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Angry echoes of recession linger in CIBC class action case at SCC

Trio of billion-dollar cases highlight top court's winter docket

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"Humanitarian" smuggling, a new tort for securities misrepresentations, and the "personal use" defence to making child pornography are among the novel issues facing the Supreme Court of Canada in 2015.

Lawyers Joel Rochon, left, and Peter Jervis, seen at their Toronto offices, represent thousands of investors suing CIBC in a closely watched class action which is among the matters to be heard in the winter Supreme Court of Canada session. [Tim Fraser for Lawyers Weekly]

The top court has 28 appeals on its docket from Jan. 12 to March 27, although at press time no hearings were scheduled for the sixth (and final) week of the winter session.

Among the cases most closely watched across Canada are a multi-billion-dollar trio of class actions to be heard Feb. 9 *(CIBC v. Green, IMAX v. Silver, and Celestica v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund)* that ask the court to determine: (1) when the three-year limitation period starts to run for the new statutory cause of action for secondary market misrepresentation, created in 2005 by s. 138.3 of Part XXIII.1 of Ontario's *Securities Act*, and (2) what standard do investor-plaintiffs have to meet, under s. 138.8, in order to get the required court permission to launch their statutory claims.

The defendants are appealing Ontario decisions green-lighting separate class actions by investors suing for alleged securities misrepresentations by the companies to the secondary market (i.e. the stock exchanges handling previously issued financial instruments such as stocks and bonds). The companies argue the claims are time-barred because the plaintiffs blew the limitation period.

In all three cases a statement of claim was filed within three years, alleging negligent misrepresentation at common law, and stating an intention to seek leave to sue on the statutory tort. But leave to sue was not obtained from the courts within the requisite three years.

The cases have "important implications for the future of securities class actions and access to justice," said Joel Rochon of Toronto's Rochon Genova, who represents thousands of investors suing CIBC for several billion dollars for allegedly not timely disclosing in 2007 that the bank was massively exposed to toxic subprime residential mortgage securities in the U.S.

CIBC's share price dropped drastically following the bank's disclosure to the markets in late 2007.

CIBC asks the Supreme Court to overturn the decision of a special five-judge Court of Appeal for Ontario panel that the cases were not time-barred because the limitation period was suspended by s. 28 of the Ontario *Class Proceedings Act, 1992*. The act suspends any limitation period applicable to a cause of action asserted in a class proceeding as of the date of the launch of the class action. The appeal court held that the plaintiff had "asserted the cause of action" for the purposes of s. 28, notwithstanding that a court still had to grant leave before the claim could be enforced.

The Ontario government amended the *Securities Act* last July so that the limitations clock stops when the plaintiff's notice of motion for leave to proceed under Part XXIII.1 is filed. However, more than 30 ongoing secondary-market misrepresentation class actions remain subject to the old rules.

"Allowing these transitional cases to proceed would promote the primary objective of the *Class Proceedings Act*—access to justice—as well as the dual purposes of compensation and deterrence

underlying the secondary-market liability regime of the *Securities Act*," says Peter Jervis, co-counsel for the plaintiffs. (Defendants' counsel did not comment).

On Jan. 16, the court will hear twin appeals dealing with the scope of the "personal use" exception to child pornography: *Barabash and Rollison v. The Queen*.

The appellants, ages 41 and 60 at the time of the alleged offences, openly videotaped for their personal use many occasions of what the trial judge held was consensual and non-exploitive sex with two homeless, drug-addicted 14-year-olds who were supplied with shelter, food, alcohol, crack cocaine and other drugs (the age of consent was raised three weeks later to 16). The two were acquitted of making and/or possessing child pornography on the basis of the "private use" exception, created by *R. v. Sharpe* [2001] S.C.J. No. 3. The Alberta Court of Appeal overturned the acquittals. The Crown argues that for the private use exception to apply there must be no exploitation or abuse. It is not enough that the acts and recordings were ostensibly consensual and the pornography was privately held. Such a narrow formulation "is a recipe for the exploitation of vulnerable youth," the Crown argues in its factum. "When [the Supreme Court] created the private use defence, this court did not intend to sanctify middle-aged drug dealers supplying crack cocaine to 14-year-old crack-addicted runaways, performing and filming male sexual fantasies, and then retaining the DVDs for the adults' exclusive use," the Crown contends.

Peter Royal of Royal Teskey in Edmonton, counsel for the appellant Donald Barabash, told *The Lawyers Weekly* it was not up to the Court of Appeal to reverse the trial judge's factual finding that there was no exploitation. Moreover, "it's for Parliament to put [exploitation] into the statute, if they think it appropriate."

Cara Zwibel of the intervener Canadian Civil Liberties Association said the association will argue that "the Court of Appeal's addition of 'exploitation and abuse' as an independent fourth prong to the private use exception may, as the trial judge noted, subject young people to invasive and unconstitutional infringements on their personal autonomy, and risks criminalizing legal sexual behaviour."

On Jan. 23 the Supreme Court will hear an alleged racial profiling case: *Commission des droits de la personne et des droit de la jeunesse c. Bombardier Inc.* Bombardier refused to enroll Javid Latif in the company's flight training in Montreal in 2004 because the U.S. Department of Justice, administering the Alien Flight Students Program instituted after 9/11, had denied his application to take the same course in Dallas on the basis that he was a threat to aviation safety. Born in Pakistan, Latif became Canadian in 2001. When he applied for the training he had more than 25 years' professional flying experience, including as a fighter pilot in Pakistan, then as chief instructor of the Qatar Air Force, and most recently as a business aircraft pilot.

In 2013 the Quebec Court of Appeal set aside the Quebec Human Rights Tribunal's compensatory damages award of $261,438 for lost income, as well as moral and punitive damages of $75,000. The tribunal held that Latif had been discriminated against based on his national origin, but the appeal court held that he and the Commission failed to show *prima facie* discrimination.

The intervener National Council of Canadian Muslims and Canadian Muslim Lawyers Association disagree. "Essentially what we have is a Canadian company blindly applying a U.S. security-watch listing to a Canadian citizen in Canada and essentially accepting it at face value without having conducted any kind of investigation…[which] has a disproportionate, and a negative, effect on Arabs and Muslims, and people from other countries, including Pakistan in this case," asserts Ottawa's Khalid Elgazzar who represents the two groups, along with Faisal Bhabha and Faisal Mirza. Elgazzar argues "it's akin to turning the presumption of innocence on its head."

On Feb. 16 and 17, the court will hear five immigration appeals about the meaning of s. 37(1)(b) of the *Immigration and Refugee Protection Act*: *Hernandez, B306 and J.P. v. Minister of Public Safety; B010 v. Minister of Citizenship and Immigration; Appulonappa v. The Queen*.

The provision bars from admissibility to Canada those found to have engaged in the transnational crime of people smuggling. They are deemed to have engaged in organized criminality.

One of the issues is whether the process of determining inadmissibility and deportation engages the *Charter*'s s. 7 fundamental justice guarantee. The cases also ask whether "humanitarian" smugglers should be viewed as organized criminals. The appellants argue the Federal Court of Appeal incorrectly decided that those who knowingly assist someone to enter Canada without the required documents—without obtaining a material benefit, e.g. humanitarian workers and close family members helping each other—qualify as people smugglers.