CITATION: Pennyfeather v. Timminco Limited, 2016 ONSC 3124
COURT FILE NO.: CV-09-378701CP
DATE: 20160512

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
ST. CLAIR PENNYFEATHER Plaintiff	*Won J. Kim* and *Michael C. Spencer* for the Plaintiff
– 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 P. YAKISCH and JOHN P. WALSH Defendants	*Alan D'Silva* and *Daniel S. Murdoch,* for the Defendants, Timminco Limited, Dr. Heinz Schimmelbusch, René Boisvert, Robert Dietrich, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey P. Yakisch *Paul Le Vay*, and *Carlo Di Carlo* for Photon Consulting LLC, Rogol Energy Consulting LLC and Michael Rogol *Alan Gardner* for John P. Walsh
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: April 29, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] "To be or not to be" is not the question. "To be, not to be, to be, not to be, might be," is the question. And, in the case at bar, "not to be" is the answer.

[2] In this proposed securities misrepresentation class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, the Timminco Defendants; namely: Timminco Limited, Dr. Heinz Schimmelbusch, René Boisvert, Robert Dietrich, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, and Mickey P. Yakisch, and the Photon Defendants; namely: Photon Consulting LLC, Rogol Energy Consulting LLC, and Michael Rogol, have brought motions for declarations that would terminate the Plaintiff St. Clair Pennyfeather's - already terminated - secondary market misrepresentation claim. Mr. Pennyfeather resists the Defendants' motion, and he brings a cross-motion for a

declaration that, if this Court grants leave to commence an action under Part XXIII.1 of the Ontario *Securities Act,* leave will be granted *nunc pro tunc* ("now for then") as of March 14, 2011, which is the date he filed his materials for what was described as a "conditional leave motion" but which was argued about s. 28 of the *Class Proceedings Act, 1992*. For the reasons that follow, I grant the Defendants' motion and I dismiss Mr. Pennyfeather's cross-motion. Mr. Pennyfeather's statutory misrepresentation claim is not to be.

[3] By way of a summary of the background facts, in May 2009, Ravinder Kumar Sharma commenced a proposed class action that included a statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act*. Mr. Sharma was subsequently replaced by Mr. Pennyfeather as the proposed representative plaintiff. The Defendants allegedly made the misrepresentations between March 17 and May 29, 2008, and Mr. Pennyfeather's statutory claim is subject to an absolute three-year limitation period from the date of the misrepresentations. On March 31, 2011, i.e., after three-years had expired, Mr. Sharma obtained an order that s. 28 of the *Class Proceedings Act, 1992* had suspended the running of the limitation period, and therefore, the Part XXIII.1 statutory misrepresentation claim was not statute-barred. On May 29, 2011, Mr. Pennyfeather served a motion for leave under Part XXIII.1; however, while his motion for leave was pending, appellate courts reversed, restored, and then reversed again the March 31, 2011 order; i.e., to be more precise, on February 16, 2012, the Court of Appeal reversed the March 31, 2011 order about s. 28 of the *Class Proceedings Act, 1992,* but on February 3, 2014, in three different proposed class actions that addressed statutory misrepresentation claims, a five-member panel of the Court of Appeal restored the October 31, 2011 order, only to be reversed by a divided Supreme Court in a decision released on December 7, 2015, known as *CIBC v. Green*, 2015 SCC 60. Thus, Mr. Pennyfeather's Part XXIII.1 statutory misrepresentation claim was to be, then not to be, then to be, and then not to be because it was statute-barred. However, within days of the Supreme Court's decision, Mr. Pennyfeather requested the scheduling of a hearing of his Part XXIII.1 claim on the theory that leave to assert his statutory misrepresentation claim might be granted *nunc pro tunc* and thus the Part XXIII.1 claim would not be statute-barred.

[4] By way of summary of the positions of the parties, the Timminco Defendants, the Photon Defendants, and Mr. Walsh, who adopted each other's arguments, submitted that Mr. Pennyfeather's request for an order *nunc pro tunc* was barred by the doctrines of *res judicata*, issue estoppel, or abuse of process and, in the alternative, based on the Supreme Court's so-called red-line rule in *CIBC v. Green, supra* about the operation of the court's *nunc pro tunc* jurisdiction, the Defendants submitted that the court's jurisdiction to make a *nunc pro tunc* order does not apply to save Mr. Pennyfeather's statutory cause of action. The red-line rule is that the motion for leave must be brought before the expiry of the limitation period. To which, Mr. Pennyfeather's responding submission is that his *nunc pro tunc* argument is not barred by any estoppel and it is a meritorious plea.

[5] Such being the factual background and such being the position of the parties, my own view is that *res judicata,* which concerns the re-litigation of causes of action and defences is not applicable. As for issue estoppel, which has strict elements, and abuse of process, which is a more flexible doctrine, their elements could have been applicable to preclude Mr. Pennyfeather's request for a *nunc pro tunc* order; however, in any event, it is not in the interests of justice either as a matter of *res judicata,* issue estoppel, or abuse of process to bar Mr. Pennyfeather's request as being re-litigation, and, rather, his request for a *nunc pro tunc* order should be considered on its merits. However, considering Mr. Pennyfeather's argument on its merits, his request for a

nunc pro tunc order fails because of the red-line rule, and it fails on its merits after considering the factors relevant to whether the court should exercise its discretion to make an order *nunc pro tunc*. In short, the court's *nunc pro tunc* jurisdiction is available for Part XXIII.1 statutory claims, but the jurisdiction should not be exercised in the circumstances of this case.

[6] Accordingly, Mr. Pennyfeather's motion should be dismissed and the Defendants' motion should be granted with an order declaring that Mr. Pennyfeather's statutory misrepresentation claim is statute-barred. Mr. Pennyfeather is barred from asserting a claim under Part XXIII.1 of the Ontario *Securities Act*.

B. FACTUAL AND PROCEDURAL BACKGROUND

[7] Timminco produced and sold metals, alloys, including silicon. Some of the silicon was sold to the solar photovoltaic energy industry. In March 2007, Timminco announced it had developed a proprietary process to produce solar-grade silicon.

[8] During the class period, between March 17, 2008 and November 11, 2008, Timminco's share price increased from $17.29 to $35.59 per share, ultimately giving Timminco a market capitalization of more than $3.5 billion. However, after corrective announcements were made, the share price plummeted, and Timminco's shares were delisted by the Toronto Stock Exchange ("TSX") in February 2012. Timminco eventually took bankruptcy and insolvency protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[9] In his proposed class action, Mr. Pennyfeather, who owned Timminco shares, alleges that on March 17, 18, 28, and 31, 2008 and May 8, 13, 14, and 29, 2008, the Defendants or certain of them made misrepresentations in oral statements and in public disclosure documents about Timminco's proprietary process and the significance of it to Timminco's business prospects and profitability. He alleges that the misrepresentations would reasonably be expected to affect the market price of Timminco's shares.

[10] Mr. Pennyfeather's particular allegations against the Photon Defendants are based on alleged misrepresentations: (a) in Photon's preliminary assessment of Timminco's process, which was released on May 14, 2008; (b) by Mr. Rogol's statements during a May 14, 2008 conference call with investors; and (c) by references to Photon's assessment at Timminco's May 29, 2008 shareholder meeting.

[11] With the value of the Timminco shares falling, on May 14, 2009, Mr. Sharma commenced a proposed class action against the Timminco Defendants, the Photon Defendants, and Mr. Walsh. The Sharma action was brought on behalf of "all persons, other than the Excluded Persons who acquired securities of Timminco between March 17, 2008 through November 11, 2008." The claim was for $500 million plus punitive damages.

[12] Mr. Sharma, who eventually would be replaced by Mr. Pennyfeather, retained Kim Orr P.C. law firm as his lawyers of record and as putative Class Counsel.

[13] Mr. Sharma's Statement of Claim mentions his intention to bring a motion seeking leave to assert secondary market claims pursuant to Part XXIII.1 of the Ontario *Securities Act*. The Statement of Claim alleges negligence, negligent misrepresentation, reckless misrepresentation, as well as the statutory claims found in Part XXIII.1 of the *Act*.

