COURT OF APPEAL FOR ONTARIO

CITATION: Green v. Canadian Imperial Bank of Commerce, 2014 ONCA 90
DATE: 20140203
DOCKET: C55832, C55982, C56252

Doherty, Feldman, Cronk, Blair and Juriansz JJ.A.

C55832

BETWEEN

Howard Green and Anne Bell

Plaintiffs (Appellants)

and

Canadian Imperial Bank of Commerce, Gerald McCaughey, Tom Woods, Brian G. Shaw, and Ken Kilgour

Defendants (Respondents)

C55982

BETWEEN

Marvin Neil Silver and Cliff Cohen

Plaintiffs (Respondents)

and

IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble

Respondents (Appellants)

C56252

BETWEEN

Trustees of the Millwright Regional Council of Ontario Pension Trust Fund

Plaintiffs (Respondents)

and

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Defendants (Appellants)

AND BETWEEN

Nabil Berzi

Plaintiffs (Respondents)

and

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Defendants (Appellants)

AND BETWEEN

Huacheng Xing

Plaintiffs (Respondents)

and

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Defendants (Appellants)

R. Paul Steep and Dana M. Peebles, for the appellants, IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis J. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble

William V. Sasso, A. Dimitri Lascaris, Serge Kalloghlian and Daniel E. Bach, for the respondents, Marvin Neil Silver and Cliff Cohen

Joel P. Rochon, Peter R. Jervis, Sakie Tambakos, John Archibald and Remissa Hirji, for the appellants, Howard Green and Anne Bell

James C. Tory and Sheila Block, for the respondent, Canadian Imperial Bank of Commerce

Benjamin Zarnett and David Conklin, for the respondents, Gerald McCaughey, Tom Woods, Brian G. Shaw, and Ken Kilgour

Nigel Campbell and Ryan A. Morris, for the appellants, Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Kirk M. Baert, Celeste Poltak, Michael Mazzuca, Peter Prozanski and Trent Morris, for the respondents, Trustees of the Millwright Regional Council of Ontario Pension Trust Fund, Nabil Berzi, Huacheng Xing

Anna Perschy, for the intervenor, Ontario Securities Commission

Alan L.W. D'Silva, Mark E. Walli and Lesley Mercer, for the intervener, Insurance Bureau of Canada

Margaret L. Waddell, for the intervenor, Canadian Foundation for Advancement of Investor Rights

Jonathan Bida, for the intervenor, Shareholder Association for Research and Education

Heard: May 13, 14, 15, 16, 2013

On appeal from the order of Justice G.R. Strathy of the Superior Court of Justice, dated July 3, 2010, with reasons reported at 2012 ONSC 3637 (C55832); and on appeal from the order of Justice K.M. van Rensburg of the Superior Court of Justice, dated August 27, 2012, with reasons reported at 2012 ONSC 4881 (C56252); and on appeal from the order of Justice P.M. Perell of the Superior Court of Justice, dated October 15, 2012, with reasons reported at 2012 ONSC 6083 (C56252).

Feldman J.A.:

A. INTRODUCTION

[1] In each of these three appeals, the plaintiffs are representative plaintiffs in a class proceeding. They are each claiming damages under Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5, s. 138.3, for misrepresentations alleged to have been made in respect of shares trading in the secondary market. In each case, the representative plaintiff commenced a class proceeding for common law negligent misrepresentation and in that statement of claim they each also made the statutory claim. The statutory claims are based on the new statutory cause of action under Part XXIII.1, which came into force on December 31, 2005. The statutory cause of action is found in s. 138.3, reproduced in Schedule "A".

[2] In each case, the statement of claim was issued and served within the three-year limitation period for bringing the statutory claim (s.138.14), but in each case, leave to commence the statutory action (s.138.8) was not obtained within the three-year period.

[3] In this court's decision in *Sharma v. Timminco*, 2012 ONCA 107, 109 O.R. (3d) 569, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 157 ("*Timminco*"), the court held that the statutory claim is statute-barred if leave to commence the action is not obtained within the three-year limitation period, and that s. 28 of the *Class Proceedings Act, 1992,* S.O. 1992, c.6 ("*CPA*") does not

suspend the running of the limitation period in favour of class members until leave has been obtained.

[4] The three experienced class proceedings judges who decided these cases dealt with the expiry of the limitation period in different ways. In *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 219 A.C.W.S. (3d) 692, ("*Green v. CIBC*"), Strathy J. held that there was no avenue available to relieve against the passage of the limitation period in light of the decision in *Timminco*. In *Silver v. IMAX Corp.*, [2009] O.J. No. 5573, 66 B.L.R. (4th) 222 (S.C.J.), leave to appeal to Ont. Div. Ct. refused, 2011 ONSC 1035, 105 O.R. (3d) 212, van Rensburg J. had already granted leave after the expiry of the limitation period. In 2012 ONSC 4881, [2012] O.J. No. 4002, she ordered that the leave that had been granted to commence the action applied *nunc pro tunc* within the limitation period. Both decisions will hereafter be referred to as *"Silver v. IMAX"*. In *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.,* 2012 ONSC 6083, 113 O.R. (3d) 264 ("*Celestica*"), Perell J. held that leave could be granted after the expiry of the limitation period by applying the doctrine of special circumstances.

[5] The three appeals were heard together by a five-judge panel of this court to allow the court to decide whether to reconsider the decision in *Timminco*.

[6] The *Timminco* court's interpretation of the term "asserted" in s. 28 of the *CPA* was a viable one based on the arguments made and the record before it in

that case. However, when the consequence of the interpretation, which leaves class members without the normal s. 28 protection from the passage of the limitation period, is assessed in light of the purpose and intent of the new statutory claim, we have concluded that the interpretation given is not correct and the decision of the court should be overturned.

B. BRIEF PROCEDURAL BACKGROUND OF THE THREE APPEALS

[7] In *Green v. CIBC*, the applications for certification under the *CPA* and for leave to proceed under Part XXIII.1 of the *Securities Act* were heard together by Strathy J. *Timminco* was released on the second last day of the motion. Strathy J. would have granted leave and certification but following the decision in *Timminco,* he dismissed the leave application and the statutory action as time-barred.[1]

[8] In *Silver v. IMAX*, van Rensburg J. had already granted leave before *Timminco* was released. Following the release of *Timminco*, the defendants applied for summary judgment to dismiss the action as time-barred when leave was granted. Justice van Rensburg dismissed the motion and made the grant of leave apply *nunc pro tunc*.

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[1] An appeal from a refusal to certify a class proceeding lies to the Divisional Court, pursuant to s. 30(1) of the *CPA.* However, an appeal from a final order, the dismissal of the leave application and the action itself, lies to this court, pursuant to s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("the *CJA*"). Since the appeal lies to both courts in the same proceeding, this court has jurisdiction to hear and determine the appeal: s. 6(2) of the *CJA*; *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, [2013] O.J. No.1007, at paras. 24 and 32-33.

