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JUSTICE MATTERS

Class Actions

A Summary of Class Action Decisions

Limitations Periods Under the Securities Act – the horror continues

Kaynes v. BP, P.L.C., **2017 ONSC 5172** (*Kaynes*) is the latest edition of a line of class actions that have faltered for violating the statutory limitations period under s.138.14 of the *Securities Act*, R.S.O. 1990, c. S.5. (the "*Act*")**[1]**

Despite its protracted procedural history, the facts in *Kaynes* are not complicated. The plaintiff, an Ontario resident, purchased the defendant BP's shares. In doing so, he alleged to have relied upon statements made in the defendant's core and other documents about its ability to respond to an oil spill in the Gulf of Mexico. In 2010, BP's oil rig in the gulf exploded, resulting in class actions across Canada and the US.

After a failed class action in Alberta, the plaintiff commenced a proposed action in Ontario pleading 14 alleged misrepresentations made by BP (13 documents and one oral statement by BP's CEO). Under rule 21.01(1)(a) of the *Rules of Civil Procedure*, the defendant moved for a declaration that Mr. Kaynes's claims were barred for being brought after the three-year statutory limitations period stipulated in the *Act.*

Justice Perell concluded that it was plain and obvious that 11 of the plaintiff's 14 misrepresentation claims were statute-barred under s.138.14. The claims could also not be revived under s.138.6, which allows for multiple alleged misrepresentations to be grouped into one.

Upholding the Supreme Court's ruling in ***Green***, the court held that unlike the general limitations period in the *Limitations Act, 2002*, S.O. 2002, c.24, Sched. B, discoverability does not apply to s.138.14 of the *Act* in triggering the running of the limitations period. In other words, when a statutory limitations period is triggered by a particular event, there is no requirement to discover the cause of action to trigger the limitations period. In the *Act*, the limitations period runs from the date the alleged misrepresentation was made in a document or oral statement. Additionally, unlike general limitations periods, the *Act*'s limitations period continues to run even after a claim is commenced.

As for the plaintiff's remaining three misrepresentation claims, the court held they were timely. Again following the Supreme Court in *Green*, Justice Perell concluded that under the *nunc pro tunc* doctrine, the limitations period under the *Act* is suspended if the notice of motion for leave under s.138.8 of the *Act* is filed prior to the limitations period expiring. This applies even if the parties entered into a tolling agreement delineating when the limitations period would run, except in the case where a plaintiff explicitly agrees not to rely upon the *nunc pro tunc* doctrine.

In sum, plaintiffs alleging misrepresentations under Part XXIII.1 the *Act* are best advised to commence their claims as early as possible to avoid being the next sequel of this horror-movie franchise.

[1] See *e.g. Sharma v. Timmico Ltd.*, **2012 ONCA 107**; *Green v. CIBC.*, **2015 SCC 60** [*Green*]; *Silver v. IMAX Corp.*, **2015 SCC 60**; *Trustees of the Millwright Regional Council v. Celestica Inc.*, **2014 ONCA 90**; and *Pennyfeather v. Timmico Ltd.*, **2017 ONCA 369**.