[14] With the benefit of hindsight, it is now known that the absolute three-year limitation

period for Mr. Sharma's and now Mr. Pennyfeather's statutory cause of action set out in Part XXIII.1 of the Ontario *Securities Act* began running on March 17, 2008 in respect of the earliest alleged misrepresentation and on May 29, 2008 in respect of the last alleged misrepresentation. This means that the time for obtaining leave for Mr. Pennyfeather to prosecute the Part XXIII.1 statutory misrepresentation claim would expire in respect of all alleged misrepresentations on May 29, 2011. However, in 2009 until perhaps early 2011, without the benefit of hindsight or foresight, the conventional wisdom of the plaintiff's class action bar was that: (a) if a statement of claim pleaded that the plaintiff would seek leave to commence the statutory cause of action and that the plaintiff would amend his or her statement of claim if the leave was granted; then, (b) the statement of claim would trigger the operation of s. 28 of the *Class Proceedings Act, 1992*, which would suspend the running of the three-year absolute limitation period. In 2009, Kim Orr and Mr. Sharma shared the conventional wisdom about the operation of s. 28 of the *Class Proceedings Act, 1992.*

[15] There was a rival class action. On June 11, 2009, Robert Gowan, who was represented by Siskinds LLP, commenced a similar proposed class action against the Defendants. A carriage motion followed, and on October 29, 2009, I stayed the Gowan action and I awarded carriage to Kim Orr. See: *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (S.C.J.), leave to appeal to the Div. Ct. ref'd [2010] O.J. No. 2161 (Div. Ct.).

[16] On November 25, 2009, at a case conference, the Timminco Defendants advised that they would be serving a Demand for Particulars in the Sharma action, and on December 11, 2009, the Demand was served. With a few exceptions, Mr. Sharma did not respond to the Demand. The Photon Defendants also asked for particulars, but rather than augmenting his pleadings, Mr. Sharma focussed his attention on attempting to settle with the Timminco Defendants. In January 2010, Mr. Sharma brought a motion to compel disclosure of Timminco's insurance policies because disclosure would facilitate settlement discussions. I granted the motion; see *Sharma v. Timminco*, 2010, ONSC 790, leave to appeal to the Divisional Court ref'd 2010 ONSC 2395 (Div. Ct.).

[17] Between April 2010 and February 2011, there are different perspectives about the status of Mr. Sharma's, which is now Mr. Pennyfeather's, action. From Mr. Pennyfeather's perspective, during this period, his lawyers were engaged in settlement discussions with the Timminco Defendants with much less attention being given to the Photon Defendants and Mr. Walsh. Mr. Pennyfeather's counsel now believes that during this period, the Timminco Defendants were acting in bad faith attempting to run out the clock on the running of the limitation period on the statutory misrepresentation claim. From the perspective of the Timminco Defendants, during the 12 months between April 2010 and March 2011, they were willing to entertain settlement negotiations but without relieving Mr. Sharma from the risks of not promptly advancing his proposed class action and his Part XXIII.1 claim under the Ontario *Securities Act,* and there is evidence that Timminco's lawyers made it clear to Kim Orr that it could and should pursue the parallel courses of settlement negotiation and prosecution of the proposed class action. From the perspectives of the Photon Defendants and Mr. Walsh, the proposed class action was just dormant between April 2010 and March 2011.

[18] I find as a fact that after the carriage motion until the end of 2010, Kim Orr were neither dilatory nor assiduous in prosecuting Mr. Sharma's and later Mr. Pennyfeather's proposed class action. The firm was, rather, practicing in accordance with the standard of practice at the time and making choices about how to advance the interests of the putative class. These choices, with

the clairvoyance of hindsight, turned out to be ill-fated choices. If the firm knew then what it knows now, it undoubtedly would have made different choices.

[19] Returning to the narrative, on December 13, 2010, Kim Orr delivered five volumes of draft leave and certification materials to the Timminco Defendants. The material was delivered at the request of the Timminco Defendants to inform the settlement discussions. The materials included draft expert reports about Timminco's solar silicon technology and about calculations of the Class Members' claim for damages for the misrepresentations. Thus, in December 2010, Mr. Sharma was in a position to file his material to bring a motion for leave under Part XXIII.1 of the Ontario *Securities Act* and for certification under the *Class Proceedings Act, 1992,* but he was still operating under the conventional wisdom about the operation of s. 28 of the *Class Proceedings Act, 1992*, which was that there was no urgency to serve and file his material, so he did not do so.

[20] However, around this time, case law events were occurring that began to raise doubt about the conventional wisdom concerning the operation of s. 28 of the *Class Proceedings Act, 1992*. In late January 2011, Nor-Dor Developments Ltd., which had commenced a proposed secondary market misrepresentation action in September of 2010 against Redline Communications Group Inc., and which had filed its motion for leave under Part XXIII.1 of the Ontario *Securities Act,* sought permission to file its proposed Part XXIII.1 misrepresentation statement of claim. Nor-Dor, which was represented by Siskinds LLP, sought this permission because it was concerned that the limitation period would run its course before leave was granted. Since scheduling depended on such matters as the availability of judicial resources, Nor-Dor and Siskinds LLP were concerned because the timing of the leave motion was beyond their control. Justice Rady, however, denied Nor-Dor's request, and she set out her analysis in paragraphs 8-10 of her judgment, which is reported as *Nor-Dor Developments Ltd. v. Redline Communications Group Inc.,* 2011 ONSC 591. Justice Rady stated:

> 8. This seems to be a matter of first impression. I have come to the conclusion that I cannot grant the relief sought. In my view, Rule 2 of the *Rules of Civil Procedure* and s. 12 of the *Class Proceedings Act* empower a court to make procedural orders that are fair and just in the circumstances in order to ensure the orderly and cost effective progress of a proceeding. However, what the plaintiffs seek here is substantive relief in the form of an order or declaration saying that the limitation period is tolled, even before they have received the court's permission to commence an action under Part XXIII.1. It is significant that the section says that no action may be commenced before leave is granted.
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> 9. While I agree that the court has an inherent jurisdiction to control its process, that does not assist the plaintiffs again because that speaks to procedural as opposed to substantive matters.
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> 10. It may well be that if the court gives the plaintiffs leave to commence an action for relief under Part XXIII.1, it would be appropriate at that time to ask that the order be made *nunc pro tunc* in order to regularize what the plaintiffs have done to date. However, it is premature to consider such relief at this stage of the proceedings.

[21] It may be noted that Justice Rady does not mention s. 28 of the *Class Proceedings Act,*

1992 as an answer to the potential limitations period problem, but she does mention an order *nunc pro tunc* as a possible solution. In any event, it was now out in the world of class actions that some members of the plaintiffs' class action bar were concerned about the timeliness of the leave motion under Part XXIII.1 of the Ontario *Securities Act.*

[22] Returning to the case at bar, in February 2011, possibly because *Nor-Dor Developments Ltd. v. Redline Communications Group Inc.* had come to its attention, Kim Orr asked Timminco's lawyers if Timminco would agree to a tolling agreement. When this request was rebuffed, Kim Orr requested a case conference. The conference was scheduled for March 10, 2011, and on February 28, 2011, Kim Orr wrote me to advise that at the upcoming case conference, it would be raising the issue of the possible expiry of the limitation period for commencing the Part XXIII.1 claim. Kim Orr indicated that Mr. Pennyfeather would be requesting that a timetable be set for a motion to substitute him as representative plaintiff and for a certification motion and for a combined motion for leave under s. 138.8 of the Ontario *Securities Act.*

[23] On March 10, 2011, at the case conference, I made the following direction:

> This is a case conference to respond to the plaintiff's request to accelerate the leave motion under the *Securities Act* and the certification motion because of the possibility of a limitation period defence becoming available, which may or may not be the case. It would not be procedurally fair to agree to this request. However, certain steps can be taken in the short term that may address the risk and that need to be done in any event. I, therefore, direct the plaintiff to bring a motion to join new plaintiffs and to seek conditional leave of the court to commence an action under the *Securities Act.* The plaintiff's material shall be delivered before noon on March 14, 2011. Responding materials shall be delivered before noon on March 18, 2011. No factums are required. Cross-examinations to take place between March 18 and March 23, 2011.

[24] I pause here to observe that reading between the lines of Mr. Pennyfeather's factum and hearing his oral argument, there is more than an innuendo that I am the one at fault for his limitation period predicament for the statutory secondary market claim under the Ontario *Securities Act.* Although I confess that in 2011, I shared the conventional - but to be proven mistaken - wisdom that s. 28 of the *Class Proceedings Act, 1992* suspended the running of the limitation period found in the Ontario *Securities Act,* I am apparently at fault because at the case conference on March 10, 2011, I did not expedite the hearing of the leave motion when the limitation period was going to expire the following week at the earliest or 80-days later at the latest and because I am alleged to be the inventor of the so-called conditional leave motion mentioned in my direction.