[9] The proceedings below in *Celestica* are not as far advanced as those in the other two appeals. The Ontario litigation was held in abeyance while a parallel action proceeded through the courts in the United States. The plaintiffs did not file a notice of motion to seek leave until after *Timminco* was released in 2012. Perell J. refused to strike the claim as statute-barred by applying the doctrine of special circumstances. He held that leave could be granted *nunc pro tunc* on the facts of *Celestica*, if the plaintiffs met the leave test.

C. THE DECISION IN *SHARMA V. TIMMINCO*

[10] In *Timminco*, the representative plaintiff commenced a class proceeding in May 2009. The pleading alleged that misrepresentations by the defendants between March and November 2008 affected the value of the Timminco shares that traded in the secondary market. It claimed damages for negligent misrepresentation on a class-wide basis. The statement of claim also stated that the plaintiff intended to move for an order "permitting the Plaintiff to assert the statutory causes of action" and to then deliver an amended statement of claim to plead them.

[11] In early 2011, as the expiry of the three-year limitation period under Part XXIII.1 approached and the plaintiff had not yet brought the motion for leave (or a motion to certify the class proceeding), he sought and obtained an order from the class proceedings judge, Perell J. The order declared that the effect of s. 28 of the *CPA* was to suspend the running of the limitation period in favour of all class

members, including the representative plaintiff, once the statutory claim was asserted or mentioned in a statement of claim and before leave to commence the statutory action was obtained.

[12] The defendants appealed that decision to this court. On appeal, this court reversed the decision of the motion judge. The court held that where a statement of claim in a class proceeding states that the statutory claim will be made based on the facts pleaded and that leave will be sought, s. 28 of the *CPA* does not suspend the running of the limitation period in favour of any member of the class unless leave to commence the statutory claim has first been obtained from the court.

D. THE EFFECT OF *TIMMINCO* ON THE THREE CASES NOW UNDER APPEAL

[13] When the decision in *Timminco* was released on February 16, 2012, the result came as a great surprise to the securities class action bar. Strathy J. observed in *Green v. CIBC* at para. 475 that: “Counsel for the individual defendants aptly described the decision, at that time, as a ‘thunderbolt’”. The immediate effect of the court’s decision was that the statutory claims in a number of cases were either statute-barred – as in the cases now before the court – or would likely become statute-barred before the three-year limitation period expired.

[14] In the three cases before the court, a class action had been commenced within the three-year limitation period provided by s. 138.14(1) of the *Securities*

Act[2] (set out in footnote 2 below and in Schedule "A" for ease of reference) in which all the facts that formed the basis of the cause of action were pleaded, along with the stated intention to seek leave to commence the statutory claim.[3] Also in all three cases, a motion for leave to commence the statutory claim has been brought. In *Green v. CIBC,* the limitation period expired on December 6, 2010, before the motion for leave was heard; in *Silver v. IMAX*, the limitation period expired on March 9, 2009, while the leave decision was under reserve. In *Celestica*, the motion for leave has not yet been heard; the limitation period expired January 30, 2010.

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[2] Section 138.14 provides: No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

[3] In *Celestica*, the *Xing* and *Berzi* actions were filed in Ontario in 2007 and 2008 respectively, but the *Millwright* action, which had been on hold while the parties monitored the U.S. action, was only filed in Ontario on April 8, 2011, after the limitation period expired. However, Perell J. consolidated all three actions on April 13, 2012 (SCJ Court File Nos. 54938CP, 08-361468-00CP, and CV-11-424069-00CP).

E. THE ABILITY OF THE COURT OF APPEAL TO REVIEW A PREVIOUS COURT DECISION

[15] In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161, this court described the circumstances in which it would revisit and reverse a previous decision of the court in the context of recognizing the importance of adhering to the doctrine of *stare decisis*. Previously, some judgments of this court had taken a more rigid approach, requiring errors to fit within one of the traditional exceptions to *stare decisis*. In *Polowin*, a case involving the interpretation of a provision of the *Insurance Act,* R.S.O. 1990, c. I.8 and a regulation under the Act, this court held that it could overrule its previous decision that had misinterpreted those provisions, regardless of whether the type of error fit into one of the traditional exceptions. Writing for the court in *Polowin,* Laskin J.A. articulated the preferred approach at para. 127, as follows:

> [127] Instead of focusing on phrases such as "manifestly wrong", the approach I prefer is that adopted by this court in *R. v. White* (1996), 29 O.R. (3d) 577, [1996] O.J. No. 2405 (C.A.), at p. 602 O.R. It calls on the court to weigh the advantages and disadvantages of correcting the error in a previous decision. This approach focuses on the nature of the error, and the effect and future impact of either correcting it or maintaining it. In doing so, this approach not only takes into account the effect and impact on the parties and future litigants, but also on the integrity and administration of our justice system.

F. APPLYING THE *POLOWIN* TEST TO THE *TIMMINCO* DECISION

(1) The findings in *Timminco*

[16] Following the approach taken in *Polowin*, the first issue to be determined is whether the court in *Timminco* erred in its interpretation of s. 28 of the *CPA* and s. 138.8(1) of the *Securities Act.* To do that, it is necessary to review the *Timminco* decision in order to identify specifically what the case decided. As already noted, *Timminco* was a class action proceeding for alleged misrepresentations in the secondary market that caused the value of Timminco shares to fall and the class members to suffer losses. Along with common law causes of action in negligence and negligent misrepresentation, the statement of claim included para. 117, which provided:

> 117. The Plaintiff intends to deliver a notice of motion seeking, among other things, an Order permitting the Plaintiff to assert the statutory causes of action particularized in Part XXIII.1 of the Securities Act, and if granted, to amend this Statement of Claim to plead these causes of action.

[17] Unlike the common law cause of action for negligent misrepresentation, the statutory cause of action under Part XXIII.1 of the *Securities Act* allows an investor to recover for losses suffered without proving any reliance on the misrepresentation in the purchase or sale of shares. Consequently, the same facts surrounding the misrepresentation and its effect on the share price can ground both the common law cause of action and the statutory cause of action. However, the statutory cause of action requires leave of the court.

[18] Under the heading “Leave to Proceed”, s. 138.8(1) of the *Securities Act* provides:

> 138.8(1) No action may be commenced under s. 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
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> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[19] In *Timminco*, the court stated at para. 15 that it was not disputed that because leave had not been granted, the “class proceeding is not an action commenced under s. 138.3”. Therefore, whether leave of the court had to be obtained before a statement of claim could issue that commenced the action was not before the court in *Timminco*. The only issue before the court was whether the application of s. 28 of the *CPA* would nevertheless suspend the running of the limitation period for all class members before leave was obtained because the statutory cause of action was “asserted” in the class action statement of claim for negligent misrepresentation.

