

**SUPREME COURT OF CANADA**

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| **Citation:** Canadian Imperial Bank of Commerce *v.* Green, 2015 SCC 60, [2015] 3 S.C.R. 801 | **Date:** 20151204  **Docket:** 35807, 35811, 35813 |

Between:

Canadian Imperial Bank of Commerce

Appellant

and

Howard Green and Anne Bell

Respondents

**And Between:**

Gerald McCaughey, Tom Woods,

Brian G. Shaw and Ken Kilgour

Appellants

and

Howard Green and Anne Bell

Respondents

- and -

Canadian Foundation for Advancement of Investor Rights,

Shareholder Association for Research and Education,

Ontario Securities Commission and Insurance Bureau of Canada

Interveners

And Between:

IMAX Corporation, Richard L. Gelfond,

Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun,

Kenneth G. Copland, Garth M. Girvan,

David W. Leebron and Kathryn A. Gamble

Appellants

and

Marvin Neil Silver and Cliff Cohen

Respondents

- and -

Canadian Foundation for Advancement of Investor Rights and

Ontario Securities Commission

Interveners

And Between:

Celestica Inc., Stephen W. Delaney and

Anthony P. Puppi

Appellants

and

Trustees of the Millwright Regional Council of

Ontario Pension Trust Fund

Respondent

And Between:

Celestica Inc., Stephen W. Delaney and

Anthony P. Puppi

Appellants

and

Nabil Berzi

Respondent

And Between:

Celestica Inc., Stephen W. Delaney and

Anthony P. Puppi

Appellants

and

Huacheng Xing

Respondent

- and -

Canadian Foundation for Advancement of Investor Rights and

Ontario Securities Commission

Interveners

**Coram:** McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon and Côté JJ.

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| **Reasons Dissenting in Part (*CIBC* and *IMAX*); Reasons for Judgment (*Celestica*):**  (paras. 1 to 129)  **Reasons Concurring in the Result With Those of Karakatsanis J. (*CIBC* and *IMAX*) and Concurring With Those of Côté J. (*Celestica*):**  (paras. 130 to 159)  **Reasons for Judgment (*CIBC* and *IMAX*); Dissenting Reasons (*Celestica*):**  (paras. 160 to 214) | Côté J. (McLachlin C.J. and Rothstein J. concurring)  Cromwell J.  Karakatsanis J. (Moldaver and Gascon JJ. concurring) |

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**Indexed as: Canadian Imperial Bank of Commerce *v.* Green**

2015 SCC 60

File Nos.: 35807, 35811, 35813.

2015: February 9; 2015: December 4.

Present: McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon and Côté JJ.

on appeal from the court of appeal for ontario

*Securities — Class actions — Limitation of actions — Statutory action for secondary market misrepresentation — Suspension of limitation period — Plaintiffs in three class proceedings claiming damages under common law tort of negligent misrepresentation and under statutory cause of action for secondary market misrepresentation in s. 138.3 of Securities Act — Leave required to commence statutory action under s. 138.8 of Securities Act — Limitation period for statutory action expiring prior to leave being granted — Whether s. 28 of Class Proceedings Act, 1992, operates to suspend limitation period applicable to statutory action before leave to commence statutory action is granted — Whether statutory action time‑barred — If yes, whether statutory action can be saved by order granting leave nunc pro tunc or doctrine of special circumstances — Whether threshold of reasonable possibility of success applies for leave to commence statutory action under s. 138.3 of Securities Act — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 28 — Securities Act, R.S.O. 1990, c. S.5, ss. 138.3, 138.8, 138.14.*

*Civil procedure — Class actions — Preferable procedure — Plaintiffs in three class proceedings claiming damages under common law tort of negligent misrepresentation and under statutory cause of action for secondary market misrepresentation — Whether Court of Appeal erred in holding that five of seven common issues relating to common law misrepresentation claim should be certified.*

The appeals in these three cases (*CIBC*, *IMAX* and *Celestica*) stem from motions in class proceedings brought before different judges of the Ontario Superior Court of Justice. In each case, the respondent plaintiffs claimed damages under the common law tort of negligent misrepresentation and pleaded an intention to claim damages under the statutory cause of action in s. 138.3 of Part XXIII.1 of the Ontario *Securities Act* (“*OSA*”) for alleged misrepresentations in respect of shares trading in the secondary market. None of the plaintiffs obtained leave to commence the statutory action, required under s. 138.8 *OSA*, before commencing the class proceeding based on the common law cause of action. In all of the cases, the limitation period for the statutory action, if not suspended, would have run out prior to leave being obtained. In *CIBC*, the motion for leave was filed before the expiry of the limitation period; in *IMAX*, the motion for leave was filed and argued before the expiry of the limitation period; and in *Celestica*, the motion for leave was filed after the expiry of the limitation period.

Section 28 of the *Class Proceedings Act, 1992* (“*CPA*”) operates to suspend the limitation period for a cause of action asserted in a class proceeding in favour of the members of a class on the commencement of the class proceeding. During the course of the class proceedings at issue in these appeals, the Ontario Court of Appeal released its decision in another matter, *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569 (“*Timminco*”), in which it interpreted the application of s. 28 *CPA* to the limitation period in s. 138.14 *OSA* for the first time. The panel held that s. 28 *CPA* did not operate to suspend the limitation period in s. 138.14 *OSA* until leave was obtained under s. 138.8 *OSA*. The motion judges considering the issue of leave to commence the statutory action in the present cases found that they were bound by *Timminco*. The motion judges in *IMAX* and *Celestica* applied the common law doctrines of *nunc pro tunc* and special circumstances to save the statutory claims in those proceedings from being statute‑barred. The motion judge in *CIBC* found that those doctrines were inapplicable, and that the statutory claim could not be saved.

In *CIBC*, in addition to the limitation period issue, the defendants challenged the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA* and the plaintiffs sought certification for seven common issues relating to the common law misrepresentation claim. Despite his finding that the statutory action was statute‑barred, the motion judge interpreted s. 138.8 *OSA* as establishing a relatively low threshold. With respect to certification of the issues, the motion judge held that reliance, a necessary element of a common law misrepresentation claim, was not an issue that was capable of resolution on a common basis, and that a class proceeding would not be the preferable procedure for resolving a reliance‑based claim. He refused to certify all seven issues relating to the common law misrepresentation claim.

On appeal, the three cases were heard together by a five‑member panel of the Ontario Court of Appeal. The panel unanimously overruled the interpretation of *Timminco*, holding that s. 28 *CPA* operates to suspend the limitation period for all class members once the statutory cause of action is asserted in a class proceeding by a representative plaintiff, even if leave has not yet been granted under s. 138.8 *OSA*, as long as the facts that found the action and the intent to seek leave to commence the action have been pleaded. As a result, the court concluded that in all three cases, the plaintiffs’ statutory claims for secondary market misrepresentation were not statute‑barred. With respect to the threshold to be met for leave to be granted under s. 138.8 *OSA*, the Court of Appeal upheld the interpretation of the motion judge in *CIBC*. Finally, the Court of Appeal upheld the motion judge’s decision in *CIBC* not to certify the issues relating to reliance and damages, but it held that five out of the seven issues proposed by the plaintiffs related to the intent and conduct of the defendant CIBC and should be certified as against that defendant in order to advance the litigation against it.

*Held* (McLachlin C.J. and Rothstein and Côté JJ. dissenting in part):The appeals in *CIBC* should be dismissed. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. find that the statutory action is time‑barred. McLachlin C.J. and Rothstein and Côté JJ. would allow the appeals on this issue. Cromwell J. would grant leave *nunc pro tunc* and dismiss the appeals. Moldaver, Karakatsanis and Gascon JJ. find that the statutory action is not time‑barred and would dismiss the appeals. On the issues of the threshold for leave and the certification of common issues, a unanimous court would dismiss the appeals.

*Held* (McLachlin C.J. and Rothstein and Côté JJ. dissenting in part):The appeal in *IMAX* should be dismissed. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. find that the statutory action is time‑barred. McLachlin C.J. and Rothstein and Côté JJ. would allow the appeal with respect to the defendants who were not parties to the original statement of claim but would grant leave *nunc pro tunc* and dismiss the appeal with respect to the defendants who were parties to the original statement of claim. Cromwell J. would grant leave *nunc pro tunc* and dismiss the appeal with respect to all defendants. Moldaver, Karakatsanis and Gascon JJ. find that the statutory action is not time‑barred and would dismiss the appeal.

