

## Sharma v. Timminco Limited, 2012 ONCA 107 (CanLII)

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### COURT OF APPEAL FOR ONTARIO

CITATION: **Sharma** v. **Timminco** Limited, 2012 ONCA 107  
DATE: 20120216  
DOCKET: C53624, C53642 and C53644

Goudge, Armstrong and Lang J.J.A.

BETWEEN

Ravinder Kumar **Sharma**

Plaintiff (Respondent)

and

**Timminco** Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmelbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh

Defendants (Appellants)

Proceedings under the *Class Proceedings Act, 1992*

Alan L.W. D'Silva, Daniel S. Murdoch and Lesley Mercer, for the appellants **Timminco** Limited, Dr. Heinz Schimmelbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey M. Yaksich

Paul Le Vay and Brendan Van Niejenhuis, for the appellant Photon Consulting LLC

Derek J. Bell, for the appellant John P. Walsh

Michael C. Spencer, Won J. Kim and Victoria Paris, for the respondent

Heard: November 2, 2011

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated March 31, 2011, with reasons reported at 2011 ONSC 2040.

**Goudge J.A.:**

[1] The issue raised by this appeal is whether [s. 28](#) of the *Class Proceedings Act, 1992, S.O. 1992, c. 6* (the *CPA*) can operate to suspend the limitation period applicable to the statutory cause of action for misrepresentation provided by [s. 138.3](#) of Part XXIII.1 of the Ontario *Securities Act, R.S.O. 1990, c. S.5* (the *OSA*) before an action under that part is commenced.

[2] At first instance the motion judge answered that question affirmatively. For the reasons that follow, I have come to the opposite conclusion and I would therefore allow the appeal.

[3] The essential facts are easily stated. On May 14, 2009 the respondent commenced a proposed class action alleging misrepresentations by the appellants that adversely affected the value of shares of **Timminco** Limited in the secondary market. These misrepresentations are alleged to have commenced on March 17, 2008 and continued until November 11, 2008.

[4] The respondent's statement of claim alleges two common law causes of action, negligence and negligent misrepresentation. It also indicates that the respondent will seek an order granting leave to assert the statutory cause of action for misrepresentation provided by [s. 138.3](#) of Part XXIII.1 of the *OSA*.

[5] By the end of February 2011, the respondent had not yet sought that leave and, as a result, was faced with a possible limitation issue. Part XXIII.1 imposes a limitation period of three years from the misrepresentation for the commencement of an action under this Part. It also provides that such an action can be commenced only with leave.

[6] Faced with this, the respondent moved for an order declaring that this limitation period is suspended pursuant to [s. 28](#) of the *CPA*. The result was the order that is now appealed.

[7] The relevant statutory provisions in the *OSA* are found in Part XXIII.1 of the legislation, which was proclaimed in effect on December 31, 2005. Part XXIII.1 provides for statutory civil liability where misrepresentations are made that adversely affect the value of securities purchased in the secondary market (as opposed to purchases from an issuer in a primary distribution). Enacted after much careful study, this Part provided the counterpart to Part XXIII, which, for some time, has provided a statutory cause of action for misrepresentation to purchasers of securities in the primary market.

[8] In Part XXIII.1, [section 138.3](#) provides a statutory cause of action against an issuer and those acting on its behalf for misrepresentation to persons who acquire the issuer's securities in the secondary market.

[9] Section 138.8(1) provides that an action under [s. 138.3](#) may not be commenced without leave of the court. This differs from Part XXIII, which does not require leave for commencement of an action. Section 138.8(1) reads as follows:

**Leave to proceed**

138.8 (1) No action may be commenced under [section 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.

[10] Section 138.14 provides that an action under [s. 138.3](#) must be commenced within three years of the misrepresentation:

**Limitation period**

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.