[20] Section 28 of the *CPA* is the provision that addresses how limitation periods operate in the context of class actions and reads as follows:

> 28. (1) Subject to subsection (2), any 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 and resumes running against the class member when,
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> (a) the member opts out of the class proceeding;

> (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
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> (c) a decertification order is made under section 10;
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> (d) the class proceeding is dismissed without an adjudication on the merits;
>
> (e) the class proceeding is abandoned or discontinued with the approval of the court; or
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> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. [Emphasis added.]

[21] In order to come within s. 28 of the *CPA*, the s.138.3 cause of action had to have been "asserted" in a class proceeding. In order to interpret the term "asserted", the court referred, at para. 17, to two dictionary definitions of "assert": "make or enforce a claim to (*assert one's rights*)" and "to invoke or enforce (a legal right)". Focusing on the second meaning, "enforce" a claim or legal right, the court reasoned that because the statutory cause of action could not be enforced without leave being obtained, it could not be asserted before leave is obtained.

[22] The court identified five bases of support for this interpretation. The first two reflected access to justice concerns for the class members. First, the fact that none of the subsections of s. 28(1) that recommence the running of the limitation period depends on the granting or denial of leave means that class members could have the limitation period suspended to protect them, but the class action may never proceed. Similarly, the protective purpose of s. 28 would be thwarted where no leave motion is brought.

[23] Third, it was not the purpose of s. 28 to put class action plaintiffs in a better position than individual plaintiffs by suspending the limitation period before leave only for class action plaintiffs but not for individual plaintiffs. Fourth, the court's interpretation furthered the object of s. 138.14 of the *Securities Act*, the limitation period for the statutory claim, by forcing plaintiffs to proceed with the leave motion expeditiously. Fifth, in answer to an anticipated concern, the court observed that its interpretation would not have the effect of making s. 28 inapplicable to s. 138.3 claims for misrepresentation in the secondary market; s. 28 would apply to suspend the running of the limitation period, but only once an action was commenced with leave.

(2) The effect of the *Timminco* decision on class actions for a remedy under s. 138.3 of the *Securities Act*

[24] The effect of the decision in *Timminco* is that representative plaintiffs are required to both move for and obtain leave of the court, and to commence a class action containing a claim under s. 138.3, within the three-year limitation period provided in s. 138.14 of the *Securities Act* (or the abbreviated period, if it becomes applicable – ss. 138.14(a)(ii),(b)(ii),(c)(ii)).

[25] Obtaining leave within time may prove either difficult or impossible, depending on a number of circumstances. Two are most significant. Because the limitation period is not dependant on the discovery or the discoverability of the misrepresentation, the action must be commenced within three years of the misrepresentation. The longer it takes to discover the misrepresentation, the

shorter is the period available to conduct the leave motion (and any appeals), obtain leave and commence the action.

[26] Then once the motion for leave is launched, the timing of the hearing is only partially within the control of the moving party. For example, the defendants may initiate procedural steps that could cause delay. As well, court availability can affect the timing of the hearing and the decision. In *Silver v. IMAX*, the leave motion had been argued and was under reserve when the limitation period expired.

[27] The fact that a plaintiff cannot unilaterally control whether its claim is brought within the applicable limitation period is a unique circumstance, and one which is foreign to the concept of a limitation provision. The court was not made aware of any comparable limitation provision.[4]

(3) Considering *Timminco* in the context of the history and purpose of s. 28 of the *CPA* and s. 138.3 of the *Securities Act*

Section 28 of the *CPA*

[28] In order to reconsider the analysis and the result in *Timminco* in context, it is also necessary to review 1) the history and purpose of s. 28 of the *CPA* and 2)

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[4] The *Patented Medicines (Notice of Compliance) Regulations*, S.O.R. /93-133, as amended, cited by the Canadian Imperial Bank of Commerce in *Green v. CIBC* as an example of an analogous time limit, do not contain a limitation period *per se*. They provide for a 24-month stay of the power of the federal Minister of Health to issue a Notice of Compliance where there is a claim with respect to a drug patent. The Regulations on their face give the court the discretion to extend the time if the claim is not expedited. If the case is not disposed of within two years and the court does not extend the time, the Minister could issue a Notice of Compliance, but the Federal Court does not automatically lose jurisdiction over the case.

the history and purpose of the new statutory action for misrepresentation in the secondary market under s. 138.3 of the *Securities Act*.

[29] Section 28 of the *CPA* has its genesis in the discussion and recommendation contained in chapter 19 of the Ontario Law Reform Commission's *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982). The issue before the Commission was clearly articulated in the first paragraph of the chapter at p. 771:

> A statute of limitations operates to prevent a party from commencing proceedings after the passage of a specific period of time, generally measured from the accrual of the cause of action. As a general rule, time ceases to run upon the commencement of an action within that specified period of time. It is clear that, when a representative plaintiff commences a class action, this result will follow insofar as the individual cause of action of the class representative is concerned. However, what of the causes of action of the absent class members? Does time likewise cease to run? If so, when does this occur: upon the commencement of the class action; upon the granting of certification; or, for example, upon the filing of a motion to intervene? Without statutory guidance, no certain answer is possible. Equally uncertain is the time when the limitation period, if suspended, will resume running against the absent class members. In the opinion of the Commission, these matters are important and should be dealt with in the proposed *Class Actions Act*.

[30] In *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418, 36 C.P.C. (5th) 176 (S.C.J.), aff'd, [2004] O.J. No. 2769, 71 O.R. (3d) 451 (C.A.), at para. 24, Winkler J. quoted the Discussion of s. 28 of the *CPA* in the *Report of the*

Attorney General's Advisory Committee on Class Action Reform (Toronto, 1990) as follows:

> Given the number of potential class members and the fact that many of them are absent and require protection, care must be taken to ensure that their rights are not prejudiced by the commencement of a class proceeding. Limitation periods are therefore suspended until a party decides to act alone (opting-out) or until determination has been made in the proceeding itself.

[31] In an individual action where s. 28 of the *CPA* does not apply, when a person commences an action before the expiry of the applicable limitation period the action has been commenced within time and "time ceases to run". This is also what normally occurs for the representative plaintiff in the context of a class proceeding: the clock stops running for him or her because the action is in time. The concern is for the other class members who have not commenced their own actions and will not need to do so if the class action is certified and proceeds. If it does not proceed, it is only in the case of the other class members that the limitation period may resume running. It will not normally resume running against the representative plaintiff because that person has an action commenced within time.

[32] The role of the representative plaintiff in a class action from a limitation point of view is to properly commence the action within the limitation period. Where a proceeding is commenced by the representative plaintiff within the limitation period, the other class members are, in effect, sheltered by the

timeliness of the representative plaintiff's action. The contrary is also true: the other class members get no protection from an untimely proceeding. That is, unless the representative plaintiff commences the action effectively within the limitation period, then time does not cease to run for the other class members.

