

## Sharma v. Timminco Limited - Limiting Suspension under Section 28 of the Class Proceedings Act

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By [Jennifer Dolman](#), [Evan Thomas](#), [Lia Bruschetta](#)

### I. OVERVIEW

A recent decision of the Ontario Court of Appeal in *Sharma v. Timminco Limited*<sup>1</sup> (*Timminco*) suggests that a plaintiff and/or class members in a class action must comply with time-limited leave, notice and other pre-conditions to litigation and cannot rely on the suspension of limitation periods under section 28 of the Ontario *Class Proceedings Act, 1992*<sup>2</sup> (the CPA) to avoid these requirements. As a result, the decision may give defendants in class proceedings potential defences where plaintiffs and/or class members in class actions fail to comply with such pre-conditions before asserting statutory causes of action under, among other statutes, the *Securities Act*,<sup>3</sup> the *Arthur Wishart Act (Franchise Disclosure), 2000*<sup>4</sup> (the Wishart Act) and the *Consumer Protection Act*.<sup>5</sup> The decision may also have implications for class actions against the Crown due to the notice requirements under the *Proceedings Against the Crown Act*.<sup>6</sup>

### II. SUSPENSION OF LIMITATION PERIODS UNDER SECTION 28 OF THE CPA

Subsection 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.”<sup>7</sup> The limitation period resumes running when the class member opts out, the class proceeding is decertified or analogous events that do not dispose of the class proceeding on the merits occur.

As the Ontario Court of Appeal noted in *Coulson v. Citigroup Global Markets Canada Inc.*,<sup>8</sup> which was released on the same day as *Timminco*, “the purpose of s. 28 of the Class Proceedings Act, 1992 is to protect class members from the operation of limitation periods until it has been determined whether class members may obtain access to justice through membership in a class proceeding as an alternative to obtaining access to justice by pursuing individual actions.”<sup>9</sup>

### III. The *Timminco* Decision

*Timminco* is a proposed securities class action alleging misrepresentations that adversely affected the value of shares of Timminco Limited in the secondary market. In addition to pleading negligence and negligent misrepresentation in the statement of claim, the proposed class representative also pleaded that he would seek leave, as required by the Ontario Securities Act, to assert the statutory cause of action for misrepresentation found in section 138.3 of Part XXIII.1 of the Securities Act. Under the Securities Act, leave to assert a section 138.3 statutory misrepresentation claim must be obtained within three years of the alleged misrepresentation to meet the limitation period imposed under the Act.<sup>10</sup>

By February 2011, nearly three years had passed since the alleged misrepresentation, but the plaintiff had not yet obtained leave. The plaintiff successfully sought an order declaring that the three-year limitation period imposed on a section 138.3 claim was suspended by section 28 of the CPA.<sup>11</sup> The defendants appealed to the Ontario Court of Appeal.

The issue on appeal was whether the mere mention of the intention to seek leave was sufficient to suspend the limitation period for bringing a section 138.3 claim. The Court of Appeal concluded that it was not sufficient because without leave the cause of action was not yet a legal right and could not be enforced.

In reaching this conclusion, the Court of Appeal observed: "it cannot have been the purpose of section 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".<sup>12</sup> In other words, if section 28 of the CPA suspended the limitation period in question simply because the plaintiff's claim mentioned the statutory cause of action, it would have provided the plaintiff a benefit not available to him in his individual capacity because the plaintiff would have had no choice but to obtain leave within the three-year limitation period to commence an individual action. The Court of Appeal concluded that such a benefit was not the intention of section 28 of the CPA.

#### IV. IMPACT OF *TIMMINCO* ON CLASS PROCEEDINGS GENERALLY

A broader reading of *Timminco* is that section 28 of the CPA does not suspend time limits on satisfying applicable pre-conditions to commencing litigation. Numerous Ontario statutes besides the Securities Act create statutory causes of action that may only be asserted if certain pre-conditions are met within a specified period of time. As such, *Timminco* may have implications for class proceedings more generally where plaintiffs and/or class members fail to satisfy those pre-conditions before the applicable time periods elapse.

For example, *Timminco* suggests that section 28 of the CPA would not suspend the limitation periods for giving notice of rescission of a franchise agreement under subsections 6(1) and (2) of the Wishart Act.<sup>13</sup> Rescission under the Wishart Act is governed by strict notice requirements, including time limits. Depending on the circumstances, a notice of rescission must be given within either 60 days after receiving a franchise disclosure document or two years after entering into a franchise agreement.