*Held* (Moldaver, Karakatsanis and Gascon JJ. dissenting): The appeal in *Celestica* should be allowed. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. find that the statutory action is time‑barred and would allow the appeal. Moldaver, Karakatsanis and Gascon JJ. find that the statutory action is not time‑barred and would dismiss the appeal.

The issues are decided as follows:

1. On a majority reasoning by Côté J. (and McLachlin C.J. and Rothstein and Cromwell JJ.), s. 28 *CPA* operates to suspend the limitation period in s. 138.14 *OSA* applicable to a statutory cause of action under s. 138.3 *OSA* at the time when the action is commenced, that is, when leave is granted under s. 138.8 *OSA* in a class proceeding. Moldaver, Karakatsanis and Gascon JJ. (dissenting on this issue) would find that s. 28 *CPA* operates to suspend the limitation period in s. 138.14 *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.
2. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. hold that courts have the inherent jurisdiction to issue orders *nunc pro tunc* for leave to proceed with an action where leave is sought prior to the expiry of the limitation period. In *CIBC*, McLachlin C.J. and Rothstein and Côté JJ. would not exercise their discretion to grant such an order, but Cromwell J. would. In *IMAX*, McLachlin C.J. and Rothstein and Côté JJ. are of the view that the motion judge exercised her discretion to grant such an order correctly with respect to the defendants who were parties to the original statement of claim, but not in respect of the defendants who were not parties to any statement of claim at the time when argument on the leave application was concluded. Cromwell J. is of the view that the motion judge was correct to exercise her *nunc pro tunc* discretion in respect of all of the defendants. In *Celestica*, McLachlin C.J. and Rothstein, Cromwell and Côté JJ. would deny the *nunc pro tunc* order.
3. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. hold that the doctrine of special circumstances is of no avail to any of the plaintiffs in the three cases since neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3 *OSA*.
4. Unanimous: the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA* is that there must be a reasonable or realistic chance that the action will succeed. Moldaver, Cromwell, Karakatsanis and Gascon JJ. find that the *CIBC* plaintiffs have met the required threshold.
5. Unanimous: in *CIBC*, the Court of Appeal did not err in holding that five of the seven common issues proposed by the plaintiffs relating to the common law misrepresentation claim should be certified.

Interaction Between Section 28 *CPA* and Section 138.14 *OSA*

*Per* McLachlin C.J. and Rothstein and Côté JJ. (majority opinion): Pleading an intention to seek leave in respect of a s. 138.3 *OSA* claim in a class proceeding together with a common law cause of action amounts to neither the assertion of the statutory cause of action nor the commencement of a class proceeding for that statutory cause of action under s. 28 *CPA*. Accordingly, the limitation period at s. 138.14 *OSA* cannot be suspended in favour of the class members under s. 28 *CPA* before leave is granted under s. 138.8 *OSA* to commence the statutory action.

There is no ambiguity in the interaction of s. 28 *CPA* with Part XXIII.1 *OSA*. Section 28 *CPA* requires “a cause of action asserted” in order for the limitation period to be suspended in favour of the class members on the commencement of the class proceeding. The interpretation of the meaning of the word “assert” in s. 28 *CPA* proposed by the Court of Appeal in *Timminco* is correct. The assertion of a cause of action must be premised on the existence of a “right of action”. Given the clear wording of s. 138.3 *OSA*, pleading a factual matrix and an intention to seek leave under s. 138.8 *OSA* cannot amount to the assertion of the statutory cause of action.

Section 28 *CPA* does not operate to suspend the limitation period applicable to a cause of action until the commencement of a class proceeding in which the cause of action is asserted. This commencement cannot occur under Part XXIII.1 *OSA* until leave is granted. Section 138.8(1) *OSA* is clear that no action may be commenced under s. 138.3 without leave of the court.

Even if there was an ambiguity in the wording of the relevant provisions — which there is not — the legislative purpose and structure of those provisions would nonetheless support this conclusion. To hold that s. 28 *CPA* operates to suspend a limitation period for a statutory claim under s. 138.3 *OSA* before leave is obtained would be to circumvent the carefully calibrated purposive balance struck by the limits to the statutory action provided for in Part XXIII.1 *OSA* and render s. 138.8 *OSA* ineffective.

A careful consideration of the context of limitation periods, the *CPA* and Part XXIII.1 *OSA* reveals that the Court of Appeal’s decision in the instant cases broadly undermines the legislative structures and the purposes at stake in these appeals. On the one hand, Part XXIII.1 *OSA* strikes a delicate balance between various market participants: the interests of potential plaintiffs and defendants and of affected long‑term shareholders have been weighed considerably and deliberately in light of a desired precise balance between deterrence and compensation. On the other hand, class actions are procedural mechanisms which can only extend the substantive rights of the representative plaintiff to the other class members: before there is a right of action or a suspension of the limitation period flowing from the operation of the statutory scheme itself, the *CPA* cannot be interpreted in such a way as to create either one. Part XXIII.1 *OSA*, the more recent legislation, creates a scheme that is intended to be comprehensive, and was crafted with the *CPA* in mind. The purposes associated with the *CPA* — judicial economy, access to the courts and behaviour modification — were each explicitly considered in developing the structure of Part XXIII.1 *OSA*. Policy concerns, as compelling as they are, do not override the plain meaning of the text and the intent of the Ontario legislature. This is not altered by the fact that both the *CPA* and Part XXIII.1 *OSA* are remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature’s consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.

The interpretation proposed by the Court of Appeal in these cases also significantly affects the protection provided against strike suits, which aims to screen out strike suits as early as possible in the litigation process. The preliminary leave requirement in s. 138.8 *OSA* was added because the usual measures under the *CPA* did not provide appropriate safeguards. Requiring merely that a statutory cause of action be mentioned in an existing class proceeding for the limitation period to be suspended can hardly be said to achieve the intended protection.

*Per* Cromwell J.: The conclusions of Côté J. on the interpretation of the limitation and leave provisions are agreed with.

*Per* Moldaver, Karakatsanis and Gascon JJ. (minority opinion): The five‑member panel of the Court of Appeal was correct to overturn that court’s earlier interpretation of the application of s. 28 *CPA* to the s. 138.14 *OSA* limitation period. As long as the statutory cause of action in Part XXIII.1 *OSA* is asserted in a properly commenced class proceeding, s. 28 *CPA* will suspend the limitation periods applicable to all causes of action asserted — including the limitation period governing the statutory claim — regardless of whether leave has been obtained under s. 138.8 *OSA*.

This understanding of s. 28 *CPA* best accords with the words, scheme and purpose of the *CPA*, as well as the language, purpose and operation of Part XXIII.1 *OSA*. A harmonious interpretation that respects the ordinary meaning of the text of both the *CPA* and the *OSA* and the context and the purpose of the *CPA*, recognizing its intended application in the securities context, must be sought. As both the *CPA* and Part XXIII.1 *OSA* are remedial in nature, the provisions from those statutes must be interpreted broadly and purposively. Moreover, in analysing the interaction between the laws of one legislature, it must be presumed that the laws are meant to work together, both logically and teleologically, as parts of a functioning whole. The relevant provisions in the *OSA* were enacted after the *CPA*, and it is clear that Part XXIII.1 *OSA* was intended to operate in the context of class proceedings legislation.

Section 28 *CPA* is engaged upon the commencement of a class proceeding with respect to “a cause of action asserted” in the class proceeding. “Assert” has multiple dictionary meanings, and “to assert” is defined variously as “to invoke or enforce a legal right” or “make or enforce a claim to”. The Court of Appeal’s conclusion that “asserting” a cause of action in s. 28 *CPA* refers to “invoking the legal right” or “making the claim” is more consistent with the English and the French text of s. 28 *CPA* and with the context of that provision.