[25] I will return to these points below, but here, I simply expand on my endorsement to say that I did not think it was fair to force to a hearing a leave motion in a $500 million statutory misrepresentation claim when Mr. Pennyfeather had several years to prepare his material and Mr. Walsh and the Photon Defendants had not yet been served with the motion material and where the Timminco Defendants had only seen draft materials and none of the Defendants had had an opportunity to prepare responding materials and where there had been no cross-examinations on any material.

[26] Returning to the narrative, following the case conference held on March 10, 2011, Mr.

Sharma brought a motion for: (1) an order that he be removed as plaintiff and Mr. Pennyfeather be substituted; (2) an order declaring that the limitation period in s. 138.14 of the Ontario *Securities Act* is suspended pursuant to s. 28 of the *Class Proceedings Act, 1992*; or (3) for "conditional leave" to commence an action under s. 138.3 of the Ontario *Securities Act*.

[27] The motion was argued on March 25, 2011, and at the hearing, the Defendants did not oppose an order substituting Mr. Pennyfeather for Mr. Sharma, and, possibly because I had expressed doubt about whether the court had jurisdiction to grant a conditional leave, Mr. Pennyfeather abandoned this request, and the argument focused on the request for an order declaring that the limitation period in Part XXIII.1 of the Ontario *Securities Act* is suspended by s. 28 of the *Class Proceedings Act, 1992.*

[28] On March 25, 2011, although the Defendants did discuss: *Nor-Dor v. Redline Communications*, *supra*; s. 12 of the *Class Proceedings Act, 1992*, which provides the court with jurisdiction to control and manage class actions; the special circumstances doctrine; the court's inherent jurisdiction; and, the provisions of the *Legislation Act, 2006,* S.O. 2006, c. 21, Sched. F, there was no argument by Mr. Pennyfeather about the court's jurisdiction to make orders *nunc pro tunc* as a means to circumvent the operation of the limitation period in Part XXIII.1 of the Ontario *Securities Act*.

[29] And, I do not regard Mr. Pennyfeather bringing and then abandoning his request for conditional leave as implicitly a request for the exercise of the court's jurisdiction to make orders *nunc pro tunc*. While the court's jurisdiction to make orders *nunc pro tunc* could have been added to the juridical feast on March 25, 2011, it was not on the menu, save with respect to the aperitif of substituting Mr. Pennyfeather for Mr. Sharma. The nature of the court's *nunc pro tunc* jurisdiction in the context of Part XXIII.1 of the Ontario *Securities Act* was not argued on March 25, 2011.

[30] I released my decision on March 31, 2011, and I concluded that if a statement of claim in a proposed class action mentions an action provided for under Part XXIII.1 of the Ontario *Securities Act*, then s. 28 of the *Class Proceedings Act, 1992* becomes operative and s. 28 suspends the operation of the limitation period found in Part XXIII.1 of the Ontario *Securities Act*. See *Sharma v. Timminco Limited*, 2011 ONSC 2040.

[31] The Defendants appealed my decision, and while the appeal was pending, on May 16, 2011, at another case conference, I directed Mr. Pennyfeather: (a) to deliver, as he might be advised, a further reply to Timminco's Demand for Particulars; and (b) his motion material for the motions for certification and for leave to assert the Part XXIII.1 claim. On May 17, 2011, Mr. Pennyfeather delivered an Amended Statement of Claim. With a few exceptions, the Amended Statement of Claim, which did not plead any new causes of action, did not provide the particulars requested by the Defendants. On May 31, 2011, Mr. Pennyfeather served motion materials on the leave and certification motions. There were six volumes of evidentiary material. However, no formal Reply to the Demand for Particulars was included, and the Timminco Defendants brought a motion to compel answers to the Demand for Particulars.

[32] I pause here to point out that on May 31, 2011, when Mr. Pennyfeather served his material for leave to pursue a statutory claim under Part XXIII.1 of the Ontario *Securities Act*, it was three years and two days after the last of the alleged misrepresentations that are the foundation for the statutory misrepresentation claims. But for the apparent operation of s. 28 of the *Class Proceedings Act, 1992*, the statutory misrepresentation claims were statute-barred. Mr.

Pennyfeather's motion materials were filed with the court on June 13, 2011.

[33] On July 13, 2011, I granted in part the Timminco Defendants' motion for particulars. See *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257.

[34] Relatively soon thereafter, the progress in the proposed class action ground to a halt. On November 2, 2011, the parties argued the appeal about the operation of s. 28 of the *Class Proceedings Act, 1992*. On January 3, 2012, Timminco sought protection under the *CCAA*, and the proposed class action was stayed. On February 14, 2012, Mr. Pennyfeather moved to have the stay lifted, but the motion was denied.

[35] On February 16, 2012, the Court of Appeal (Justices Goudge, Armstrong, and Lang) reversed my decision of March 31, 2011. See *Sharma v. Timminco,* 2012 ONCA 107.

[36] In the Court of Appeal, the parties could not agree on the matter of the form and content of the Court's formal order, and ultimately the form and content of the order had to be settled by a ruling by the Court of Appeal. In written submissions to the Court of Appeal, the Defendants were bluntly candid that the language they proposed was drafted to preclude any subsequent argument about the operation of the limitation period having terminated Mr. Pennyfeather's statutory claim. The Court of Appeal agreed with the Defendants' proposed drafting of the order.

[37] I will return to the matter of the significance of the Court of Appeal's decision about the form of the order to the matters now before the court below, but I pause here to say that there are no inferences to be drawn relevant to the issues now before the court about my order as to costs, which the Court of Appeal left undisturbed, with costs remaining in the cause. I ordered costs in the cause because I thought that it was the fair thing to do having regard to the fact that the fundamental issue of whether Timminco made misrepresentations was still going to go forward because there were both common law and statutory misrepresentation claims. I regarded my March 31, 2011 as essentially interlocutory, where costs in the cause is appropriate.

[38] Returning again to the narrative, Mr. Pennyfeather obtained a lifting of the *CCAA* stay for the purpose of allowing him to apply to the Supreme Court for leave to appeal the Court of Appeal's decision. However, the Supreme Court denied the application for leave to appeal on August 2, 2012 ([2012] S.C.C.A. No. 157), and the stay resumed. Thereafter, Mr. Pennyfeather repeatedly sought to lift the *CCAA* stay so he could continue to prosecute his action, but the stay continued in effect.

[39] With Mr. Pennyfeather's action idling, there were, however, significant developments in other statutory misrepresentation class actions. The Court of Appeal's decision in *Sharma v. Timminco,* reversing my decision about s. 28 of the *Class Proceedings Act, 1992*, was used by defendants in other actions much like an IED ("improvised explosive device") to blow up billions of dollars of statutory misrepresentation claims. It is now a matter of legal lore that on the sixth day of argument of the leave motion in *Green v. Canadian Imperial Bank of Commerce,* 2012 ONSC 3637, Justice Strathy, as he then was, was told that it was too late for him to grant leave under Part XXIII.1 of the Ontario *Securities Act* and that in *Silver v. IMAX Corp.*, 2012 ONSC 4881, Justice van Rensburg was confronted with the problem that the absolute limitation period had expired while she had the motion for leave under reserve. Although Justice van Rensburg had granted leave and certified the action as a class proceeding, the defendants were moving to strike as statute-barred the late arriving amended statement of claim with its statutory claim. In *Trustees of the Millwright Regional Council v. Celestica Inc.,* 2012 ONSC 6083, which

was a case that I was case managing, after the release of the Court of Appeal's decision in *Sharma v. Timminco,* the plaintiff ramped up its action against Celestica, but Celestica responded with a Rule 21 pleadings motion to have the action dismissed as statute-barred.