[33] The effect of s. 28 was explained by Winkler J. and confirmed by this court in *Logan,* where the defendant argued that a class proceeding is only commenced once it is certified and, until then, it is an individual action and does not attract the protection of s. 28 for the rest of the class members. Winkler J. rejected that interpretation. He explained that the *CPA* is remedial legislation enacted to enhance access to justice for those with uneconomic individual claims. To require each such person to start his or her own action while waiting to see if the representative action is certified would defeat the purpose of s. 28 and the legislation as a whole. The court held that under s. 28, the commencement of the class action occurs when the claim is issued. It is at that time, and not when the claim is certified, that the limitation period is suspended for all class members.

[34] Section 28 recognizes that different causes of action can be asserted in one statement of claim and that they may have different, applicable limitation periods. Each such limitation period is suspended when each cause of action is effectively "asserted" in the action within the applicable limitation period.

Section 138.3 of the *Securities Act*

[35] Ongoing disclosure by corporate issuers of securities is one of the touchstones of corporate responsibility to the investing public. Together with the supervisory, regulatory authority of the Securities Commission, civil actions are an important way of obtaining compliance with the corporate obligation for ongoing, accurate disclosure.

[36] The new statutory claim for misrepresentation in the secondary market under s. 138.3 of the *Securities Act* (see Schedule "A") was intended to be remedial legislation with the twin goals of a) facilitating and enhancing access to justice for investors, and b) deterring corporate misconduct and negligence. By removing the need to prove reliance by an individual investor in order to obtain a remedy, the new action makes it easier and more cost-effective for investors to prove their claims. It thereby achieves compensation for investors (although with a damages cap), and by so doing, discourages corporate actors from making misrepresentations in their post-prospectus continuous disclosure.

[37] In formulating the new civil remedy, both the Allen Committee that prepared the original report to the Toronto Stock Exchange, and the Canadian Securities Administrators ("CSA") that prepared follow-up comments and draft legislation, focused on ensuring that the proposed legislative remedy would balance the interests of all potential parties and actors. This meant providing statutory defences for the corporate actors, a cap on the amount of damages that

could be recoverable, and a defined three-year limitation period from the date of the misrepresentation.

[38] In the Allen Committee final report, titled *Final Report: Responsible Corporate Disclosure: A Search for Balance* (Toronto: The Toronto Stock Exchange Committee on Corporate Disclosure, 1997), which recommended the new statutory action, the committee concluded that to achieve the dual goals of a remedy for aggrieved investors and deterrence of corporate issuers, the most appropriate form of action would be a class proceeding under the *CPA*. The authors summarized their conclusion at para. 4.6:

> 4.6 The Committee concluded that the combination of class actions with statutory civil liability for a misrepresentation in continuous disclosure, properly designed, would provide the benefits of better disclosure without unduly facilitating meritless litigation. The objective is to provide aggrieved investors with a remedy the potential exercise of which would act as a deterrent to misrepresentations (similar to liability for a prospectus misrepresentation) without facilitating extortionate class actions…

[39] One of the largest concerns of potential defendants following the Allen Report recommendation remained the "strike suit", which had become prevalent in the United States. In a strike suit, a class action lawyer would sue on a corporate statement whenever the share price fell, in order to obtain a quick settlement from the corporation, regardless of the merit of the claim.

[40] In order to meet this concern, two further protections were later added to the proposed new action by the CSA to prevent strike suits in Canada; one was

court-approved settlements. The other was a screening mechanism that required a plaintiff to seek leave of the court to commence an action, where the court would consider the merits of the proposed action by examining the evidence and determining whether the action was being brought in good faith and had a reasonable possibility of success. That is the leave requirement in s. 138.8 of the *Securities Act.*

[41] The result was the provision of the new statutory remedy for misrepresentation in ongoing disclosure, best pursued as a class proceeding, which would achieve compensation for class members, but also corporate deterrence. The deterrence component is significantly weakened if the claims are brought only by individual investors, first because the involved loss amounts are smaller, but also because such actions are likely to be too expensive to pursue on an individual basis.

(4) Is leave a component of and therefore a pre-requisite to "asserting" the statutory claim?

[42] The issue for the court in *Timminco* was whether the representative plaintiff had effectively "asserted" the statutory misrepresentation cause of action in the statement of claim when he commenced the class action for negligence but did not first obtain leave of the court to commence the statutory cause of action in accordance with s. 138.8(1) of the *Securities Act*. In other words, is leave required before the plaintiff is entitled to assert the statutory claim? In *Timminco*, this court answered "yes" to this question.

[43] The leave requirement is set out in s. 138.8(1) of the *Securities Act*. I repeat here for ease of reference both s. 138.8(1) as well as the opening phrase in s. 28 of the *CPA*:

> 138.8(1) No action may be commenced under s. 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> 28. Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member…

[44] The court in *Timminco* determined that the statutory cause of action under s. 138.3 of the *Securities Act* could not be "asserted" under s. 28 of the *CPA* because a component of that cause of action is leave of the court to commence the action. The two dictionary meanings of "assert" set out by the court were to "make or enforce a claim to" and "to invoke or enforce (a legal right)". The court in *Timminco* focused on the enforcement aspect of the definitions.

[45] However, using the same definitions, to assert a claim is also to make a claim or to invoke a legal right.

[46] In my view, by pleading the statutory claim under s. 138.3, the representative plaintiff is "making the claim" or "invoking the legal right". Although the claim cannot be ultimately enforced unless leave is granted, by pleading the

facts necessary to found the claim, the representative plaintiff is "making the claim" and "invoking the legal right" given by the statute.

[47] Even if one viewed the word "assert" in s. 28 as ambiguous, because it is contained in a provision that gives the benefit of the suspension of a limitation period to class members, the ambiguity should be resolved in favour of those entitled to that benefit. In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 136, the Supreme Court of Canada stated that statutory provisions creating a limitation period are to be strictly construed in favour of the plaintiff. The Court referred to a statement by Estey J., writing for the majority of the Court in *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, at p. 280, that as a limitation provision circumscribes the rights of action of a citizen, any ambiguity should be "resolved in favour of the person whose right of action is being truncated".

[48] In *Timminco,* the court raised the five concerns with this interpretation, referred to in paras. 22 and 23 above, some of which affect the rights of the defendants and some, the class action plaintiffs. The first was that the failure to seek leave or the denial of leave are not triggering events listed in s. 28(1) that restart the running of the limitation period. Therefore class members could be waiting indefinitely with no action proceeding. I believe the answer to this observation is that both the defendants and the class action case management judge will ensure that the motion for leave is proceeded with in a timely manner

or the class action proceeding is dismissed. Dismissal without adjudication on the merits is one of the triggers (s. 28(1)(d)) for resumption of the running of the limitation period. Of course, if leave is denied, the statutory claim is effectively at an end for all potential plaintiffs.

[49] The second issue raised in *Timminco* was that class members did not need the protective suspension of the limitation period that is the purpose of s. 28, where the representative plaintiff was not proceeding with the leave application. However, to the contrary, if a representative plaintiff is not proceeding and needs to be replaced, then the class members do need the protection of s. 28 during that time, otherwise they will each have to commence their own action and bring a leave motion.