In order to “make the claim” or “invoke the legal right”, the representative plaintiff must plead the essential factual elements required to constitute the cause of action. Section 138.3 provides injured shareholders with four causes of action tied to misrepresentations or the failure to make timely disclosure of a material change. Leave is not one of the factual elements set out in that provision. Therefore, the leave requirement in s. 138.8 *OSA* is not a constituent element of the statutory cause of action set out in s. 138.3 *OSA*. Rather, obtaining leave under s. 138.8 *OSA* is a procedural requirement. It is necessary for the right arising from s. 138.3 to be ultimately exercised, adjudicated at trial and enforced; however, “asserting” the statutory cause of action for the purposes of s. 28 *CPA* does not require the representative plaintiff to first obtain leave. The statutory cause of action can therefore be asserted in a class proceeding statement of claim before leave is obtained.

Section 28 *CPA* suspends the running of the limitation periods upon the “commencement of the class proceeding”. “Commencement” for the purpose of this provision refers to the commencement of an intended class proceeding under the *CPA* prior to certification. To commence a class proceeding, the representative plaintiff must file a statement of claim. The text of s. 28 recognizes that multiple causes of action could be asserted in a single statement of claim. Section 28 does not condition the commencement of the class proceeding on the prior fulfillment of all procedural requirements in respect of every cause of action asserted in the proceeding. On a plain reading of s. 28, the limitation periods applicable to all causes of action asserted in the proceeding are suspended upon the commencement of the proceeding, regardless of whether some would require leave to proceed individually. Thus, s. 28 *CPA* will suspend the limitation period in s. 138.14 *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.

Excluding the statutory cause of action in Part XXIII.1 *OSA* from the protection of s. 28 *CPA* until leave has been granted removes compliance with the limitation period from the plaintiff’s control. It would also necessarily oblige potential class members to file a multitude of individual motions for leave to commence the statutory claim, thus unnecessarily adding procedural steps and increasing costs and delays for all parties involved. Such an obligation is not required by the text of s. 28 *CPA*, nor by the context or purposes of the *CPA*. Such a result serves neither judicial economy nor access to justice. Rather, it undermines the harmonious operation of class proceedings in the securities context. An interpretation that suspends the limitation period where leave has not yet been granted under s. 138.8 *OSA* promotes the purposes of the *CPA*, is harmonious with the language, purpose and operation of Part XXIII.1 *OSA*, and allows the class proceeding to remain an effective vehicle for the pursuit of Part XXIII.1 statutory claims while respecting the policy underpinnings of limitation periods.

In each of the three cases under appeal, the plaintiffs commenced class proceedings and pleaded the constituent facts of the tort of negligent misrepresentation and of the statutory cause of action in Part XXIII.1 *OSA* in their statements of claim. This pleading constitutes an assertion of the statutory cause of action for the purposes of s. 28 *CPA*. Thus, the limitation periods for the statutory claims at issue in these appeals are suspended as of the date of filing of their statements of claim and none of the claims are statute‑barred.

Remedies

*Per* McLachlin C.J. and Rothstein and Côté JJ.: *Nunc pro tunc* and special circumstances are two separate doctrines, which need to be addressed separately. The courts have inherent jurisdiction to issue orders *nunc pro tunc*, that is, to backdate their orders. This power is implied by rule 59.01 of the Ontario *Rules of Civil Procedure*. The following non‑exhaustive factors guide the courts 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. None of these factors is determinative.

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. However, a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue. 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. *Nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. Accordingly, the courts’ inherent jurisdiction to issue *nunc pro tunc* orders in relation to leave to commence claims under s. 138.3 *OSA* is not unlimited and should be exercised bearing in mind that the leave requirement, and its interaction with the limitation period, are central to the delicate balance struck in Part XXIII.1 *OSA*.

The standard of review that ordinarily applies to a judge’s discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion. However, if the judge’s discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene. In *CIBC*, the motion judge found that he did not have jurisdiction to make the order *nunc pro tunc*. It follows that he did not actually exercise any discretion, and there is therefore no decision to defer to. But, even if he had done so, his reasoning on whether the order should be granted *nunc pro tunc* was based on an erroneous principle. In *IMAX*, in exercising her discretion, the motion judge failed to address or distinguish the situation of the defendants who were not parties to the original statement of claim. Therefore, no deference applies.

In *CIBC*, the plaintiffs were aware of the requirement of obtaining leave but made the choice not to expedite the leave motion, proceeding on the assumption that the court had the jurisdiction to extend the limitation period and that the discretion would be exercised in their favour by granting leave *nunc pro tunc*. In this case, to grant a *nunc pro tunc* order even though the plaintiffs did absolutely nothing to prevent the expiry of the limitation period would have the effect of overriding the legislature’s intent.

In *IMAX*, the motion judge exercised her discretion correctly in making a *nunc pro tunc* order in relation to the defendants who were parties to the original statement of claim. However, as regards the other defendants, who were not defendants in any proceeding at the time when argument on the leave application was concluded, the plaintiffs, who waited more than two years after leave was granted before issuing a first statement of claim against them as defendants and provided no valid explanation for this delay, certainly cannot be said to have acted diligently. Granting relief to the plaintiffs against those defendants would undermine the strict limitation period set out in s. 138.14 *OSA* and the balance struck in the legislation.

In *Celestica*, no motion for leave was filed before the expiry of the limitation period. Accordingly, a *nunc pro tunc* order could not remedy that expiry. This is sufficient to deny such an order.

The doctrine of special circumstances allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. The circumstances warranting such an amendment will not often occur. In the case of statutory actions under s. 138.3 *OSA*, the legislature specifically barred a plaintiff from commencing such an action without first obtaining leave of the court. Accordingly, the doctrine of special circumstances is of no avail to any of the plaintiffs in the three instant cases. Neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3 *OSA*. The doctrine, therefore, does not provide the plaintiffs with an effective remedy, since it cannot on its own overcome the leave requirement of s. 138.8 *OSA*.

*Per* Cromwell J.: Agreement is expressed for the reasons of Côté J. in respect of the discretionary power of the courts to grant leave *nunc pro tunc* after the expiry of the limitation period to commence a statutory claim for secondary market misrepresentation.

In *CIBC*, the motion judge was ideally placed to assess and weigh all of the many considerations that are relevant to the question of whether the court’s discretion should be exercised in the plaintiffs’ favour. His assessment of those considerations and the weight to be given to them should be treated with deference on appeal. There is no error in the principles that the motion judge applied, in the factors that he considered relevant or in his assessment of the evidence. Accordingly, there is no basis to interfere with his conclusion that the *nunc pro tunc* discretion should be exercised in the plaintiffs’ favour.

The motion judge in *IMAX* was also correct to exercise her *nunc pro tunc* discretion. The motion judge was intimately familiar with the progress of this file with which she had been dealing over several years. There is no basis on which to interfere with her assessment of the equities of the situation or of the plaintiffs’ diligence.

The conclusions of Côté J. in *Celestica* are agreed with.

**Cases Cited**

By Côté J.

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By Karakatsanis J.

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APPEALS from a judgment of the Ontario Court of Appeal (Doherty, Feldman, Cronk, Blair and Juriansz JJ.A.), 2014 ONCA 90, 370 D.L.R. (4th) 402, 118 O.R. (3d) 641, 314 O.A.C. 315, 50 C.P.C. (7th) 113, [2014] O.J. No. 419 (QL), 2014 CarswellOnt 1143 (WL Can.); setting aside a decision of Strathy J., 2012 ONSC 3637, 29 C.P.C. (7th) 225, [2012] O.J. No. 3072 (QL), 2012 CarswellOnt 8382 (WL Can.); affirming a decision of van Rensburg J., 2012 ONSC 4881, [2012] O.J. No. 4002 (QL), 2012 CarswellOnt 10391 (WL Can.); and affirming a decision of Perell J., 2012 ONSC 6083, 113 O.R. (3d) 264, [2012] O.J. No. 5083 (QL), 2012 CarswellOnt 13292 (WL Can.). The appeals in *CIBC* and *IMAX* are dismissed, McLachlin C.J. and Rothstein and Côté JJ. dissenting in part; the appeal in *Celestica* is allowed, Moldaver, Karakatsanis and Gascon JJ. dissenting.