[40] In *Green v. Canadian Imperial Bank of Commerce*, although he said that he would have granted leave, Justice Strathy, with considerable regret, concluded that plaintiffs' claim was statute-barred and, as a result, the statutory misrepresentation claim had no reasonable possibility of success and leave under Part XXIII.1 of the Ontario *Securities Act* should not be granted. Justice Strathy considered whether the court's jurisdiction to make orders *nunc pro tunc* was available, and he concluded that it was not. In *Silver v. IMAX Corp., supra*, disagreeing with Justice Strathy about the availability of the court's jurisdiction to make an order *nunc pro tunc*, Justice van Rensburg made an order *nunc pro tunc* to grant leave to Mr. Silver to bring a claim under Part XXIII.1 of the Ontario *Securities Act*. In *Trustees of the Millwright Regional Council v. Celestica Inc., supra,* I ruled that it was not plain and obvious that the special circumstances doctrine was not available to make a *nunc pro tunc* order should leave to assert a Part XXIII.1 claim be granted.

[41] I will return to discuss Justice Strathy's, Justice van Rensburg's and my own reasoning in the discussion and analysis portion of these Reasons for Decision, but it may be noted here that one factual difference between *Green v. Canadian Imperial Bank of Commerce* and *Sharma v. Timminco* is that unlike Mr. Sharma, Mr. Green noted in his original statement of claim that if leave was granted, he would, if necessary, ask that it be granted *nunc pro tunc*. It may also be noted that unlike Mr. Pennyfeather and the plaintiff in *Trustees of the Millwright Regional Council v. Celestica Inc., supra*, the plaintiffs in *Green v. Canadian Imperial Bank of Commerce, supra*, and in *Silver v. IMAX Corp., supra*, satisfied the so-called red-line rule, discussed below, that they had served and filed a motion for leave within three years of the alleged misrepresentation.

[42] The plaintiff in *Green v. Canadian Imperial Bank of Commerce, supra*, and the defendants in *Silver v. IMAX Corp., supra*, and in *Trustees of the Millwright Regional Council v. Celestica Inc., supra*, (the "Trilogy"), respectively appealed to the Court of Appeal, and on February 3, 2014, a five-judge panel (Justices Doherty, Feldman, Cronk, Blair, and Juriansz) overturned the Court of Appeal's *Sharma v. Timminco* decision. The Court of Appeal concluded that s. 28 of the *Class Proceedings Act, 1992* suspended the limitation period for Part XXIII.1 claims under the Ontario *Securities Act* as of the date when the original statement of claim was issued.

[43] It thus appeared that Mr. Pennyfeather's statutory claim was not statute-barred, and on July 7, 2014, Justice Morawetz lifted the *CCAA* stay and allowed Mr. Pennyfeather's action to go forward.

[44] On July 29, 2014, Mr. Pennyfeather sought to schedule his leave and certification motion for hearing, but when on August 7, 2014, the Supreme Court granted leave to appeal in the Trilogy, the parties in the Pennyfeather action agreed that further proceedings should await the decision of the Supreme Court, which was scheduled to hear argument in February 2015.

[45] Mr. Pennyfeather sought leave to intervene in the Trilogy on the grounds that the Supreme Court's decision in those cases had the potential to impact his ability to pursue the Part XXIII.1 claim. On the motion for leave to intervene, Mr. Pennyfeather argued that secondary market misrepresentation class actions were made unworkable or impossible by the *Sharma v.*

Timminco decision. The Supreme Court, however, dismissed Mr. Pennyfeather's motion to intervene.

[46] On December 7, 2015, the Supreme Court (Chief Justice McLachlin and Justices Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon and Côté) released its decision in the Trilogy. A four to three majority of the Court overruled the five-member panel decision of the Ontario Court of Appeal and restored the Court of Appeal's original decision in *Sharma v. Timminco, supra*, about the operation of s. 28 of the *Class Proceedings Act, 1992.*

[47] And, in *CIBC v. Green*, a four to three majority of the Supreme Court held that courts have a discretionary jurisdiction to grant leave *nunc pro tunc* after the expiry of the limitation period to commence a statutory claim for secondary market misrepresentations. Thus, in *CIBC v. Green, supra*, a majority of the Supreme Court ruled that the statutory causes of action in all of *Silver v. IMAX, supra, Green v. CIBC, supra,* and *Trustees of the Millwright Regional Council v. Celestica Inc., supra* (the "Trilogy"), were statute-barred for failure to obtain leave within three years of the alleged misrepresentations.

[48] However, for *Silver v. IMAX,* a threesome, comprised of Chief Justice McLachlin and Justices Rothstein and Côté, saved Mr. Silver's statutory claim by making an order *nunc pro tunc* against some of the IMAX defendants. Justice Cromwell, in a separate judgment, extended the *nunc pro tunc* order to all of the defendants and, combined with the practical effect of the minority judges' decision (Justices Karakatsanis, Moldaver, and Gascon) that the statutory claim was not statute-barred, rescued all of Mr. Silver's statutory misrepresentation claims.

[49] In a similar peculiar way, the plaintiff in *Green v. CIBC, supra* also snatched victory from the jaws of defeat, and he was saved from having his statutory claim ruled statute-barred by the *nunc pro tunc* doctrine. Although Chief Justice McLachlin and Justices Rothstein and Côté would not apply *nunc pro tunc*, Justice Cromwell felt that a *nunc pro tunc* order was appropriate for Mr. Green and combining Justice Cromwell's *nunc pro tunc* holding with the three dissenting Justices who held that the statutory claim was not statute-barred because of s. 28 of the *Class Proceedings Act, 1992,* there was a four-person majority holding that Mr. Green's statutory misrepresentation claim was not statute-barred.

[50] As for *Trustees of the Millwright Regional Council v. Celestica Inc.,* the majority of Chief Justice McLachlin and Justices Rothstein, Cromwell, and Côté refused to make an order *nunc pro tunc*. The Millwrights had never served a motion for leave under Part XXIII.1 of the Ontario *Securities Act* before the expiry of the limitation period and this was regarded as fatal to the exercise of the court's discretion. This ruling is the so-called red-line rule.

[51] With the release of the Supreme Court's decision about s. 28 of the *Class Proceedings Act, 1992* and about the doctrine of *nunc pro tunc* being available - in some but not all cases - to get around the expiry of the limitation period, the next day, on December 8, 2015, Kim Orr wrote me to request dates for a case conference to set a timetable for the hearing of Mr. Pennyfeather's leave and certification motions. The theory behind Mr. Pennyfeather's bringing on the motions was that although the time for obtaining leave had passed and his statutory claims were statute-barred, Mr. Pennyfeather would request an order *nunc pro tunc* and circumvent the expiry of the limitation period for his Part XXIII.1 claims.

[52] At a case conference on January 8, 2016, I directed the parties to file updated or new motions setting forth the relief they sought if the action was to move forward, and at a case

conference on February 2, 2016, I denied Mr. Pennyfeather's request to set a timetable for the leave and certification motion, and instead, I scheduled the motions now before the court.

C. DISCUSSION AND ANALYSIS

1. Introduction

[53] Relying on the doctrines of *res judicata*, issue estoppel, and abuse of process, Timminco, the Photon Defendants, and Mr. Walsh, who filed no materials but who adopted the arguments of the co-Defendants, request an order declaring that there has been a final determination that Mr. Pennyfeather's statutory misrepresentation action is statute-barred. If this submission is correct, then it would follow that Mr. Pennyfeather's motion, which relies on the invocation of the court's jurisdiction to make orders *nunc pro tunc*, should be quashed or dismissed as moot.

[54] As an alternative, the Defendants submit that if Mr. Pennyfeather is allowed to make his argument, which relies on the court's *nunc pro tunc* jurisdiction, his cross-motion should be dismissed on its lack of merits and, once again, the court should declare that his statutory misrepresentations claim under Part XXIII.1 of the Ontario *Securities Act* is statute-barred.

[55] As the discussion below will reveal, in the contest between the parties about *res judicata*, issue estoppel, and abuse of process, there is no real dispute about the general principles. Where the parties differ is about the application of the principle from *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100, which is authority for the proposition that a final decision of the court bars re-litigation of not only what was decided but also what could and should have been decided by the court.

[56] In regard to the *Henderson v. Henderson* principle, Mr. Pennyfeather argues that the principle does not apply to issue estoppel and since there has never been an argument about the application of the court's *nunc pro tunc* jurisdiction to the circumstances of Mr. Pennyfeather's statutory misrepresentation claim, thus there is no re-litigation. In contrast, the Defendants argue that the issue before the court was not just the issue of how s. 28 of the *Class Proceedings Act, 1992* operates, but the issue was the broader issue of whether Mr. Pennyfeather's apparently imminently or already statute-barred statutory claim could be saved - by any means - including: by s. 28 of the *Class Proceedings Act, 1992*; by the so-called concept of conditional leave; or by the court's *nunc pro tunc* jurisdiction. With this wider ambit for the March 2011 order of this court and of the February 2012 order of the Court of Appeal, the Defendants submit that Mr. Pennyfeather is estopped from litigating whether an order granting leave under Part XXIII.1 of the Ontario *Securities Act* can be made *nunc pro tunc*.