[50] The third concern was that if asserting the claim without first obtaining leave has the effect of suspending the limitation period for class action plaintiffs under s. 28, this puts class action plaintiffs in a better position than an individual plaintiff, which is not the purpose of s. 28. I believe what the *Timminco* court was commenting on here is that by asserting the statutory cause of action in a statement of claim that commences another action, the effect of s. 28 is that it tolls the limitation period for all the class members, including the representative plaintiff, without having to first obtain leave and commence the statutory cause of action, as an individual plaintiff does.

[51] I agree that this is an unusual, if not anomalous effect of s. 28, in the context of the statutory claim. Normally, when a cause of action is asserted in a statement of claim, that statement of claim commences that cause of action. If the claim is commenced within the applicable limitation period, then the representative plaintiff has commenced his or her own action in time and the effect of s. 28 is only to suspend the limitation period for the other class members so that they need not commence their own actions. However, here the effect is to protect the representative plaintiff as well, who has not yet obtained leave and commenced the statutory action.

[52] As I have said, this effect is unusual. In this case, it means that class action members appear to have a procedural benefit or advantage that individual claimants do not, because individual claimants must obtain leave and commence the statutory action within the three-year limitation period. However, this result is not necessarily either inappropriate or unintended by s. 28.

[53] It is not inappropriate because although the statutory claim can be made individually, the committees that formulated it and the legislature that enacted it expected the statutory claim to be used optimally through the procedural vehicle of a class proceeding.[5] This was in order to accomplish the two purposes: 1) to enhance and facilitate access to justice for claimants; and 2) to have a significant deterrent effect on corporate actors. Therefore, it is not inappropriate to give the

[5] See paras. 37 and 38 above.

term “asserted” the purposive and effective interpretation which makes the statutory claim work successfully as a class proceeding.

[54] It follows that if the effect of the application of s. 28 to the statutory claim is to give class members a procedural benefit over individual claimants, there is no basis to say that effect was unintended by s. 28 in this context. It furthers the intent of the drafters of the new statutory claim that the claim be primarily brought as a class action.

[55] Fourth, the court in *Timminco* noted that the purpose of the three-year (or the abbreviated) limitation period for bringing secondary market misrepresentation claims (s. 138.14), is to ensure that such claims are brought and proceeded with expeditiously. An interpretation that does not require that leave be obtained within that period is inconsistent with that purpose. I will respond to this issue more fully in the next section of these reasons dealing with whether the *Timminco* judgment should be overruled.[6]

[56] Fifth, the court denied that the effect of its interpretation was to make s. 28 of the *CPA* inapplicable to s. 138.3 claims for misrepresentation in the secondary market. Rather, s. 28 would still suspend the running of the limitation period, but only once an action had been commenced with leave.

[6] See paras. 67, 68 and 69 below.

[57] The problem with this interpretive conclusion is that it does not give s. 28 its protective effect for class members. Before leave is granted in the class action, they would have to start their own individual actions and obtain leave individually to ensure that their personal claims were timely. This result undermines the purpose of s. 28 as envisioned by the Law Reform Commission and the Attorney General's Advisory Committee, and as explained in *Logan* as well as in *Coulson v. Citigroup Markets Canada Inc*., 2010 ONSC 1596, 92 C.P.C. (6th) 301, at para. 49; aff'd, 2012 ONCA 108, 288 O.A.C. 355.

(5) Two arguments made in these appeals that address the issue whether the statutory action can be commenced before leave is obtained, rather than whether it can be "asserted" within the meaning of s. 28 of the *CPA* before leave is obtained

[58] As discussed in paragraph 19 of these reasons, it was not argued in *Timminco* that a class proceeding for the statutory remedy had been "commenced" without obtaining leave. The only issue was whether the statutory claim could be "asserted", within the meaning of s. 28 of the *CPA*, without first obtaining leave, in a statement of claim that was properly commenced for another class action framed in negligent misrepresentation.

[59] Part of the argument addressed to this court was based on a line of cases, culminating in this court's decision in *Re New Alger Mines Ltd.* (1986), 54 O.R. (2d) 562 (C.A.), which holds that where a statute provides that leave is required to commence an action, leave can be obtained after the action is commenced in an order that is made *nunc pro tunc*. It was argued that similarly,

this statutory claim could be commenced without first obtaining leave, as long as leave was later obtained by an order made *nunc pro tunc*.

[60] Another submission that addressed the timing of commencing the statutory action was that one could examine the use of language contained in a number of subsections of s. 138 of the *Securities Act* to assist in interpreting the intention of the legislature as to whether leave had to be obtained before a statement of claim for the statutory claim could be issued. For example, the *Securities Act* refers to a "motion" for leave but also to an "application" for leave. It also refers to the parties to the motion as plaintiff and defendant, arguably suggesting an existing action.

[61] Because the focus of these appeals was on the issue decided in *Timminco,* and because the procedural factual matrix of these appeals also mirrors that in *Timminco*, I have limited the decision in these appeals to the issue decided in *Timminco*. Accordingly, I do not address the two arguments just outlined.

(6) Conclusion on *Timminco*

[62] Based on the analysis discussed above, I conclude that *Timminco* wrongly held that: 1) a class action properly commenced cannot also assert a cause of action for the statutory remedy under s. 138.3 unless leave has first been obtained, and 2) before leave is obtained, s. 28 of the *CPA* does not suspend the limitation period for all class members in a properly commenced

class proceeding that claims a remedy under s. 138.3 and proposes to seek leave. Allowing the statutory claim to be asserted with the common law claim provides for procedural simplicity and reconciliation of the respective purposes of the *CPA* and the *Securities Act*.

G. IS THIS A CASE WHERE THE COURT SHOULD OVERRULE ITS PREVIOUS DECISION?

[63] Following the approach taken by this court in *Polowin*, which focuses on "the effect and future impact of either correcting [the error] or maintaining it", in my view, the decision in *Timminco* should be overruled on these appeals for the following four reasons.

(1) One of the main benefits of the class action, the suspension of the limitation period for all members of the class, has been removed

[64] As discussed above, the twin goals of the new statutory cause of action for misrepresentation in the secondary market were to facilitate access to justice for investors and to deter corporate misconduct.

[65] It is clear that neither of the twin goals will be effectively achieved if the class action procedure is not a viable one. However, that is an effect of the *Timminco* decision. As a result of the *Timminco* interpretation of the interaction between s. 28 of the *CPA* and ss. 138.14 and 138.8 of the *Securities Act*, there is no suspension of the three-year limitation period for class members when the representative plaintiff commences a class action for negligence which also seeks a s. 138.3 remedy but without first obtaining leave. This means that class

members must do what s. 28 was intended to obviate: commence their own action with leave in order to try to ensure that their action is brought within the limitation period.