*Sheila R. Block* and *James C. Tory*, for the appellant the Canadian Imperial Bank of Commerce.

*Benjamin Zarnett*, *David D. Conklin* and *Jonathan Edge*, for the appellants Gerald McCaughey et al.

*R. Paul Steep*, *Dana M. Peebles* and *Brandon Kain*, for the appellants IMAX Corporation et al.

*Nigel Campbell*, *Andrea Laing* and *Ryan A. Morris*, for the appellants Celestica Inc., Stephen W. Delaney and Anthony P. Puppi.

*Peter R. Jervis*, *Joel P. Rochon*, *Sakie Tambakos* and *Remissa Hirji*, for the respondents Howard Green and Anne Bell.

*A. Dimitri Lascaris*, *William V. Sasso*, *Michael Robb*, *Daniel E. H. Bach* and *Serge Kalloghlian*, for the respondents Marvin Neil Silver and Cliff Cohen.

*Kirk M. Baert* and *Celeste B. Poltak*, for the respondents the Trustees of the Millwright Regional Council of Ontario Pension Trust Fund, Nabil Berzi and Huacheng Xing.

Written submissions only by *Margaret L. Waddell* and *Denise Cooney*, for the intervener the Canadian Foundation for Advancement of Investor Rights.

*Bonnie Roberts Jones*, for the intervener the Shareholder Association for Research and Education.

*Anna Perschy* and *Amanda Heydon*, for the intervener the Ontario Securities Commission.

*Alan L. W. D’Silva*, *Daniel S. Murdoch* and *Sinziana R. Hennig*, for the intervener the Insurance Bureau of Canada.

The reasons of McLachlin C.J. and Rothstein and Côté JJ. were delivered by

Côté J. —

1. Introduction
2. These appeals are the result of competing interpretations of the interaction between two pieces of Ontario legislation: Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (“*OSA*”), and s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“*CPA*”).
3. Part XXIII.1 *OSA* provides, at s. 138.3, for a claim for secondary market misrepresentation. An action with respect to this statutory claim may be commenced only with leave of the court as prescribed by s. 138.8 and within the limitation period specified in s. 138.14, that is, three years after the date of the alleged misrepresentations in the instant cases.
4. As for s. 28 *CPA*, it operates to suspend the limitation period for “a cause of action asserted in a class proceeding” in favour of the members of a class “on the commencement of the class proceeding”.
5. At issue in the court below was the meaning of the word “asserted” in s. 28 *CPA*. Initially, a panel of three judges of the Court of Appeal ruled unanimously in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, that the statutory claim for secondary market misrepresentation cannot be “asserted” until a court has granted leave to do so. As a result, the court held that the *CPA* could not operate to suspend the limitation period for class members (including for the representative plaintiff) until leave was obtained.
6. The ruling in *Timminco* was handed down in the midst of three class action suits for secondary market misrepresentations in Ontario: *Canadian Imperial Bank of Commerce et al. v. Green and Bell* (“*CIBC*”); *IMAX Corp. et al. v. Silver and Cohen* (“*IMAX*”); and *Celestica Inc. et al. v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* (“*Celestica*”).
7. In each of those cases, the plaintiffs[[1]](#footnote-1) had pleaded a common law cause of action together with an intention to seek leave to assert a statutory claim under s. 138.3 *OSA* within the statutory limitation period, but leave was not granted before the limitation period expired. It should be noted however that in *CIBC*, a motion for leave was filedbefore the expiry of the limitation period, and that in *IMAX*, a motion for leave was both filed and argued before the limitation period expired. It is fair to say that *Timminco* came as a surprise to the litigants.
8. In the Superior Court, the motion judges considering the issue of leave to commence the statutory action found that they were bound by *Timminco*, although relief was granted in the form of a *nunc pro tunc* order in *IMAX*, and by applying the doctrine of special circumstances in *Celestica*. No relief was granted to the plaintiffs in *CIBC*. The appeals in the three cases were subsequently heard together by a five-judge panel of the Court of Appeal, which unanimously overruled the interpretation of *Timminco*: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402. The Court of Appeal found that a representative plaintiff who pleads an intention to seek leave in respect of a s. 138.3 claim within the limitation period has “asserted” a cause of action within the meaning of s. 28 *CPA* even before the filing of a motion seeking leave. As a result, the court held that in all three cases, the plaintiffs’ statutory claims for secondary market misrepresentation were not statute-barred.
9. In my opinion, pleading an intention to seek leave in respect of a s. 138.3 *OSA* claim in a class proceeding together with a common law cause of action amounts to neither the assertion of the statutory cause of action nor the commencement of a class proceeding for that statutory cause of action under s. 28 *CPA*. Not only is this interpretation consistent with the fundamental principles and structure of class proceedings in Canada, but it is also the only one that is consistent with the wording of the provisions and the ordinary and grammatical meaning of the words used as well as with the rigorous and exhaustive legislative balancing that produced Part XXIII.1 *OSA*.
10. Moreover, I am of the view that neither the doctrine of *nunc pro tunc* nor that of special circumstances can be of any avail to the plaintiffs in *CIBC* and *Celestica*. With regard to *IMAX*, relief should be granted to the plaintiffs in the form of a *nunc pro tunc* order, but only in relation to the defendants who were parties to the original statement of claim: IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.
11. Accordingly, I would allow the appeals in *CIBC* except in respect of the Court of Appeal’s conclusion that five of the seven issues proposed by the plaintiffs should be certified. I would allow the appeal and issue a partial *nunc pro tunc* order in *IMAX*, and I would allow the appeal in *Celestica*.
12. Legislation
    1. Ontario Securities Act
13. Part XXIII.1 *OSA* sets out a scheme of civil liability for secondary securities market misrepresentation in Ontario. Section 138.3 creates a statutory cause of action for a misrepresentation made in a document or a public oral statement, or a failure to make timely disclosure, against a range of parties potentially implicated in the misrepresentation. This statutory cause of action accrues to those who acquired or disposed of the issuer’s security between the time of the misrepresentation and that of its correction. Explicitly not required for a finding of liability is proof of a plaintiff’s reliance on the misrepresentation, which is essential to a common law cause of action based on misrepresentation. Furthermore, as s. 138.13 makes plain, this statutory right of action is in addition to any other rights of action the plaintiff may have.
14. Two components of this scheme are of particular relevance to these appeals.
15. First, s. 138.8 imposes a requirement that leave be granted before the statutory action based on a secondary market misrepresentation may be commenced:

**138.8** (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

* + - * 1. the action is being brought in good faith; and
        2. there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

1. Second, s. 138.14 imposes a limitation period for statutory actions based on s. 138.3:

**138.14** No action shall be commenced under section 138.3,

* + - * 1. in the case of misrepresentation in a document, later than the earlier of,

three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

1. Section 138.14 thus requires that the statutory action be commenced within the earlier of three years after the date of the misrepresentation and six months after a news release discloses that leave has been granted to commence a statutory action in Ontario, or under parallel legislation elsewhere in Canada. It should be noted that the scheme contains no internal mechanism for suspending the limitation period before or pending the granting of leave.
   1. Class Proceedings Act
2. Section 28 *CPA* provides for the suspension of any limitation period in a class proceeding as follows:

**28.** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

* + - * 1. the member opts out of the class proceeding;
        2. an amendment that has the effect of excluding the member from the class is made to the certification order;
        3. a decertification order is made under section 10;
        4. the class proceeding is dismissed without an adjudication on the merits;
        5. the class proceeding is abandoned or discontinued with the approval of the court; or
        6. the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
      1. Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.
  1. Interaction Between Part XXIII.1 OSA and Section 28 CPA