[57] To foreshadow the analysis below, in my opinion, cause of action *res judicata* does not apply, but Mr. Pennyfeather is indeed re-litigating in 2016 the issues that were decided or that ought to have been decided in March 2012, and, thus, issue estoppel or abuse of process could be applied to estop him from proceeding further with his statutory misrepresentation claim. However, both doctrines are discretionary, and, in my opinion, it would not be in the interests of justice to foreclose this re-litigation and, thus I will consider whether the court's jurisdiction to make orders *nunc pro tunc* should be exercised in the immediate case to come to the rescue of Mr. Pennyfeather's $500 million statutory misrepresentation claim.

[58] In his cross-application, Mr. Pennyfeather argues that if leave is granted to him, then the

order could and should be made *nunc pro tunc*. The Defendants, however, submit that an order *nunc pro tunc* should not be made for two reasons; that is: (1) making an order would be contrary to the Supreme Court's red-line rule in *CIBC v. Green*, *supra* that a *nunc pro tunc* order can only be made if the plaintiff filed a motion for leave before the expiry of the limitation period for obtaining leave; and (2) making an order would be contrary to the factors that guide the exercise of the court's discretion to make an order *nunc pro tunc*.

[59] To foreshadow the analysis below, I agree with the Defendants' arguments that this is not an appropriate case to make an order *nunc pro tunc* for both reasons. I have the jurisdiction to make an order *nunc pro tunc* but, in my opinion, that jurisdiction should not be exercised in the circumstances of this case.

2. *Res Judicata*, Issue Estoppel, and Abuse of Process

[60] *Res judicata*, issue estoppel, and abuse of process, which are related and partially overlapping legal doctrines, are bars to litigation that preclude a party from re-litigating a claim, a defence, or an issue that already has been determined. Cause of action estoppel, which is a branch of *res judicata*, precludes a litigant from asserting a claim or a defence that: (a) it asserted; or (b) had an opportunity of asserting and should have asserted in past proceedings, which is the rule from *Henderson v. Henderson*, *supra*. Issue estoppel, another branch of *res judicata*, precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point already decided in a proceeding in which the litigant participated. The requirements for an issue estoppel are: (1) the parties must be the same; (2) the same question must be involved in the initial and subsequent hearing; (3) the question must have been actually litigated and determined in the first hearing and its determination must have been necessary to the result; and (4) the decision on the issue must have been final: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. Abuse of process is a doctrine that a court may use to preclude re-litigation. The court has an inherent jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute, and the court can and has used this jurisdiction to preclude re-litigation when the strict requirements of *res judicata* are not satisfied: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.) at paras. 55-56, *per* Goudge J.A., dissenting, approved [2002] 3 S.C.R. 307.

[61] The doctrine of abuse of process is a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice, and its application will depend on the circumstances, facts and context of a given case: *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 (C.A.) at paras. 29-32. The doctrine of abuse of process precludes re-litigation in circumstances where the strict requirements of *res judicata* are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice.

[62] An interlocutory motion in the same proceeding can raise an issue estoppel or abuse of process bar for later in that proceeding or other proceedings: *Ward v. Dana G. Colson Management Ltd.*, [1994] O.J. No. 5339 (Div. Ct.), at para 12; aff'd [1994] O.J. No. 2792 (C.A.).

[63] In the case at bar, I do not see any room for the operation of the cause of action branch of *res judicata*. Mr. Pennyfeather has yet to have any final decision made on his causes of action and

the litigation to date has been about a technical defence. There might have been a *res judicata* if the question before the court was whether - the Defendants - were re-litigating whether Mr. Pennyfeather's statutory claim was statute-barred, which the Defendants obviously do not need to do, backed as they are by the Supreme Court's decision in *CIBC v. Green, supra.* As I view the situation, the question is whether there is an issue estoppel or an abuse of process by Mr. Pennyfeather re-litigating the issue of whether the court should exercise its *nunc pro tunc* doctrine to make the granting of leave for a claim under Part XXIII.1 of the Ontario *Securities Act* timely. That is an issue not a cause of action or a defence.

[64] I have already found above that the issue of whether a *nunc pro tunc* order could or should be made in the case at bar has never actually been argued. Thus, the problem in the immediate case is whether Mr. Pennyfeather should be estopped from making an argument that could and arguably should have been made either before me in March 2011 or before the Court of Appeal in February 2012. The issue is whether the principle from *Henderson v. Henderson* applies to issue estoppels as it does for cause of action *res judicata.*

[65] The difficulty with this problem is that there is uncertainty about whether the principle from *Henderson v. Henderson* applies beyond cause of action estoppel where the *Henderson v. Henderson* principle undoubtedly applies. In *Maynard v. Maynard*, [1951] S.C.R. 346, at para. 32,, Justice Cartwright adopted a passage from the judgment of Maugham, J. in *Green v. Weatherill*, [1929] 2 Ch. 213 at a p. 221, which stated:

> 32. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[66] In *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (N.S.C.A.), leave to appeal refused [1997] S.C.C.A. No. 656, the Nova Scotia Court of Appeal held that the principle of cause of action estoppel should be determined not by whether the arguments *could* have been raised in the first proceeding, but whether the arguments *should* have been raised. The Court held that in determining whether a matter should have been raised, consideration should be given to whether the proceeding: (a) constitutes a collateral attack on the earlier findings; (b) simply asserts a new legal conception of facts previously litigated; (c) relies on new evidence that could have been discovered in the earlier proceeding; (d) relates to separate and distinct causes of action; and (e) in all the circumstances constitutes an abuse of process.

[67] The precise difficulty is that it is not immediately apparent how the *Henderson v. Henderson* principle, which addresses arguments that could have been but were not made, can apply to an issue estoppel when for an issue estoppel, the issue must be the "same question" and the question "must have been actually litigated and determined in the first hearing and its determination must have been necessary to the result." In a leading issue estoppel case of *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, Justice Dickson, as he then was, stated:

> Is the question to be decided in these proceedings ... the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument against the judgment. .... The question out of

> which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding ....

[68] Upon analysis, however, the answer to this apparent dilemma comes with the realization that underlying it is the semantic problem of determining what issue or question was argued. In other words, that debate of what was the question subsumes the *Henderson v. Henderson* principle. In *Danyluk v. Ainsworth Technologies Inc.*, *supra*, Justice Binnie stated at para. 54 for the Court that issue estoppel applies "to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that issue in the prior proceeding."

[69] The semantic analysis is demonstrated by the debate in the immediate case, where Mr. Pennyfeather would define the issue before this court and before the Court of Appeal narrowly and confined to s. 28 of the *Class Proceedings Act, 1992* and, in contrast, the Defendants would define the issue more broadly to encompass the more general question of in what circumstances may the limitation period in Part XXIII.1 of the Ontario *Securities Act* be suspended.

[70] In the case at bar, having regard especially to the language in the Court of Appeal's formally settled order, it appears to me that Mr. Pennyfeather is indeed re-litigating an issue that could and ought to have been decided already and once the semantic debate is resolved, the previously decided issue is a question for which an issue estoppel would be appropriate.

[71] In any event, the debate about the application of the principle from *Henderson v. Henderson* becomes decidedly arid when the discussion moves to abuse of process, where there has been a great deal of litigation if not necessarily re-litigation about whether Mr. Pennyfeather's statutory claim is statute-barred. In *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to the Supreme Court of Canada refused, [2006] S.C.C.A. No. 71, the Court of Appeal of Newfoundland and Labrador considered an adverse possession claim that was being litigated a second time and the Court resorted to the abuse of process doctrine and infused it with notions of the *Henderson v. Henderson* principle to bar the re-litigation. The Court adopted the analysis of Donald Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2002) at pages 348 and 361, where the author states:

> The policy supporting abuse of process by re-litigation is the same as the essential policy grounds of issue estoppel and cause of action estoppel. The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by re-litigation. Other policy grounds have also been cited namely, to preserve the courts' and litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
>
> ....
>
> Abuse of process by re-litigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in Henderson [(1843), 3 Hare 100]. To breach the rule in Henderson, even though the parties are not the same, is an abuse of process. In

> applying abuse of process by re-litigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. A party is not entitled to re-litigate a case because counsel failed to raise an argument which the party wanted to raise or re-litigate an issue indirectly by "a cleverly camouflaged effort".