[11] The relevant provision of the [CPA](#) is [s. 28\(1\)](#). It provides for the suspension of the limitation period applicable to a cause of action asserted in a class proceeding, and for the circumstances under which it resumes running:

**Limitations**

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,

- (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;
- (c) a decertification order is made under section 10;
- (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
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

[12] The motion judge granted the respondent's motion. His order declares that the limitation period in [s. 138.14](#) of the *OSA* is suspended pursuant to [s. 28](#) of the *CPA*, effective as of the date of the issuance of the statement of claim on May 14, 2009.

[13] At para. 50 of his reasons, the motion judge held that [s. 28](#) of the *CPA* applies to "any limitation period applicable to a cause of action" and that this includes a cause of action under Part XXIII.1 of the *OSA*. He saw no justification for [s. 28](#) to operate for Part XXIII causes of action, but not for Part XXIII.1 causes of action just because of the leave requirement for the latter. He pointed to [s. 28](#) speaking of a cause of action being "asserted" and concluded that this did not depend on the commencement of litigation. Rather, in his view, [s. 28](#) requires only that a cause of action be mentioned in an already commenced class proceeding for the limitation period applicable to it to be suspended. He held that to require that leave be granted before [s. 28](#) of the *CPA* applied would defeat its purpose.

[14] He therefore concluded that because the class proceeding commenced by the respondent for common law negligence and negligent misrepresentation mentioned the [s. 138.3](#) cause of action, the limitation period applicable to it was suspended.

## ANALYSIS

[15] It is not disputed that there has been no leave granted pursuant to [s. 138.8](#) of the *OSA*, that the respondent's class proceeding is not an action commenced under [s. 138.3](#), and that leave is required to add the [s. 138.3](#) cause of action to the respondent's class proceeding. The question is whether the respondent's mention in his class proceeding of his intention to seek leave is enough to activate [s. 28](#) of the *CPA*, so as to suspend the limitation period applicable to the [s. 138.3](#) cause of action. Is it enough to be able to say that this cause of action has been asserted in the respondent's class proceeding?

[16] The suspension provision in [s. 28\(1\)](#) of the *CPA* provides that "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". These words must be read in their grammatical and ordinary sense, in the full context of the scheme of the *CPA*, its object and the intention of the legislature. See: *Bell ExpressVu Limited Partnership v. Rex*, [2002 SCC 42 \(CanLII\)](#), 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[17] *The Canadian Oxford Dictionary*, 2d ed., defines "assert" as "make or enforce a claim to (*assert one's rights*)". *Black's Law Dictionary* defines "assert" as "to invoke or enforce (a legal

right”): see Henry C. Black, *Black’s Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004). By contrast, *The Canadian Oxford Dictionary* defines “mention” as “refer to or remark on incidentally”. *Black’s Law Dictionary* does not include the word. Clearly, “assert” is a significantly more forceful concept.

[18] Without leave having been granted, a [s. 138.3](#) cause of action cannot be enforced. It cannot be invoked as a legal right. [Section 138.14](#) says as much. Thus, giving the suspension provision in [s. 28\(1\)](#) of the *CPA* its ordinary meaning, the [s. 138.3](#) cause of action cannot be said to be asserted in the respondent’s class proceeding since no leave has been granted.

[19] The respondent argues that it is significant that [s. 28\(1\)](#) requires not that a cause of action be “commenced”, but only that it be “asserted”. However, this choice of language is entirely appropriate. A cause of action is not commenced. That is a concept applicable not to a cause of action but to the litigation in which it is asserted.

[20] Thus, in my view as applied to the [s. 138.3](#) cause of action, the grammatical and ordinary meaning of the [s. 28\(1\)](#) suspension provision is that without leave being granted the cause of action cannot be said to be asserted in a class proceeding.

[21] Indeed, the mention of the [s. 138.3](#) cause of action in the respondent’s statement of claim appears to reflect this view, namely that leave is required before this cause of action can be asserted in the respondent’s class proceeding.

[22] Paragraph 117 of the statement of claim reads as follows:

PART XXIII.1 OF THE SECURITIES ACT

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.