1. The primary issue in these appeals is the interaction of the leave requirement in Part XXIII.1 *OSA* with the suspension of the limitation period for a class proceeding under s. 28 *CPA*. Typically, where leave is not required, the operation of s. 28 *CPA* is straightforward: the commencement of a class proceeding would coincide with a statement of claim asserting a cause of action to be certified as a class action (*Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (C.A.), at para. 21).
2. Where leave is required, however, a statutory action cannot be commenced until leave is granted by the court. The issue in the cases at bar is whether s. 28 *CPA* operates to suspend the limitation period applicable to a statutory cause of action under s. 138.3 *OSA* at the time when an intention to seek leave under s. 138.8 *OSA* is pleaded in a class proceeding for a common law misrepresentation claim. This question has plagued the Ontario courts.
3. Judicial History and Facts
   1. Timminco
4. These appeals trace back to the Court of Appeal’s ruling in *Timminco*. The appeal in that case concerned misrepresentations that had allegedly occurred between March and November 2008. The plaintiff had initiated a class proceeding in the Ontario Superior Court in which he asserted a common law cause of action for secondary market misrepresentation. An intention to seek leave for a statutory claim under s. 138.3 *OSA* was also stated in the pleadings, but leave had not been sought as of February 2011. With the statutory claim in jeopardy because of the looming limitation period, the plaintiff moved, in March 2011, for an order declaring that the limitation period was suspended by reason of s. 28 *CPA*. The motion judge granted the order (2011 ONSC 8024), which was then appealed.
5. This table illustrates the timeline of the events in *Timminco*:

|  |  |
| --- | --- |
| Alleged misrepresentations | March 17 to November 11, 2008 |
| Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and an intent to seek leave for s. 138.3 statutory action | May 14, 2009 |
| Plaintiff requests case conference re limitation period | End of February, 2011 |
| Case conference | March 10, 2011 |
| Notice of motion filed seeking declaration that s. 138.14 limitation period is suspended and “conditional leave” to commence s. 138.3 action | March 14, 2011 |
| **Limitation period expires for statutory action** | **March 17 to November 11, 2011** |
| Leave motion heard | March 25, 2011 |
| Declaration of suspension granted by motion judge | March 31, 2011 |

1. On February 16, 2012, Goudge J.A. held that under s. 28 *CPA*, a cause of action cannot be “asserted” until it can be enforced, and that in the case of a cause of action under Part XXIII.1 *OSA*, this is only possible after leave of the court is obtained. Goudge J.A. stressed that this interpretation of the provisions was the only one to produce textual coherence while also being consistent with the purposes of both the *OSA* and the *CPA*. To interpret “asserted” such that it includes a mere mention of an intention to seek leave, he concluded, would not be consistent with the ordinary meaning of the word and would produce results that the legislature could not have intended. For example, the limitation period would be suspended for the representative plaintiff in a class proceeding, but not for the same plaintiff in an individual proceeding. As a result, Goudge J.A. ruled that leave must be granted before the Part XXIII.1 *OSA* statutory cause of action can be asserted within the meaning of s. 28 *CPA*, and that it is only then that the limitation period is suspended in favour of the representative plaintiff and the other class members.
   1. Post-Timminco Decisions of the Ontario Superior Court
2. The decision in *Timminco* seems to have taken the Ontario Bar by surprise, throwing a wrench in the works of three proceedings that were then pending before the Superior Court and are now being appealed to this Court. In each of these cases, the motion judge found that he or she was bound by *Timminco*, but the three judges then diverged entirely on whether relief was available to the plaintiffs either by way of an order made *nunc pro tunc* (a Latin expression meaning “now for then” that is used to indicate that an act has retroactive legal effect) or by application of the doctrine of special circumstances.
   * 1. *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225
        1. Facts and Procedural Timeline
3. The plaintiffs allege that, between May 31 and December 6, 2007, the defendants failed to amply record and disclose the extent of CIBC’s exposure to and position in the United States residential mortgage market as the subprime mortgage crisis unfolded. On July 22, 2008, the plaintiffs filed a statement of claim which contained a claim for a common law cause of action for misrepresentations and indicated that they intended to seek leave to proceed with the statutory action. After a series of case conferences and amendments to the statement of claim, the plaintiffs filed a motion seeking leave for the statutory claim on January 21, 2010 in which they stated that leave would be sought *nunc pro tunc* if the limitation period were to expire. Discussions between counsel to schedule the leave and certification motions continued until it was settled after a case conference in March 2010 that the motions would be heard a year later. On January 15, 2011, after the plaintiffs had completed their record in support of their motions, it was agreed that the original hearing dates were impractical, and the hearing was accordingly rescheduled for February 2012.
4. The ruling in *Timminco* was released on the penultimate day of the original hearing of the motions for leave and for certification in *CIBC*. As the defendants put it, the ruling was a “thunderbolt” in a case in which the limitation period had never been at issue (*CIBC*, at para. 475). Following *Timminco*, counsel made additional representations on the limitation period issue, and another hearing was held on April 5, 2012.
5. This table illustrates the timeline of the events in *CIBC*:

|  |  |
| --- | --- |
| Alleged misrepresentations | May 31 to December 6, 2007 |
| Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and intent to seek leave for s. 138.3 statutory action | July 22, 2008 |
| Notice of motion seeking leave under s. 138.8 | January 21, 2010 |
| Case conference | March 17, 2010 |
| **Limitation period expires for statutory action** | **May 31 to December 6, 2010** |
| Plaintiffs’ record completed | January 15, 2011 |
| Leave and certification motions heard | February 9, 10, 13-17; April 5, 2012 |
| *Timminco* released | February 16, 2012 |
| Hearing on limitation period issue | April 5, 2012 |

* + - 1. Disposition

1. In his exhaustive ruling, Strathy J. (as he then was) considered the requirements for granting leave under s. 138.8 *OSA*: (1) that the action is being brought in good faith; and (2) that there is a reasonable possibility of success. Good faith, he held, requires an honest and reasonable belief that the claim has merit, and a genuine intent and capacity to pursue it. He found that the plaintiffs had met this requirement and that this had not been seriously challenged by the defendants. As to the reasonable possibility of success requirement, Strathy J. stated that it is a “relatively low threshold” (para. 373) and that the question to ask is “whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs’ case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success” (para. 374). Had he applied this standard, Strathy J. would have granted the leave motion, but he found that he was bound by *Timminco*, as he saw no way to distinguish it from the case before him.
2. Strathy J. went on to rule that he did not have jurisdiction to extend the limitation period either by issuing an order *nunc pro tunc* or by applying the doctrine of special circumstances. On the issue of *nunc pro tunc*, Strathy J. stated that the court has inherent jurisdiction to correct a slip or an oversight in the name of justice, but added that this case does not “strictly speaking” involve a slip, since the plaintiffs had recognized the possibility of the limitation period expiring and had assumed that their motion for leave would result in a *nunc pro tunc* order (para. 511). As regards both *nunc pro tunc* and the doctrine of special circumstances, Strathy J. found that he did not have jurisdiction, because (1) Part XXIII.1 *OSA* is designed to be a comprehensive code under which a limitation period begins to run upon the occurrence of objective events; (2) nothing in the legislation or in the judicial interpretation thereof suggests that the court has jurisdiction to make such an order; and (3) the general philosophy underlying the law of limitations in Ontario is one of clearly defined periods that are not subject to judge-made exceptions. As a result, he held that the limitation period for the plaintiffs’ statutory action had expired and that no relief was available to them.
   * 1. *Silver v. IMAX*, 2012 ONSC 4881
        1. Facts and Procedural Timeline
3. The plaintiffs allege that, between February 17 and March 9, 2006, the defendants made misrepresentations overstating IMAX Corp.’s revenue and net income for 2005. In their statement of claim, issued on September 20, 2006, the plaintiffs asserted a common law cause of action for misrepresentations and an intention to seek leave for a claim under s. 138.3 *OSA*. They served their motion for leave on November 28, 2006, and the motion record in February 2007. A hearing was originally scheduled for December 2007. However, delays ensued as the record became, in the motion judge’s words, “complex and voluminous” (para. 9 (CanLII)). The parties requested that the leave motion be heard at the same time as the motion for certification and a motion under rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike certain common law causes of action from the statement of claim. Ultimately, the hearing on the three motions was concluded on December 19, 2008, though an additional attendance and further written submissions followed on the certification and rule 21 motions. It should be noted that as at December 19, 2008, 79 days remained of the three-year limitation period under s. 138.14.
4. The judgment remained under reserve for nearly a year before van Rensburg J. (as she then was) granted leave in respect of the statutory cause of action on December 14, 2009. During that period, the motion judge had held a telephone conference in the course of which she raised the maxim *actus curiae* *neminem gravabit —* an act of the court will prejudice no one — in relation to the limitation period, and requested submissions from the parties, who agreed that the limitation period should be suspended while the decision was under reserve.
5. After the granting of leave, it took another two years, until December 12, 2011, before the plaintiffs filed a fresh statement of claim in which they pleaded the statutory cause of action and added the following individuals as defendants: Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble. The defendants filed a statement of defence on February 6, 2012. This statement was amended on February 16, 2012, the day of *Timminco*’s release, to assert that the limitation period applicable to the plaintiffs’ statutory right of action had expired.
6. This table illustrates the timeline of the events in *IMAX*:

|  |  |
| --- | --- |
| Alleged misrepresentations | February 17 to March 9, 2006 |
| Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and intent to seek leave for s. 138.3 statutory action | September 20, 2006 |
| Notice of motion seeking leave under s. 138.8 | November 28, 2006 |
| Leave and certification motions heard | December 15-19, 2008 |
| **Limitation period expires for statutory action** | **February 17 to March 9, 2009** |
| Leave granted and class action certified | December 14, 2009 (the order was backdated to December 19, 2008 on August 27, 2012) |
| Fresh statement of claim pleading statutory cause of action and adding new defendants filed | December 12, 2011 |
| *Timminco* released | February 16, 2012 |
| Leave order amended *nunc pro tunc*: leave effective December 19, 2008 | August 27, 2012 |

* + - 1. Disposition

1. In her decision to amend the leave order, van Rensburg J., too, found that she was bound by *Timminco*, but she parted company with Strathy J. by finding that she had an inherent jurisdiction to grant the motion for leave *nunc pro tunc*. She wrote that absent an explicit prohibition of a *nunc pro tunc* order, a statute must be understood to contemplate the possibility of such an order. Furthermore, she drew attention to the inclusion of s. 138.14 in Sch. B to the *Limitations Act, 2002*, S.O. 2002, c. 24, which according to her lists provisions in respect of which common law doctrines such as *nunc pro tunc* continue to apply. On her reading of the jurisprudence on *nunc pro tunc* orders, the case before her was clearly one in which the court has the ability to ensure that a plaintiff’s rights will not be arbitrarily affected by matters outside his or her control, such as the court’s schedule. Van Rensburg J. added that limitation periods are not meant to foreclose causes of action that have been “actively and vigorously pursued” (para. 85). She granted the plaintiffs leave *nunc pro tunc* effective December 19, 2008, the date argument was concluded on the leave motion, and authorized the plaintiffs to amend their statement of claim to assert the statutory claim, except against two of the proposed defendants, Mr. Utay and Mr. Fuchs. Van Rensburg J. excluded them from the *nunc pro tunc* order as a result of her finding in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.), at para. 24, that the plaintiffs had no reasonable possibility of success against them.
2. Additionally, van Rensburg J. held that the doctrine of special circumstances was not applicable in this case. In her estimation, the doctrine is meant to allow amendments to an existing statement of claim which add new causes of action where the limitation period has been suspended by the commencement of the action, whereas the plaintiffs in the case before her were seeking to amend their statement of claim to add a claim which stemmed from the same facts but required leave. She found that the doctrine was “analytically irrelevant”, since it did not “fit within the framework of a limitation period such as that provided for in s. 138.14” (para. 77).
   * 1. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264
        1. Facts and Procedural Timeline
3. The defendant Celestica Inc. is an electronics manufacturer incorporated in Ontario that trades shares on both the Toronto Stock Exchange (“TSX”) and the New York Stock Exchange. The plaintiffs Trustees of the Millwright Regional Council of Ontario Pension Trust Fund (“Millwright Trustees”) purchased Celestica shares on both exchanges, whereas the plaintiffs Nabil Berzi and Huacheng Xing purchased Celestica shares only on the TSX. The alleged misrepresentations relate to the progress and success of a $225 to $275 million restructuring of the company that took place between January 27, 2005 and January 30, 2007.
4. The Millwright Trustees launched a class action in the United States on March 2, 2007. On August 20, 2007, Mr. Xing filed a statement of claim in Ontario for a class proceeding concerning a common law cause of action for misrepresentation in which he pleaded an intention to seek leave in respect of a statutory claim under s. 138.3 *OSA*; Mr. Berzi did the same on August 27, 2008. The Millwright Trustees’ U.S. class action was dismissed in District Court on October 14, 2010 after a pivotal ruling in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to the effect that “foreign plaintiffs who purchased securities on foreign exchanges where there was no trading of those securities on any domestic U.S. exchange could no longer pursue actions under the U.S. *Securities and Exchange Act of 1934*, 15 U.S.C. § 78a” (*Celestica*, at para. 33). In response, the Millwright Trustees filed a statement of claim for a class proceeding concerning a common law cause of action for misrepresentation in Ontario on April 8, 2011, alleging the same misrepresentations in Celestica’s public disclosure documents as in their U.S. case. On December 29, 2011, the U.S. Second Circuit Court of Appeals unanimously reversed the dismissal of the Millwright Trustees’ action and remanded that action for further proceedings. At that time, the pending actions of Mr. Xing and Mr. Berzi in Ontario remained inactive.
5. The release of *Timminco* on February 16, 2012 spurred the plaintiffs into action on the Canadian front. The Millwright Trustees filed a motion for leave under s. 138.8 *OSA* on February 24, 2012. Perell J. then ordered the consolidation of the Millwright Trustees, Xing and Berzi cases on April 13, 2012. A motion to strike all claims as statute-barred was heard in October of that year.
6. This table illustrates the timeline of the events in *Celestica*:

|  |  |
| --- | --- |
| Alleged misrepresentations | January 27, 2005 to January 30, 2007 |
| Millwright Trustees file class action in U.S. | March 2, 2007 |
| Xing files pursuant to the *CPA* a statement of claim for common law cause of action and pleading intent to seek leave for s. 138.3 statutory action | August 20, 2007 |
| Defendants in U.S. class action bring motion to strike | March 17, 2008 |
| Berzi files statement of claim for common law cause of action and pleading intent to seek leave for s. 138.3 action | August 27, 2008 |
| **Limitation period expires for statutory action** | **January 27, 2008 to January 30, 2010** |
| U.S. Supreme Court decision in *Morrison* | June 24, 2010 |
| District Court dismisses Millwright Trustees’ U.S. class proceeding | October 14, 2010 |
| Millwright Trustees file statement of claim for common law cause of action | April 8, 2011 |
| U.S. Court of Appeals reverses dismissal of U.S. class action | December 29, 2011 |
| *Timminco* released | February 16, 2012 |
| Notice of motion seeking leave under s. 138.8 *OSA* filed by Millwright Trustees | February 24, 2012 |
| Xing, Berzi and Millwright Trustees actions consolidated | April 13, 2012 |

* + - 1. Disposition

1. Perell J. ruled that as a result of *Timminco*, the statutory claim was time-barred, but he found that the doctrine of special circumstances could be applied so as to grant leave *nunc pro tunc* were it necessary to do so. Broadly, in his view, the doctrine is not limited to the addition of new causes of action, as van Rensburg J. had suggested, but is, rather, a discretionary doctrine that can be adapted to the factual circumstances of a particular case. In addition, he wrote, the doctrine of special circumstances is a common law doctrine which is applicable to the s. 138.14 *OSA* limitation period as a result of that provision’s inclusion in Sch. B to the *Limitations Act, 2002*. Perell J. then held that the following special circumstances existed in the case before him:

. . . (1) the defendants have known of the factual allegations against them since 2007, including the Part XXIII.1 claims; (2) the defendants have had a full opportunity to investigate the claims against them; (3) there is no prejudice to the defendants; (4) the law has changed unexpectedly — twice — each time to the plaintiffs’ and class’ detriment; (5) the plaintiffs’ Part XXIII.1 claims do not raise new factual allegations; and (6) the defendants did not raise limitation periods in any of the class proceedings until now. [para. 145]