[72] But for the discretionary factor, that I shall next discuss, my view is that it would be re-litigation and an abuse of process for Mr. Pennyfeather to attempt to advance his statute-barred statutory claim, and there could be an issue estoppel or an abuse of process that would preclude the statutory claim.

[73] In the circumstances of this case, however, I do not think it would be fair or in the interests of justice to preclude hearing Mr. Pennyfeather's argument that the court's *nunc pro tunc* jurisdiction should be applied in the circumstances of his statutory claim.

[74] In *Danyluk v. Ainsworth Technologies Inc., supra,* and in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, the Supreme Court added a discretionary element to *res judicata* and the flexible doctrine of abuse of process. The Supreme Court held that where a party establishes the pre-conditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied, and the court should stand back and, taking into account the entirety of the circumstances, the court should consider whether an estoppel in the particular case would work an injustice. See also: *Amtim Capital Inc. v. Appliance Recycling Centres of America*, 2014 ONCA 62 and *Hanna v. Abbott, supra* at paras. 29-32.

[75] In these cases and others the court recognized that there may be situations where re-litigation would enhance the integrity of the judicial system; for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context, — and in these instances, the subsequent proceeding would not be an abuse of process.

[76] In the circumstances of the immediate case, it offends principles of fundamental justice that the fate of Mr. Pennyfeather's statutory claim should be determined by court decisions after hearings in which he did not have an opportunity to be heard. The Supreme Court denied Mr. Pennyfeather leave to appeal the decision ruling his claim untimely, and it denied him leave to intervene in the appeal that restored the decision that his claim was untimely. Having denied him a seat at the table where the fate of his statutory claim was to be determined to be an statute-barred, I find it unfair for any court to make an adverse and technical determination about Mr. Pennyfeather's possible entitlement to an order *nunc pro tunc* when he has not argued his case nor had an opportunity to offer an explanation for his handling of the case. The position of a person seeking a *nunc pro tunc* order is idiosyncratic, and the idiosyncrasies of Mr. Pennyfeather's circumstances were never argued until the motion now before the court.

[77] In standing back and, taking into account the entirety of the circumstances, it is not for me to decide whether I am responsible for Mr. Pennyfeather's predicament because of how I case managed the proposed class action. I do not regret not scheduling a leave motion in the two-and-a-half-month period left before May 29, 2011 because the Defendants would have been denied due process. I suppose I could have asked the parties to address the issue of *nunc pro tunc* in March 2011, but I did not. I do know that the issue was not argued, and I do know that Mr. Pennyfeather was not a participant in the discussion of *nunc pro tunc* that occurred in the

Supreme Court of Canada in the Trilogy, although his case was used as a foil by the participants in the appeals to the Supreme Court. I notice, moreover, that counsel for Timminco, albeit representing a different client, the intervener the Insurance Bureau of Canada, were before the Supreme Court presumably arguing in favour of the strict enforcement of limitation periods. Mr. Pennyfeather's voice on the issue of *nunc pro tunc* has not been heard until the motion now before the court.

[78] Yes, Mr. Pennyfeather had his day in other courts and could have made arguments about *nunc pro tunc*, but just as the fog of war is reduced by military intelligence, the judicial intelligence about s. 28 of the *Class Proceedings Act, 1992* and about the role of *nunc pro tunc* had not yet been gathered until the Supreme Court ruled about the issues. The true nature of the law was uncertain when Mr. Pennyfeather appeared before me or before the three-member panel of the Court of Appeal, and he did not participate when the Trilogy reached the Supreme Court. Put shortly, in my opinion, it is in the interests of justice that Mr. Pennyfeather have his day in court about his request for an order *nunc pro tunc*.

3. The Court's Jurisdiction to make orders *Nunc Pro Tunc*

[79] The matter then to be decided is whether it would be appropriate to make an order *nunc pro tunc* assuming leave was granted to Mr. Pennyfeather to assert a statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act*.

[80] As noted above, in *Green v. Canadian Imperial Bank of Commerce, supra,* Justice Strathy considered but rejected the availability of the court's jurisdiction to make orders *nunc pro tunc* in the circumstances of that case or in any case involving a statutory claim under the Ontario *Securities Act*. Justice Strathy described the particular circumstances at paragraphs 495 to 497 of his decision. He noted that Mr. Green's action was filed eight months after the last of the alleged misrepresentations and that the motion for leave was argued approximately four years after the last of the alleged misrepresentations. A notice of motion for leave was filed almost a year before the expiry of the limitation period and the motion record completed just after the expiry of the limitation period, but Justice Strathy also noted that there never was a doubt that Mr. Green would seek leave and that he had expended a great deal of time and resources to do so. Justice Strathy observed that CIBC suffered no prejudice from the delay in having the motion heard and that neither CIBC nor the case management judges overseeing the case had ever considered the possibility that the limitation period might expire. Justice Strathy, nevertheless, declined to make an order *nunc pro tunc,* and his reasoning is set out in paragraphs 507 to 514, 520 to 526, and 539-545 of his judgment.

[81] Justice Strathy reasoned that the question for him to decide was jurisdictional; i.e., the question was whether the court had a discretionary jurisdiction to extend a limitation period in appropriate circumstances. He accepted that this jurisdiction existed to prevent an injustice and to validate proceedings that would be defective due to a slip or oversight: *Hogarth v. Hogarth*, [1945] 3 D.L.R. 78 (Ont. H.C.), aff'd. [1945] 3 D.L.R. 750 (Ont. C.A.), but Mr. Green had made no slip and he had been aware from the outset that he might need an order *nunc pro tunc.* Justice Strathy noted Justice Rady's decision in *Nor-Dor Developments Ltd. v. Redline Communications Group Inc., supra* which alluded to an order *nunc pro tunc,* but he regarded this observation as *obiter* and made without the benefit of the Court of Appeal's subsequent decision in *Sharma v. Timminco.* However, with the benefit of that decision, Justice Strathy decided that the court did

not have the jurisdiction to make an order *nunc pro tunc* to revive a limitation period that has expired due to the failure to obtain leave within three years. Justice Strathy said that the issue of jurisdiction boiled down to whether it would be consistent with the limitation period in Part XXIII.1 of the Ontario *Securities Act* to make an order *nunc pro tunc* to extend the limitation period. For three reasons, he concluded the jurisdiction did not exist. First, Part XXIII.1 of the Ontario *Securities Act* was a complete code and there was nothing in the statute to suggest that the limitation period could be extended. Second, there was nothing in the judicial interpretation of Part XXIII.1 or in the interpretation of Part XXIII of the Ontario *Securities Act*, to suggest that the special circumstances doctrine applied. Third, the general philosophy of the *Limitations Act, 2002*, S.O. 2002, c. 24, reflected the desirability that limitation periods be clearly defined and not subject to judicially-crafted exceptions that can lead to uncertainty and unfairness. In *obiter*, Justice Strathy stated that if he had concluded that the court did have jurisdiction to make an order *nunc pro tunc*, he would have exercised that jurisdiction in the circumstances of Mr. Green's case against CIBC.