In a recent decision in *2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc.*,<sup>14</sup> the Ontario Superior Court of Justice concluded that a cause of action to enforce rescission of a franchise agreement under the Wishart Act does not arise until either the franchisor disputes the notice of rescission or 60 days after a franchisor receives notice of rescission but fails to comply with section 6(6) of the Wishart Act.

In light of *Timminco*, the commencement of a franchise class action to assert rescission of franchise agreements on behalf of a class of franchisees may not suspend the limitation periods under subsections 6(1) and (2) of the Wishart Act. As a result, class members that fail to deliver a notice of rescission within the applicable time period under section 6 of the Wishart Act may be unable to assert a cause of action for rescission, even if the class action was commenced *before* the time period expired.

The necessity of delivering notice and allowing a franchisor the opportunity to respond, be it by disputing or complying with a claim for rescission, is an integral component of the Wishart Act and arguably as important as the leave requirement under Part XXIII.1 of the Securities Act. That a court might allow suspension of the limitation period in the absence of such notice would seem to obviate the purposes of both section 28 of the CPA and the Wishart Act.

Notice requirements analogous to those under section 6 of the Wishart Act also exist for causes of action under other Ontario statutes. Section 18 of the Consumer Protection Act, for example, provides for rescission of consumer agreements in certain circumstances and permits consumers to commence an action if the consumer does not receive a satisfactory response after giving notice of rescission within a prescribed period. Similarly, section 7 of the Proceedings Against the Crown Act requires a claimant to serve notice of the claim on the Crown prior to commencing an action for the claim. Where a cause of action that arises under such statutes is asserted in a class proceeding, the failure by class members to comply in a timely way with notice requirements may very well prevent those class members from succeeding in their claims.

#### V. CONCLUSION

With the decision in *Timminco*, the Ontario Court of Appeal has emphasized that time-limited pre-conditions to asserting a cause of action, such as giving notice or obtaining leave, still apply in the context of class proceedings. Where individual class members in a class proceeding have failed to comply with these pre-conditions, defendants

may have a defence that can significantly reduce the number of class members with viable claims and hence the defendants' potential exposure.

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<sup>1</sup> 2012 ONCA 107 (CanLII)

<sup>2</sup> S.O. 1992, c. 6 (the CPA)

<sup>3</sup> R.S.O. 1990, c. S.5

<sup>4</sup> S.O. 2000, c. 3

<sup>5</sup> S.O. 2002, c. 30

<sup>6</sup> R.S.O. 1990, c. P-27

<sup>7</sup> CPA at s.28(1)

<sup>8</sup> 2012 ONCA 108 (CanLII) (*Coulson*)

<sup>9</sup> *Coulson* at para. 11. The decision in *Coulson* was released on the same day as *Timminco*. While *Coulson* also deals with the interpretation of section 28, the specific cause of action pleaded in that case is under section 130 of the Ontario *Securities Act*. Section 130 creates liability for misrepresentation in a prospectus allowing a purchaser to elect a right of rescission subject to strict limitation periods imposed under the Act. Unlike *Timminco*, no leave is required to bring the action. While the decision provides insight into the application of section 28 in the context of class proceedings, this update focuses on the interplay between the Ontario Court of Appeal's application of section 28 of the CPA and the leave requirement under section 138.3 of the Ontario Securities Act.

<sup>10</sup> Under section 138.14 of the Securities Act, a section 138.3 action for statutory misrepresentation must be commenced no later than three years after the document containing the misrepresentation was released or the oral statement containing the misrepresentation was made. For a section 138.3 action to meet the section 138.14 limitation period, leave pursuant to section 138.8(1) must be obtained prior to the three year period running out.

<sup>11</sup> See *Timminco* at para. 12 where the Ontario Court of Appeal states that the motion judge granted an order declaring the section 138.14 limitation period imposed on a section 138.3 action (three years) was suspended pursuant to section 28 of the CPA effective as at the date of the issuance of the statement of claim.

<sup>12</sup> *Timminco* at para. 25.

<sup>13</sup> Similar franchise legislation governing the remedy of rescission can be found in the following provinces: (i) Alberta (*Franchises Act*, RSA 2000, c. F-23, s.13); (ii) New Brunswick (*Franchises Act*, SNB 2007, c. F-23.5, s. 6); (iii) Prince Edward Island (*Franchises Act*, RSPEI 1988, c. F-14.1, s.6); and (iv) Manitoba (*The Franchises Act*, S.M. 2010, c.13, s.6) where the Act has been given Royal Assent but has yet to come into force.

<sup>14</sup> 2011 ONSC 6852