February 2014 decision of the Court of Appeal, which held that in the class action context, the clock stops running as soon as the plaintiffs file a statement of claim. The Supreme Court nevertheless allowed the Part XXIII.1 claims to proceed in the *CIBC* and *IMAX* cases, on the basis that the order granting leave to proceed could and should be "backdated" to a point in time when the limitation period had not yet expired. The backdating remedy was not available in *Celestica* because the limitation period had already expired by the time the motion for leave to proceed was brought.

This aspect of the Supreme Court's decision is unlikely to have an impact on future securities cases because in July 2014, the Ontario legislature amended the Act to clarify that the limitation clock stops running when a notice of motion seeking leave to proceed is first filed in court, and not when leave to proceed is actually granted.

[1] *Canadian Imperial Bank of Commerce v. Green,* 2015 SCC 60 *[Green SCC]*.

[2] *Green v. Canadian Imperial Bank of Commerce,* 2014 ONCA 90 *[Green ONCA]*.

[3] *Ibid.* at paras. 88, 90.

[4] 2015 SCC 18.

[5] *Ibid.* at paras. 38-39.

[6] *Green SCC, supra* note 1 at paras. 120-122.

[7] *Green ONCA, supra* note 2 at paras. 97-99, 101-103.

[8] *Green SCC, supra* note 1 at paras. 126-128.

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