[23] The statutory context of the suspension provision in [s. 28\(1\)](#) of the *CPA* provides additional support for this interpretation. The balance of the subsection lists the various circumstances that cause the suspended limitation period to resume running. They do not include any reference to the leave motion required to add the [s. 138.3](#) cause of action to the respondent’s class proceeding. If mention of the intention to seek leave were enough to trigger the suspension of the applicable limitation period, surely the failure to proceed with the leave motion or the denial of leave would be included as circumstances causing its resumption. Assume, for instance, that having pleaded his intention to seek leave, the respondent decides not to do so. The consequence of his argument would mean that since the statutory cause of action is mentioned in his pleading, the limitation period applicable to it is suspended and remains so even though the class proceeding could never be the vehicle to vindicate the class members’ rights under Part XXIII.1. That cannot have been the legislature’s intention.

[24] It is also clear that the interpretation I propose is consistent with the purpose of [s. 28\(1\)](#) of the *CPA*. In *Coulson v. Citigroup Global Markets Canada Inc.*, [2010 ONSC 1596 \(CanLII\)](#), 2010 ONSC 1596, at para. 49, Perell J. described this purpose to be to protect class members from the operation of limitation periods without the need to themselves pursue individual actions in order to avoid being out of time until it has been determined whether they can get access to justice through the class proceeding. That purpose was approved in this court in *Coulson v. Citigroup Global Markets Canada Inc.*, [2012 ONCA 108 \(CanLII\)](#), 2012 ONCA 108. In the context of this case, the respondent’s class proceeding gives class members no possibility of access to justice for their [s. 138.3](#) causes of action because no leave to assert it has been granted. The purpose of [s. 28\(1\)](#) of the *CPA* does not therefore require that the limitation period applicable to

these causes of action be suspended pending the outcome of this class proceeding, since that action cannot give class members access to justice for their claims.

[25] Indeed, the respondent's proposal would reflect a different purpose that cannot have been intended by the legislature. It would suspend the applicable limitation period for the [s. 138.3](#) cause of action on the mere mention of that cause of action. This is a benefit that would not come to the respondent if he were suing in an individual capacity and did the same thing. It cannot have been the purpose of [s. 28\(1\)](#) of the *CPA* to put the class plaintiff in a better position than he would have been had he commenced an individual action.

[26] The purpose of [s. 138.14](#) of the *OSA* is also served by the interpretation of [s. 28\(1\)](#) of the *CPA* that I have described. [Section 138.14](#) was clearly designed to ensure that secondary market claims be proceeded with dispatch. That requires the necessary leave motion to be brought expeditiously. To suspend that limitation period with no guarantee that the [s. 138.3](#) cause of action, including the prerequisite leave motion, will be proceeded with expeditiously is inconsistent with that purpose.

[27] Finally, the interpretation I have given for [s. 28\(1\)](#) of the *CPA* does not make it inapplicable to a [s. 138.3](#) cause of action under Part XXIII.1 of the *OSA*. It simply requires that leave be granted before that happens. The fact that by comparison no leave is required for [s. 28\(1\)](#) to apply to Part XXIII causes of action is simply a reflection of the legislative policy to require leave for secondary market causes of action but not for their primary market counterparts.

[28] In summary, I conclude for a [s. 138.3](#) cause of action to be asserted in a class proceeding, so as to trigger the suspension provision in [s. 28\(1\)](#) of the *CPA*, leave must be granted. Since the respondent has not obtained leave, [s. 28\(1\)](#) has not been activated.

[29] I would therefore allow the appeal and dismiss the respondent's motion for an order declaring that the limitation period in [s. 138.14](#) of the *OSA* is suspended.

[30] As we indicated during argument, the parties may make written submissions of no more than eight pages addressing costs here and below. These are to be filed within 30 days of the release of these reasons.

Released: February 16, 2012 "STG"

"S.T. Goudge J.A."  
"I agree Robert Armstrong J.A."  
"I agree S.E. Lang J.A."

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