(2) *Timminco* undercuts the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period

[66] The effect of the decision In *Timminco* is that a representative plaintiff must move for and obtain leave to proceed (including the resolution of all appeals) before a class action can be commenced. This means that if, for example, an investor only learns about the misrepresentation two years and eleven months after it was made, the investor would have only one month not only to commence the action, but to obtain leave to do so. Even if a representative plaintiff initiates the leave motion much earlier in the three-year period, there is no guarantee that the motion will be completed, an order made, and all appeals exhausted within time. This makes the entire class action an uncertain endeavor.

[67] In *Timminco*, the representative plaintiff had taken no steps to bring the motion for leave as the limitation period came close to expiring. The *Timminco* court observed that its decision had the desirable effect of ensuring that the leave motion would be proceeded with expeditiously. It preserved the effective three-year time limit for obtaining leave, which is created by the combination of the

leave requirement (s. 138.3) and the three- year limitation for commencing the statutory action (s. 138.14).

[68] I agree that the motion for leave must be brought in a timely manner and pursued diligently until leave has been granted or denied. However, I note the submission made in these appeals on behalf of the Ontario Securities Commission that the leave provision, added to prevent strike suits, came after the limitation period was already part of the draft legislation. In addition, the CSA report that recommended the leave requirement did not refer to the issue of timeliness or link the importance of the leave motion to the limitation period.

[69] Accepting that the leave motion must be pursued diligently, there are a number of ways that can be achieved. Since class actions come under case management by experienced class action judges, it will be up to the judge and the parties to ensure timeliness.

[70] Removing from plaintiffs the ability to control compliance with the limitation period is another effect of the *Timminco* decision that undercuts the viability of the s. 138.3 action and the effectiveness of using the class action procedure. It could also have the indirect effect of forcing judges or the judicial administration to give undue priority to these particular actions and motions over other equally deserving litigation, in order to try to ensure limitation compliance.

(3) Similar legislation in other provinces and Ontario's response to *Timminco*

[71] Almost every province has leave, press release, and limitation period provisions very similar to those of the Ontario *Securities Act* in ss. 138.8 and 138.14. The fact that the same remedy can be obtained in other provinces for the same misrepresentation is recognized in s. 138.14 as a factor that may affect the limitation period for any claimant in any of those provinces.

[72] In response to the public concern about the effect of the *Timminco* decision on the efficacy of the statutory remedy, the Ontario government announced in its 2013 Budget, *A Prosperous and Fair Ontario* (Toronto: Queen's Printer for Ontario, 2013), at p. 290, that it would propose updates to the *Securities Act* if needed, following court cases (these appeals), to suspend the operation of the secondary market civil liability limitation period while leave to proceed was being sought. The Manitoba government has already amended its *Securities Act*, C.C.S.M. s. S50, Part 2. Section 197(2) of that Act now provides that once a leave motion has been initiated in a class action, the limitation period is suspended.

[73] It appears from these two legislative reactions, as well as the acknowledged surprise and concern in the securities bar and community, that the *Timminco* decision interprets the legislation in an unintended way and limits the access to justice that the new remedy was intended to provide. This court's

interpretation could also affect the interpretation and application of the statutory remedy in other provinces.

[74] One could argue that the court need not reverse its own decision when the legislature is able to fix the statutory language and clarify its intent with amendments to the legislation. However, where the court is in the position to revisit its interpretation and is satisfied that the *Polowin* test is met, and especially when the court's revised interpretation could be given effect in other affected provinces, the better course is for the court to act. Otherwise, each province would have to take separate action. In *Polowin*, the legislature had already amended the legislation for the future, but the court nevertheless reversed its decision, in part in order to protect those not covered by the amendment.

[75] Of course, it is still open to the legislature, if it so chooses, to reconsider the issue of commencement of a stand-alone claim for the statutory remedy, and to clarify at what stage of the litigation leave must be obtained.

(4) The *Timminco* decision is very recent

[76] In *R. v. White and Côté* (1996), 29 O.R. (3d) 577, [1996] O.J. No.2405 (C.A.), the case that preceded *Polowin* in reconsidering this court's approach to *stare decisis*, one of the factors that the court considered important in deciding whether to overrule a previous precedent was how recently it had been decided.

As the court stated at p. 605: there would be “less confusion and more certainty in correcting the error now rather than letting it take root”.

[77] Applying that principle here militates in favour of setting aside the *Timminco* interpretation of s. 28 of the *CPA* on these appeals.

CONCLUSION

[78] For the above reasons, I would set aside the interpretation given to s. 28 of the *CPA* in *Timminco*. I would hold that when a representative plaintiff in a class action brought within the *Securities Act* s. 138.14 limitation period, also pleads a cause of action based on s. 138.3 of the *Securities Act*, together with the facts that found that claim, and further pleads the intent to seek leave to commence an action under the *Securities Act*, then that claim has been “asserted” for the purpose of s. 28 of the *CPA*, and the limitation period is thereby suspended for all class members.

[79] The result of this conclusion is that none of the three actions under appeal is statute-barred. In *Celestica*, the leave motion has yet to be heard. In *Silver v. IMAX*, leave has been granted *nunc pro tunc*. Based on my proposed disposition of these appeals, the *nunc pro tunc* order is not necessary.

[80] In *Green v. CIBC*, the leave motion was heard and dismissed, based on *Timminco*. The respondent in that case has raised a further issue with respect to the granting of leave, and the appellant appeals the decision of the motion judge

to deny certification of the common law claim for negligent misrepresentation. I turn now to these additional issues.

H. OTHER ISSUES RAISED IN *GREEN V. CIBC*

(1) Did the motion judge err in his interpretation and application of the "reasonableness" test for granting leave

[81] The respondent argues that if this court finds that the s. 138.3 action is not statute-barred, then the motion judge erred in his conclusion that leave should be granted based on the evidence presented. Specifically, the respondent's position is that the motion judge erred in his interpretation of the "reasonable possibility" of success statutory standard, and that he set the bar for granting leave too low when he stated that the test was intended "to screen out cases that, even though possibly brought in good faith, are so weak they cannot possibly succeed".

[82] The respondent focuses on the motion judge's conclusion with respect to the standard to be applied on the leave test in para. 373 of his reasons:

> I respectfully agree with van Rensburg J. and Tausenfreund J. that the leave requirement is a relatively low threshold. *It is meant to screen out cases that, even though possibly brought in good faith are so weak they cannot possibly succeed.* This is consistent with the purpose of the legislation – *to screen out strike suits that are plainly unmeritorious. It is not meant to deprive* bona fide *litigants, with a difficult but not impossible case, from having their day in court.* This interpretation is also consistent with the philosophy of our legal system that contentious issues of fact and law

> are generally decided after a full hearing on the merits. [Emphasis added.]

[83] The respondent interprets this paragraph to mean that the standard has been set so low that a *mere* possibility of success rather than a *reasonable* possibility will suffice. I do not agree.

[84] I do agree with the respondent that to properly interpret and apply the leave standard, a "reasonable possibility" that at trial the action will be resolved in the plaintiff's favour, it is essential to give full effect to the word "reasonable".