[82] As a matter of chronology of the development of the law associated with the court's jurisdiction to make orders *nunc pro tunc*, Justice van Rensburg's decision in *Silver v. IMAX Corp.*, *supra* came next. In her judgment, she undertook a detailed examination of the court's jurisdiction to make orders *nunc pro tunc* in relation to the Ontario *Securities Act*. Three aspects of her reasons should immediately be noted. First, a few years later, in the Supreme Court, Justice Côté, for three of the four judges who addressed the *nunc pro tunc* issue, stated at paras. 92-93 that Justice van Rensburg correctly stated the law. Second, both the Supreme Court and Justice van Rensburg disagreed with Justice Strathy on whether the court had the jurisdiction to make an order *nunc pro tunc* that would, in effect, circumvent the limitation period in Part XXIII.1 of the Ontario *Securities Act*. Third, it is difficult to imagine a stronger case for an order *nunc pro tunc* than the circumstances of *Silver v. IMAX Corp.*

[83] The factual background in *Silver v. IMAX Corp.* was that Mr. Silver commenced his misrepresentation action against IMAX and three individuals within six months of the last alleged misrepresentation, and he mentioned his intention to obtain leave under Part XXIII.1 in his statement of claim. The motion record for a leave motion was served around the time of the first anniversary of the alleged misrepresentations. The defendants brought a Rule 21 motion to strike various causes of action and a tripartite motion under Rule 21 of the *Rules of Civil Procedure*, for certification under the *Class Proceedings Act, 1992* and for leave under Part XXIII.1 of the Ontario *Securities Act*, which motions were fully argued three months before the expiry of the limitation period. There was some very heavy judicial lifting to do because the law about the test for leave was undeveloped at the time when the motions were argued. A year then passed while the judgment was under reserve. During this period, the parties agreed to suspend the running of the limitation period, which had 79 days to run. Ultimately, Justice van Rensburg released a series of lengthy and significant judgments. She granted leave and certified the action as a class proceeding. A motion for leave to appeal both the certification and leave orders was argued to the Divisional Court and leave was refused. Mr. Silver amended his statement of claim and added five more individual defendants. The pleadings were completed including the delivery of a statement of defence. On February 16, 2012, the day that the Court of Appeal released *Sharma v. Timminco*, *supra*, the defendants served an amended defence asserting that the Part XXIII.1 statutory claim was statute-barred because the amended pleadings had been delivered outside the three-year limitation period for the statutory misrepresentation claims.

[84] In *Silver v. IMAX Corp.*, Justice van Rensburg agreed that the statutory claim was statute-barred, but she concluded that she had the jurisdiction and would exercise it to make an order *nunc pro tunc*. The authority to make an order *nunc pro tunc* was part of the court's inherent jurisdiction and was recognized by rule 59.01 of the *Rules of Civil Procedure*. She reasoned that the court's jurisdiction to make orders *nunc pro tunc* was available in a variety of circumstances. The jurisdiction was available to correct oversights and slips by the parties or their lawyers after considering the relative prejudice to the parties: *Hogarth v. Hogarth*, [1945] O.J. No. 165 (H.C.J.); *Re Cadillac Fairview Inc.*, [1995] O.J. No. 623 (Gen. Div.). The jurisdiction was available to regularize proceedings that require leave before being commenced unless, as a matter of interpretation, the statute in question precluded such relief: *Re New Alger Mines Limited* (1986), 54 O.R. (2d) 562 (C.A.); *Re Montego Forest Products Ltd.* (1998), 37 O.R. (3d) 651 (C.A.); *McKenna Estate v. Marshall*, [2005] O.J. No. 4394 (S.C.J.). The jurisdiction was available to prevent any injustice arising from the court's delay in rendering a decision; the Latin maxim is *actus curiae neminem gravabit* ("what the court does ought not to prejudice a litigant"): *Turner v. London & South-Western Railway Co.* (1874), 17 L.R. Eq. 561; *The Queen v. Justices of County of London and London County Council*, [1893] 2 Q.B. 476.

[85] Justice van Rensburg concluded that the *Silver v. IMAX Corp.* case fit within the authorities for making a *nunc pro tunc* order where the plaintiff's rights have abated through no fault of the plaintiff, while a decision has been reserved by the court and there was nothing in the Ontario *Securities Act* that precluded the granting of relief and there was nothing contrary to the policies of the *Limitations Act* that stood against granting relief in the circumstances of the case. At para. 85 of her judgment, she stated:

> 85. The defendants assert that recognizing the authority of the court to grant leave *nunc pro tunc* in a leave application under s. 138.8, would defeat the very purpose of the limitation period in s. 138.14. I disagree. Limitation periods exist to ensure that lawsuits are brought within a reasonable period of time so that defendants are not subject to liability for an unlimited duration, so that cases do not proceed on stale evidence, and as incentives to plaintiffs to pursue their claims in a timely fashion: *K.M. v. H.M.*, [1992] 3 S.C.R. 6, at paras. 21 to 24. In *Timminco*, Goudge J.A. described the purpose of the limitation period in s. 138.14 to "ensure that secondary market claims be proceeded with dispatch" (at para. 26). Limitation periods are not intended to arbitrarily bring to an end a cause of action that has been actively and vigorously pursued. The finality that a limitation period may offer is not an end in itself.

[86] The circumstances for a *nunc pro tunc* order were not nearly so favourable in *Trustees of the Millwright Regional Council v. Celestica Inc., supra*, where I made such an order in the context of a Rule 21 motion where I ruled that it was not plain and obvious that this court does not have the jurisdiction pursuant to the special circumstances doctrine to make an order *nunc pro tunc* to make the plaintiffs' proposed action under Part XXIII.1 of the Ontario *Securities Act* timely. However, as noted above and discussed further below, my decision was overruled by the Supreme Court of Canada.

[87] The Millwrights main allegation was that for a two-year period, from January 2005 to January 2007, Celestica and two of its former officers, misrepresented the progress of Celestica's restructuring of its operations in North America. In March 2007, in the United States, the

Millwrights commenced a class action against the defendants. Meanwhile in Canada, in July 2007, Mr. Xing brought a proposed class action and about a year later in August 2008, Mr. Berzi brought a proposed class action. Messrs. Xing and Berzi were not concerned about the limitation period under Part XXIII.1 of the Ontario *Securities Act* because they believed - wrongly as it turns out - that s. 28 of the *Class Proceedings Act, 1992* had suspended the running of the limitation period. Messrs. Xing and Berzi were content to let their Ontario actions idle as events unfolded in the United States and as the Millwrights took the fight to the defendants in the United States. Here, it may be noted that Messrs. Xing and Berzi would eventually consolidate their actions with an action brought by the Millwrights. In April 2011, because of developments in the United States, the Millwrights commenced that action in Ontario, but it was left idling as the United States action moved into the discovery phase. However, in Ontario, on February 16, 2012, the Court of Appeal released its reasons in *Sharma v. Timminco Limited, supra,* and on February 24, 2012 - it would seem spurred by the *Timminco* judgment and developments in the United States rejecting global class actions - the Millwrights revved up the Ontario action, and they delivered notices of motion to certify their Ontario action as a class proceeding, and to obtain leave under s. 138.8 of the Ontario *Securities Act* or under the analogous provisions in other provinces. A motion challenging various causes of action and raising the issue of whether the Part XXIII.1 claim was statute-barred was heard by me in October 2012.

[88] I held that I was bound by the Court of Appeal's decision in *Sharma v. Timminco* but that it was not plain and obvious that the claim could not be saved by a *nunc pro tunc* order made pursuant to the special circumstances doctrine which is associated with amending pleadings after the expiry of a limitation period. It should be noted that there are two aspects to this decision. First, that as a matter of statutory interpretation of the *Limitations Act, 2002* and the Ontario *Securities Act* whether the special circumstances jurisdiction was available and second, whether if available, the special circumstances jurisdiction, which is discretionary, could be exercised. In *Silver v. IMAX Corp., supra,* Justice van Rensburg only relied on the *nunc pro tunc* jurisdiction and ruled that the special circumstances doctrine was not also available. For my part, I agreed with Justice van Rensburg's discussion of the law associated with orders *nunc pro tunc*, which I regarded as also supporting my conclusion about the special circumstances doctrine as a means of circumventing an expired limitation period under Part XXIII.1 of the Ontario *Securities Act.*

[89] Mr. Green appealed the decision that his statutory claim was statute-barred and not saved by an order *nunc pro tunc,* and IMAX Corp. and Celestica appealed the decisions that although the statutory claims were statute-barred the claims were or could be saved by orders *nunc pro tunc.* As noted above, the Court of Appeal constituted a panel of five justices and overruled *Sharma v. Timminco.* The claims not being statute-barred, it was not necessary for the Court of Appeal to opine about the court's jurisdiction to make orders *nunc pro tunc.*

[90] The defendants in the Trilogy appealed to the Supreme Court. In the Supreme Court, the minority judges did not deal with the *nunc pro tunc* issue.

[91] Justice Côté delivered the reasons for herself and for Chief Justice McLachlin and Justice Rothstein. Justice Côté concluded that neither the doctrine of *nunc pro tunc* nor that of special circumstances assisted the plaintiffs in *Green v. CIBC* or in *Trustees of the Millwright Regional Council v. Celestica Inc.* With regard to *Silver v. IMAX Corp.,* it was Justice Côté's view that a *nunc pro tunc* order was appropriate but only in relation to the defendants who were parties to the original statement of claim. As noted earlier in these Reasons for Decision, Justice Cromwell agreed with Justice Côté that the Millwright's claim was statute-barred and that Mr. Silver's

statutory claim against some of the defendants in *Silver v. IMAX Corp.* should be saved by an order *nunc pro tunc*. He also would have made a *nunc pro tunc* order for Mr. Green in his action against CIBC.