1. Perell J. therefore ruled that these special circumstances would justify granting leave for the statutory action *nunc pro tunc* were it to be granted at a later date. Leave was eventually granted to the plaintiffs with respect to some of the alleged misrepresentations a year and a half later: 2014 ONSC 1057, 49 C.P.C. (7th) 12.
   1. Ontario Court of Appeal Decision (2014 ONCA 90)
2. The Ontario Court of Appeal convened a panel of five judges to consider the appeals from the decisions on the motions in the three cases and to determine whether *Timminco* should be overturned.
3. Feldman J.A., writing for a unanimous court, held that for the purposes of s. 28 *CPA*, asserting a claim should be understood tomean “to invoke a legal right” rather than solely to “enforce” one, particularly considering that any ambiguity in interpreting a limitation provision must be resolved in favour of the plaintiff (paras. 45-47). The court found that this interpretation would not produce an indefinite suspension, which was a concern Goudge J.A. had raised in *Timminco*, because the diligence of the defendants and the class action case management judge would ensure that stalled proceedings are dismissed. Feldman J.A. reasoned that although this reading of s. 28 *CPA* produces the “unusual, if not anomalous effect” (para. 51) that the limitation period will be suspended if a s. 138.3 statutory claim is asserted in a class proceeding, but not if it is asserted in an individual action, this effect followed from a statutory scheme that was optimized for class proceedings. Feldman J.A. also expressed concern for judicial economy, worrying that all members of a class would be required to start their own actions while waiting to see if leave would be granted in the class proceeding. Overall, the Court of Appeal ruled that its new interpretation was consistent with the purposes of the *CPA* and the *OSA*, and of limitation periods generally.
4. As a result of the Court of Appeal’s conclusion that *Timminco* had been wrongly decided, the statutory actions in *CIBC*, *IMAX* and *Celestica* were each held not to be statute-barred. Feldman J.A. also upheld the interpretation of the “reasonable possibility” threshold for granting leave under s. 138.8 *OSA* given by Strathy J. in *CIBC*.
   1. Legislative Amendment
5. Following the Court of Appeal’s decision in the cases at bar, the Ontario legislature amended s. 138.14 *OSA* to include the following subs. (2):

(2) A limitation period established by subsection (1) in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court and resumes running on the date,

* + - * 1. the court grants leave or dismisses the motion and,

all appeals have been exhausted, or

the time for an appeal has expired without an appeal being filed; or

* + - * 1. the motion is abandoned or discontinued.

1. Issues
2. There are two issues common to each of these appeals:

Does s. 28 *CPA* operate to suspend the limitation period applicable to a statutory claim under s. 138.3 *OSA* at the time when an intention to seek leave under s. 138.8 *OSA* is pleaded in a proposed class proceeding alleging a common law misrepresentation claim?

If not, can the plaintiffs obtain relief in the form of an order granting leave *nunc pro tunc* or pursuant to the doctrine of special circumstances?

1. In addition, there are two issues raised only by the defendants in *CIBC* which I will discuss at the end of these reasons:

Was the threshold test for leave under s. 138.8 *OSA* properly interpreted and applied?

Can a class proceeding based on a common law cause of action be the preferable procedure for resolving a secondary market misrepresentation claim?