[85] Fortunately, in the class action context, the reasonable possibility concept is very familiar because it is used for determining whether the pleading discloses a cause of action as required by the first part of the test for certification in s. 5(1)(a) of the *CPA*. As this court recently said in *Arora v. Whirlpool Canada LP,* 2013 ONCA 657, at para. 14:

> Certification is to be denied on the basis that the requirement of s. 5(1)(a) is not met only "if, assuming the facts pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action, meaning that the plaintiff has no reasonable prospect of success": *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161 (Ont. C.A.), at para. 22, citing *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at paras. 17-19; *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81 (Ont. C.A.), at para. 14, leave to appeal refused, [2011] S.C.C.A. No. 258 (S.C.C.).

[86] The phrase “reasonable prospect of success” was used by McLachlin C.J. in *Knight v. Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 S.C.R. 45 (also called *R. v. Imperial Tobacco Canada Ltd*.) where, in reference to a motion to strike a claim, the Chief Justice stated the test to be whether “the claim has any reasonable prospect of success”. She described its effect as “weeding out the hopeless claims and ensuring that those that have some chance of success go to trial” (para.19). Again, at para. 20, she refers to claims that have “a reasonable prospect of success” and “a reasonable chance of success”.

[87] It is apparent that the terms “prospect” and “chance” are being used by the Chief Justice as synonyms, and I would include the term “possibility” as another one.

[88] The purpose of the leave provision under Part XXIII.1 of the *Securities Act* is to discourage and eliminate bad faith strike suits that do not have a reasonable possibility of being successful. The statute asks the leave judge to first determine good faith, then whether there is a “reasonable possibility” that the action will be resolved at trial in favour of the plaintiff, *i.e.* that the plaintiff’s case will be successful – a reasonable possibility of success. In order to make that determination, the motion judge applies the same test that is used for determining whether the claim has a reasonable prospect of success for the purpose of certification. As the Chief Justice has described it, the purpose is to

weed out hopeless claims and only allow those to go forward that have "some chance of success".

[89] Of course, the evidentiary record for the leave and certification motions is quite different. For the leave motion, each side may file affidavit evidence upon which there can be cross-examination. But, as has been pointed out by both Strathy J. and van Rensburg J., the motion is brought before discovery and production of documents, with the result that the evidence may or may not be the same at the trial. In contrast, for the certification motion under s. 5(1)(a), there is no evidentiary record, but the facts as pleaded in the statement of claim are taken to be true. In both cases, there is an evidentiary or deemed evidentiary record to which the test is applied.

[90] The motion judge stated that he agreed with van Rensburg J. (in *Silver v. IMAX*) and Tausenfreund J. (in *Dobbie* v. *Arctic Glacier Income Fund,* 2011 ONSC 25, 3 C.P.C. (7th) 261) that the leave requirement is "a relatively low threshold". Perell J. in *Zaniewicz v. Zungai Haixi Corp,* 2012 ONSC 6061, at para. 37, described it as a "preliminary low-level merits based leave test". I agree with these descriptive characterizations. However, beyond that, it is not necessary, in my view, to try to further qualify the test. As discussed above, it has been effectively described by McLachlin C.J. in relation to the *Hunt v. Carey* test for determining if a claim should be struck as disclosing no cause of action, when deciding whether a class action can be certified.

[91] In the securities class action context, there is also a significant procedural advantage to having the same test apply to the leave motion as to the certification motion. If the leave motion is heard before the certification motion and leave is denied, the claim is at an end. But if leave is granted, it will be unnecessary to reconsider the issue on the certification motion. Because the test is the same, and the evidentiary basis is the highest it can be for the plaintiff on the certification motion, once leave is granted on the record filed, the claim will also meet the cause of action criterion under s. 5(1)(a) of the *CPA*.

[92] There was considerable discussion at the oral hearing before this court about how quickly or expeditiously the leave motion is able to be heard and should be heard. Because the leave motion does not necessarily have to be heard and decided within the three-year limitation period when the statutory claim is asserted within the three-year limitation period in a class action, there is flexibility for the parties, together with the class action case management judge, to determine the best timing for the leave motion. That determination will also include whether it should be heard before or at the same time as the certification motion. The fact that the test for leave and for determining whether there is a cause of action is the same can shorten the proceedings considerably and factor into the timing decision.

[93] I am satisfied that Strathy J. applied the correct level of scrutiny when deciding whether leave should be granted in respect of each of the plaintiffs'

claims. At para. 374, after discussing the legislative and interpretive history of the leave test, he summarized the way he would approach the analysis as follows:

> In my view, considering the purpose of the leave test and its legislative history, it would be unfair to the parties and to the court to expect the motion judge to engage in a finely calibrated weighing process. It seems to me that I should simply ask myself whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success.

[94] He then went on to make findings in respect of each of the plaintiffs' claims, determining whether there was a reasonable possibility that the plaintiffs would establish at trial each of the impugned misrepresentations. He found there was a reasonable possibility for some claims but not for others. After dealing with the corporate responsibility, he addressed the statutory responsibility of each of the individual defendants. Finally, he dealt with the statutory defences. He applied the following test at para. 447: "whether there is a reasonable possibility that the defendants will not be able to establish one or both branches of the reasonable investigation defence" contained in s. 138.4(6) of the *Securities Act*. He concluded that there was such a reasonable possibility.

[95] In the result, but for the conclusion he had reached with respect to the passing of the limitation period based on *Timminco*, the motion judge would have granted leave to the plaintiffs to pursue the three claims set out in Schedule "B" to these reasons.

[96] Strathy J.'s analysis was careful and detailed. He applied the test set out in the statutory provision for leave to the evidence before him. There is no basis to interfere with his conclusions.

(2) Did the motion judge err by failing to certify some issues in the class action for common law negligent misrepresentation?

[97] The motion judge found that proof of reliance is a necessary component of a negligent misrepresentation claim. He referred to his earlier decision in *McKenna v. Gammon Gold Inc*., 2010 ONSC 1591, 88 C.P.C. (6th) 27, where he concluded that multiple plaintiffs would not be able to prove reliance as a common issue in a claim for negligent misrepresentation in either the primary or secondary markets, and that such claims were therefore "fundamentally unsuitable for certification" (paras. 159-161). He then noted that the Supreme Court of Canada had recently reaffirmed the need to establish reliance in negligent misrepresentation claims in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175. Finally, he rejected the submission that "fraud on the market" or the "efficient market" theory could replace the need to prove individual reliance.

[98] The appellants challenge these findings on two grounds. First, they say that the motion judge failed to consider whether certifying some of the issues that were common within the negligent misrepresentation claims would significantly advance the litigation; they submit that he erred in restricting his analysis solely to the common issue of reliance. Second, they argue that he should have

certified the issue of inferred common reliance based on the "fraud on the market" or "efficient market" economic theories.

[99] I would not give effect to the second ground. However, I agree with the appellants that certifying issues other than reliance that are common to the negligent misrepresentation claims would significantly advance those claims. For example, there may be investors who are entitled to a very large recovery beyond the capped amount allowed by the statutory claim. Those investors could use the findings on the common issues in order to advance their individual claims.