[92] Justice Côté's discussion of the law about *nunc pro tunc* is found in paragraphs 90, 92-94 of her judgment, where she stated:

> 90. In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice (*Re New Alger Mines Ltd.* (1986), 54 O.R. (2d) 562 (C.A.), at pp. 570-71; *Gallo v. Beber* (1998), 116 O.A.C. 340, at paras. 7 and 10; *Krueger v. Raccah* (1981), 12 Sask. R. 130 (Q.B.), at paras. 11-15; *Parker v. Atkinson* (1993), 104 D.L.R. (4th) 279 (Ont. Unif. Fam. Ct.), at p. 286; *Hogarth v. Hogarth*, [1945] 3 D.L.R. 78 (Ont. H.C.), at pp. 78-79; *Montego Forest Products Ltd. (Re)* (1998), 37 O.R. (3d) 651 (C.A.), at p. 654; *Couture v. Bouchard* (1892), 21 S.C.R. 281, at p. 285; *Westman v. Gyselinck*, 2014 MBQB 174, 308 Man. R. (2d) 306, at para. 40, citing *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 28; *McKenna Estate v. Marshall* (2005), 37 R.P.R. (4th) 222 (Ont. S.C.J.), at paras. 23-24). None of these factors is determinative.
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> ....
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> 92. In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant *nunc pro tunc* orders where leave is sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products Ltd.*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A *nunc pro tunc* order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.
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> 93. Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made *nunc pro tunc* where leave is sought prior to the expiry of the limitation period. One very important *caveat*, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.
>
> 94. This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order: *McKenna*, at para. 27; *Parker*, at pp. 286-87;

> *New Alger Mines*, at pp. 570-71. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.

[93] With this analysis of the law, Justice Côté was prepared to make a *nunc pro tunc* order for the plaintiffs with respect to the original defendants in *Silver v. IMAX Corp.,* but she was not prepared to make an order for Mr. Green in *Green v. Canadian Imperial Bank of Commerce* or for the Millwrights in *Trustees of the Millwright Regional Council v. Celestica Inc.* For the Millwrights, she firmly stated that because no motion for leave was filed before the expiry of the limitation period, that was sufficient to deny a *nunc pro tunc* order.

[94] Applying Justice Côté's approach to the circumstances of Mr. Pennyfeather's action, he did not seek leave before to the expiry of the limitation period unless the motion in March 2011, whatever it might be called, was a motion for leave. However, the motion in March 2011 was not a leave motion because, as noted above, I had already decided at the March case conference that I would not schedule a leave motion. Whatever the motion was in March 2011, it was not a leave motion, and thus Mr. Pennyfeather cannot satisfy the so-called red-line rule found in the decision of Justice Côté.

[95] Further, treating the motion in March 2011 as a motion for leave is to effectively circumvent or defeat the will of the legislature as it was expressed in 2011. In this regard, it is important to keep in mind that the legislature had designed an absolute limitation period that was not diluted by principles of discoverability, and Kim Orr knew about the misrepresentations for over three years before they brought a genuine motion for leave. Absolute limitation periods go beyond the usual purposes of limitation periods of incenting plaintiffs to pursue remedies, of giving defendants repose from a liability of unlimited duration, and of avoiding deciding cases based on stale evidence and put a premium on finality that will exculpate defendants of liability notwithstanding wrongdoing.

[96] For his part, Justice Cromwell made *nunc pro tunc* orders that led to the salvation of Mr. Green's and Mr. Silver's statute-barred statutory claims, but he joined Justice Côté in interring the Millwright's statutory claim and he endorsed her reasoning in this regard. With respect to *Silver v. IMAX Corp.* and *Green v. Canadian Imperial Bank of Commerce*, Justice Cromwell noted that: (a) the plaintiffs had prosecuted their claims with diligence; (b) their claims had a reasonable prospect of success; (c) the defendants had been aware of the nature of the claims from the beginning; (d) there was no hint of prejudice to them resulting from the passage of time. (e) the parties were surprised that they might have a limitation defence when *Sharma v. Timminco* was released; and (f) failing to exercise the *nunc pro tunc* discretion would permit the defendants to avoid facing the merits of the plaintiffs' claims on purely technical grounds that the defendants did not assert until after the fact.

[97] Comparing the circumstances of *Pennyfeather v. Timminco* with the circumstances identified by Justice Cromwell that justified a *nunc pro tunc* order for *Silver v. IMAX Corp.* and *Green v. Canadian Imperial Bank of Commerce*, the case for making an order is weaker for Mr. Pennyfeather. Although I have found that Kim Orr acted in accordance with the accepted wisdom of the time when acting for the class, its diligence was misdirected and it had no adequate explanation for not advancing the proposed class action on the parallel tracks of

negotiation and prosecution of the proposed statutory claim. While it may be the case that the Defendants' ability to defend the case has not been prejudiced by the passage of time, this is not clearly the case, and the Defendants cannot be faulted for refusing to abandon a limitation defence to a $500 million claim when they did nothing to lull Mr. Sharma or Mr. Pennyfeather into thinking that he did not have to worry about the ticking limitation clock. While the law about s. 28 of the *Class Proceedings Act, 1992*, may have been uncertain and eventually shocking, the Defendants did nothing to lull or induce Mr. Pennyfeather not to pursue the prosecution of the statutory claim and he was capable of pursuing the claim. Further, the prospects of success for the statutory claim had actually been tested in both *Silver v. IMAX Corp.* and in *Green v. Canadian Imperial Bank of Commerce,* but that is not the situation for the case at bar. Thus it is not possible to rely on the prospects of success factor to favour a *nunc pro tunc* order. The prospects of success factor is a neutral factor.

[98] Another comparison is between the circumstances of *Pennyfeather v. Timminco* and that of *Trustees of the Millwright Regional Council v. Celestica Inc.*, where four justices of the Supreme Court agreed that a *nunc pro tunc* order was not appropriate. In several respects, the circumstances of the Millwrights is a closer analog to the circumstances of Mr. Pennyfeather than the circumstances of Mr. Green and Mr. Silver.

[99] In *Trustees of the Millwright Regional Council v. Celestica Inc.*, in the context of a Rule 21 motion about what is plain or obvious, I decided that it was not plain and obvious that a *nunc pro tunc* order would not be made assuming that leave were granted to assert a statutory misrepresentation claim. At the time that I made the conditional *nunc pro tunc* order, the Millwrights, like Mr. Pennyfeather, were thunderstruck by the *Sharma v. Pennyfeather* decision of the Court of Appeal about the operation of s. 28 of the *Class Proceedings Act, 1992*. They asked for a provisional *nunc pro tunc* order, which I granted. By the time the Millwrights' case reached the Supreme Court of Canada, there had been a leave motion and I granted leave to pursue a statutory claim; see *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2014 ONSC 1057.

[100] Thus, the Millwrights were in a better position than Mr. Pennyfeather to argue that failing to exercise the *nunc pro tunc* jurisdiction would permit the defendants to avoid a possibly meritorious claim on purely technical grounds. The other comparables between the Millwright's circumstances and that of Mr. Pennyfeather are more or less equivalent. A majority of the Supreme Court decided that a *nunc pro tunc* order was inappropriate for the Millwrights, and as I see it, the circumstances of Mr. Pennyfeather are quite similar and for similar reasons, it would be inappropriate to make a provisional *nunc pro tunc* order on the assumption that he would be successful in obtaining leave under Part XXIII.1 of the Ontario *Securities Act*.

D. CONCLUSION

[101] For the above reasons, I grant the Defendants' motion and dismiss Mr. Pennyfeather's cross-motion.

[102] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions with 20 days of the release of these Reasons for Decision followed by Mr. Pennyfeather's submissions within a further 20 days.

Perell, J.

Released: May 12, 2016

CITATION: Pennyfeather v. Timminco Limited, 2016 ONSC 3124
COURT FILE NO.: CV-09-378701CP
DATE: 20160512

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ST. CLAIR PENNYFEATHER

Plaintiff

– 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 P. YAKISCH and JOHN P. WALSH

Defendants

REASONS FOR DECISION

PERELL J.

Released: May 12, 2016