[100] Dealing first with whether the issue of reliance should be certified, in other cases of negligent misrepresentation, such as Strathy J.'s recent decision in *Cannon v. Funds for Canada Foundation,* 2012 ONSC 3009, 218 A.C.W.S. (3d) 264, the facts allowed the court to certify certain common issues, including inferred reliance. In that case, investors had invested in a tax shelter which was promoted, in part, based on an opinion letter and a comfort letter from a defendant lawyer. Strathy J. was prepared to certify common issues relating to reliance on the basis that there were only two documents investors looked at, and the entire tax shelter was premised on those documents being true. In those circumstances, inferred group reliance could be certified as a common issue.

[101] In *Green v. CIBC*, Strathy J. concluded that the issues of individual reliance were not suitable for certification on any basis. Nor could the issues of

individual reliance be supplanted by an inference of group reliance in the secondary market context. He supported that conclusion by observing that there was no authority for the use of the "fraud on the market" theory to supplant the inquiry into individual reliance in the secondary market context.

[102] Finally, Strathy J. also based his decision on the fact that the introduction of the statutory remedy for secondary market misrepresentation under s. 138.3 of the *Securities Act* "was enacted, in part, due to the difficulty in proving reliance-based common law claims and the rejection in Ontario of the 'fraud on the market' theory" (para. 595). The remedy includes provisions that prevent abuse and protect continuing shareholders from damaging exposure to such claims. He observed that to allow common law claims where the corporate and shareholder protections are not available would render the new remedy and the protective leave process redundant.

[103] I see no error in the motion judge's analysis and no basis to interfere with his conclusion that the reliance issues should not be certified. However, if the motion judge intended to say that no issues in the entire common law misrepresentation claim can be certified alongside the statutory claim, that suggestion conflicts with s. 138.13 of the *Securities Act*, which provides:

> The right of action for damages and the defences to an action under s. 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

[104] The first five proposed common issues identified by the plaintiffs refer to the conduct and intent of the defendant CIBC.[7] (There is no appeal on this ground as against the individual defendants.) I see no reason why those issues cannot and should not be certified as against CIBC in order to advance the litigation. See *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 73 O.R. (3d) 401, at para. 52. The trial judge may order individual trials to determine the issues of reliance and damages in accordance with s. 25 of the *CPA*.

[105] I would therefore allow the appeal in respect of those issues and allow them to be certified.

CONCLUSION

[106] In the result, in *Green v. CIBC*, I would allow the appeal to the extent that the order dismissing the class action as statute-barred would be set aside and the common issues in the common law claim relating to the conduct and intent of the defendant CIBC set out in Schedule "B" to these reasons would be certified. The finding of the motion judge that would have granted leave to commence the statutory action in respect of the common issues that he would have certified, also set out in Schedule "B", plus the denial of certification of common issues relating to the issue of reliance in the common law claim would be confirmed.

[107] In *Silver v. IMAX*, I would dismiss the appeal.

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[7] See Schedule "B" to these reasons.

[108] In *Celestica*, I would dismiss the appeal. I would confirm the conclusion that that action is not statute-barred, but for the reasons set out above. I would confirm the conclusion that the motion for leave can now be heard.

[109] At the conclusion of the hearing of these appeals, it was agreed that costs of the appeals would be dealt with following release of the reasons for decision. If the parties are unable to agree on the costs of the appeals, the successful parties shall each submit a costs brief together with brief (maximum 3 pages) written submissions within 30 days of release of these reasons. The responding parties may make brief (maximum 4 pages) written response submissions within 14 days thereafter.

Released:

"FEB -3 2014"
"DD"

"K. Feldman J.A."
"I agree Doherty J.A."
"I agree E.A. Cronk J.A."
"I agree R.A. Blair J.A."
"I agree R. Juriansz J.A."

SCHEDULE "A"

***Securities Act*: Part XXIII.1**

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) the person who made the public oral statement;
(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;
(d) each influential person, and each director and officer of the influential person, who knowingly influenced,
(i) the person who made the public oral statement to make the public oral statement, or
(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and
(e) each expert where,
(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,
(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
(b) the person who made the public oral statement;
(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
(d) the influential person;
(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and
(f) each expert where,
(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

138.14: No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

SCHEDULE "B"

Common law negligent misrepresentation issues that would have been certified as against CIBC in *Green v. CIBC*:

1. Did CIBC owe a duty of care to Class Members?

2. Did CIBC make representations, as set out in paragraphs 144 to 208 of the Second Amended Statement of Claim, concerning the overall extent of CIBC's CDO Exposure (as defined in the claim) and the extent of the impaired value of CIBC's CDO Portfolio and the hedges purchased to provide protection against the default of the RMBS and CDOs held directly and indirectly by CIBC during the Class Period, which were untrue, inaccurate or misleading? If so, what were the untrue, inaccurate or misleading representations made by CIBC, when, where and how?

3. Did CIBC make the representations described above negligently? If so, when, where and how were the representations made?

4. Were the representations described above publicly corrected? If so, when?

5. Did CIBC make the representations intending that the Class Members rely upon them in acquiring CIBC shares?

Issues on which leave to commence the statutory claim would have been granted:

(a) the claim against CIBC and Brian Shaw in connection with the May 31, 2007 earnings conference call and against the three individual defendants who acquiesced in the statements made by Mr. Shaw;

(b) the claim against CIBC and Woods in connection with the August 30, 2007 BNN interview;

(c) the claim against CIBC, McCaughey and Woods in connection with the core documents, namely Q2, Q3, Q4 and fiscal 2007 financial statements and reports.

Common issues that would have been certified in the statutory action in respect of the above three misrepresentations (with necessary modifications) on which leave would have been granted:

8. Did some or all of the representations, as described above, made by CIBC and the Individual Defendants, or any of them, during the Class Period, constitute a misrepresentation within the meaning of section 138.3 of the Securities Act?

9. If the answer to (8) is yes, did the Individual Defendants, or any of them, authorize, permit, acquiesce in the release of any or all of the public oral statements or documents containing a misrepresentation within the meaning of section 138.3 of the Securities Act?

10. If the answer to (8) is yes, did CIBC or the individual Defendants, or any of them, know that the non-core document as defined under the Securities Act or the public oral statement contained a misrepresentation, or deliberately fail to acquire knowledge that the non-core document or public oral statement contained the misrepresentation, or are guilty of gross misconduct in connection with the release of the non-core document or the making of the public oral statement that contained the misrepresentation?

14. If the answer to either (8) [or (11)] is yes, have the Defendants, or some of them, established a reasonable investigation or expert reliance defence under the Securities Act?

15. Can any or all of the Defendants rely on section 138.7 of the Securities Act in order to limit their liability in the prescribed statutory amounts? If CIBC can rely on section 138.7 of the Securities Act, what was CIBC's market capitalization for the purposes of determining the cap on its liability?