1. Analysis
   1. Interpretation of the Legislation
2. In *Timminco* and the cases at bar, the Ontario Court of Appeal advanced two different interpretations of s. 28 *CPA*. According to its decision in the cases at bar, pleading the relevant facts and an intention to seek leave for a statutory cause of action under s. 138.3 *OSA* is sufficient to trigger s. 28 *CPA* and suspend the limitation period for all class members, including the representative plaintiff. According to *Timminco*, leave must be granted under s. 138.8 *OSA* before the limitation period can be suspended under s. 28 *CPA*. Neither of these interpretations matches the subsequent amendment to s. 138.14 *OSA*, which provides that the limitation period for a claimant is suspended upon the filing of a notice of motion seeking leave under s. 138.8.
   * 1. Ordinary and Grammatical Meaning of the Words
3. In my opinion, there is no ambiguity in the interaction of s. 28 *CPA* with Part XXIII.1 *OSA*. The ordinary and grammatical meaning of the words clearly confirms the ruling in *Timminco* regarding the aforementioned provisions. Furthermore, an analysis of the legislative context does not support the Court of Appeal’s decision in the cases at bar. Feldman J.A.’sinterpretation of s. 28 *CPA* goes against the very purpose of s. 138.14 *OSA*, namely to impose an additional mechanism designed to screen out strike suits as early as possible in the litigation process.
4. Section 28 *CPA* requires “a cause of action asserted” in order for the limitation period to be suspended in favour of the class members “on the commencement of the class proceeding”. Section 138.8(1) *OSA* is clear, however: “No action may be commenced under s. 138.3 without leave of the court . . . .” On its face, the timing is clear. Unless leave is granted, a statutory action may not be commenced under Part XXIII.1 *OSA*, and it is not until the action commences that a limitation period can be suspended under s. 28 *CPA*. In short, I am of the view that, under s. 138.8(1) *OSA*, a statutory action commenced without having first obtained leave is a nullity and a statutory claim under Part XXIII.1 *OSA* cannot be validly commenced without leave of the court. Therefore, the limitation period cannot be suspended in favour of the class members under s. 28 *CPA* before leave is granted.
5. The Court of Appeal’s ruling in the instant cases, if accepted,would create unnecessary inconsistencies between the two pieces of legislation and within the *OSA* itself. The result of Feldman J.A.’s interpretation is that a plaintiff proceeding by way of a class action would have more rights than a plaintiff suing in his or her individual capacity. Yet class actions are merely procedural vehicles, designed to extend the substantive rights of the representative plaintiff to the entire class, not to create substantive rights for the class which an individual plaintiff would not otherwise enjoy since they do not exist.
6. It is also quite troubling that the effect of the Court of Appeal’s ruling in the instant cases is thata class proceeding asserting a statutory cause of action can commence before a judge has granted the initial leave to allow the statutory action itself to commence. This is plainly putting the cart before the horse: a class proceeding cannot commence before the action itself commences.
7. I also agree with the interpretation of the meaning of the word “assert” in s. 28 *CPA* proposed by Goudge J.A. in *Timminco*. The plaintiffs argue that to trigger the application of s. 28 *CPA*, it is sufficient to merely plead the material facts of the claim which are common to the statutory and common law causes of action together with an intention to seek leave under s. 138.8 *OSA*.Although it is true that the definition of “cause of action” is the set of facts that give rise to a legal right of action, I am of the view that the *assertion* of a cause of action must be premised on the existence of a “right of action”. In this sense, the meaning of the word “assert”, plucked and isolated from the context of the provision, is a red herring. In *Méthot v. Montreal Transportation Commission*, [1972] S.C.R. 387, the relevant limitation provision required that a written notice be provided before an action was commenced. This Court held that “the notice which is required is not simply a procedural step. It is part of the very formation of the right of action” (p. 396). The same reasoning applies here with respect to the leave requirement, and I do not share Karakatsanis J.’s view that that case dealt with a different issue. Given the clear wording of s. 138.3 *OSA*, pleading a factual matrix and an intention to seek leave under s. 138.8 *OSA* cannot amount to the assertion of the statutory cause of action.
8. Furthermore, as can be seen from the legislative history, the original draft of what is now s. 28 *CPA* read “a cause of action advanced in a proceeding” before it was later changed to “a cause of action asserted in a class proceeding” in the final piece of legislation: *Report of the Attorney General’s Advisory Committee on Class Action Reform* (1990), at p. 47. In my opinion, this change is evidence that the legislature intended “assert” to represent a more forceful concept than a mere mention or advancement of a cause of action, since the change would otherwise have been unnecessary.
9. Viewing these provisions together, there is no ambiguity to speak of in their interaction. Section 28 *CPA* does not operate to suspend the limitation period applicable to a cause of action until the commencement of a class proceeding in which the cause of action is asserted. This commencement cannot occur under Part XXIII.1 *OSA* until leave is granted. In this sense, the leave requirement of s. 138.8 *OSA* is a hurdle which must be cleared before s. 28 *CPA* can operate to suspend the limitation period. The necessity of the leave requirement is equally applicable for an individual plaintiff and for a representative plaintiff in a class proceeding. However, in the latter case, once leave has been granted to one plaintiff, the members of the group benefit from it and the limitation period is suspended for all.
10. Finally, considering the entire context, I am also of the view that pleading an intention to seek leave under s. 138.8 *OSA* cannot have the effect of suspending the limitation period prior to the time when leave is granted by the court. At that time, and only at that time, the representative plaintiff will have the benefit of suspension of the limitation period, and a class proceeding in respect of the statutory claim may be commenced*.* 
    * 1. Legislative Purpose and Structure
11. Even if we were to assume that there is an ambiguity in the wording of the relevant provisions — which there is not — the legislative purpose and structure of those provisions would nonetheless support my conclusion. In other words, “the scheme of the Act, the object of the Act, and the intention of Parliament” are consistent with the ordinary and grammatical meaning of the words, which is another reason not to depart from that meaning: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. To hold that s. 28 *CPA* operates to suspend a limitation period for a statutory claim under s. 138.3 *OSA* before leave is obtained would be to circumvent the carefully calibrated purposive balance struck by the limits to the statutory action provided for in Part XXIII.1 *OSA*. Such an interpretation would render s. 138.8 *OSA* ineffective, since the suspension of the limitation period, although not permanent, could nevertheless delay the decision on the merits of leave for several months or even for years, as the cases at bar demonstrate.
12. In these appeals, the legislative context has three components that must be interwoven as seamlessly as possible: the purposes attributed to limitation periods generally; the *CPA*, which gives structure and form to class action proceedings; and Part XXIII.1 *OSA*, enacted subsequently to the *CPA*, which lays out the scheme for the statutory claim for secondary market misrepresentation. The goal of interpretation is to maximize the coherence of these three components to the extent possible within the range of ordinary and grammatical meaning of the text.
    * + 1. Limitation Periods
13. This Court has generally recognized that limitation periods have three purposes known as the certainty, evidentiary and diligence rationales: *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 64-67, per McLachlin J.; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-31, per La Forest J. Limitation periods serve “(1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion”: P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123.
14. Clearly, it is desirable that litigation be accurate and certain, given that the passage of time dims memories and erodes evidence, and also that the risk of error grows as an adjudicator is further removed from the cause of action. Furthermore, after a certain time, possible defendants may be unaware of the need to preserve potentially enlightening or even exonerating pieces of evidence. Finally, it is appropriate to expect plaintiffs to assert their claims diligently and to be cognizant of their circumstances and of the extent of their control over them. Modern limitations legislation is therefore based on a recognition that limitation periods, in order to be effective, need to be final. This is the other side of the coin, the practical consequence of limitation periods that can make the application of a limitations statute seem harsh: *Novak*, at para. 8,per Iacobucci and Major JJ., dissenting.
    * + 1. Class Proceedings Act
15. The Ontario Law Reform Commission identified three benefits of the class action procedure: judicial economy, increased access to the courts and modification of the behaviour of potential wrongdoers (*Report on Class Actions* (1982), vol. I, at pp. 117-46). Where there are multiple claims, the number of actions can be reduced via the consolidating mechanism of class proceedings. The aggregation of the class helps overcome social, psychological and economic barriers to redress. The possibility of a class action discourages unjust enrichment and encourages an internalization of costs. Finally, class proceedings extend the substantive rights of a representative plaintiff to the class in order to make the legal system more efficient, more accessible and more effective.
16. The purpose of s. 28 *CPA* is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, 92 C.P.C. (6th) 301, at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108, 288 O.A.C. 355, at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.
17. In *Logan v. Canada (Minister of Health)*, 2003 CanLII 20308 (Ont. S.C.J.), it was these goals which were held to justify a reading of s. 28 *CPA* to the effect that the commencement of a class proceeding is not delayed until the time of certification: paras. 14-24, aff’d *Logan* (Ont. C.A.), at paras. 21 and 24. *Logan* therefore confirms that the time of commencement precedes that of certification.
18. Most importantly, as this Court has repeatedly ruled, a class action provision cannot operate to create or modify substantive legal rights: *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 52; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 111; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 105-8. This principle forms a vital foundation for all class proceedings in Canada. Limitation periods and rights of action are such substantive legal rights.
    * + 1. Part XXIII.1 OSA
19. Part XXIII.1 *OSA* represents a carefully calibrated statutory head of liability for secondary market misrepresentation. Section 1.1 *OSA* provides that the *OSA*’s overall purposes are twofold: to protect investors “from unfair, improper or fraudulent practices”, but also to guarantee fairness, efficiency and confidence in capital markets. Part XXIII.1 was developed progressively through a series of reports and other documents which ultimately culminated in the adoption of the statutory liability scheme in 2002. Three of the documents are vital to this appeal: (i) Toronto Stock Exchange Committee on Corporate Disclosure (the “Allen Committee”), *Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997) (the “*Allen Committee Report*”); (ii) Ontario Securities Commission, “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market — Notice and Request for Comment” (1998), 21 OSCB 3335 and 3367 (the “1998 Draft Legislation”); and (iii) Canadian Securities Administrators (“CSA”), “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of ‘Material Fact’ and ‘Material Change’”, CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383.
20. In its report, the Allen Committee identified the failure by public corporations to comply with continuous disclosure requirements as a problem from the perspective both of actual incidents and of public perception. It concluded that the regulatory sanctions available at the time were an “inadequate deterrent” (conclusion (ii)) and that the common law remedies available to aggrieved investors for misleading disclosure in secondary trading markets were so onerous that they were “as a practical matter largely academic” (conclusion (iii)): p. vii.
21. As a solution, the Allen Committee proposed a statutory scheme for secondary market misrepresentation liability in which it would not be necessary to prove reliance on the misrepresentation. Its recommendations were informed by two goals — deterrence of corporate non-disclosure and compensation for wronged investors — related to the identified problem, but it is important to recognize that the Committee knowingly struck a precise balance between these goals. Its report concluded as follows at p. vii:

(v) Faced with the task of designing recommendations from the perspective of strengthening deterrence (conclusion (ii)) or creating a route to meaningful compensation of injured investors (conclusion (iii)), the Committee has adopted improved deterrence as its goal in the belief that effective deterrence will logically reduce the need for investor compensation.

This understanding would later be reiterated in CSA Notice 53-302, which includes the following comment: “The CSA accept that deterrence should outweigh compensation but, at the same time, any deterrent effect requires a plausible element of compensation” (p. 7391, fn. 23). In order to achieve this balance, the Committee proposed the establishment of a series of limits on damages and liability, as well as the creation of express statutory defences. To give priority to compensation would have led to a different set of recommendations and limits, as can be seen from the dissenting statement of Philip Anisman in the *Allen Committee Report*: pp. 85-124.

1. The limitation period in s. 138.14 *OSA*, which was added by the CSA in 2000 through proposed amendments to legislation in response to the 1998 Draft Legislation (see App. C of the CSA Notice 53-302 (the “2000 Draft Legislation”), at p. 7429), was originally modeled upon the limitation period for general civil liability in s. 138 *OSA*. It was expressly designed to run without regard for the “plaintiff’s knowledge of the facts giving rise to the cause of action”: 1998 Draft Legislation, at p. 3384.
2. The leave requirement for actions under Part XXIII.1 *OSA* was developed by the CSA and reported in CSA Notice 53-302. This requirement arose out of a concern for the potential of U.S.-style “strike suits” in Canada. Strike suits are meritless actions launched in order to coerce targeted defendants into unjust settlements. The Allen Committee had concluded that the legal environment in Canada was sufficiently different from the United States to prevent a flood of unmeritorious claims: pp. 26-27.
3. The CSA nonetheless concluded that the depth of public concern and some examples of “entrepreneurial litigation” in Canada justified further measures to prevent strike suits: CSA Notice 53-302, at p. 7389. It proposed a screening mechanism that would require plaintiffs to obtain leave in order to assert a statutory cause of action under the *OSA* by satisfying the court that the action was being brought in good faith and had a reasonable possibility of success. The overriding policy concern was for long-term shareholders, who are unfairly affected by the volatility of share prices that results from spurious claims. In setting out the nature and the components of this mechanism, the CSA stressed the importance of screening out unmeritorious actions *as early as possible* in the litigation process:

The CSA have also introduced in the 2000 Draft Legislation a new provision designed to screen out, as early as possible in the litigation process, unmeritorious actions (section 7 of the 2000 Draft Legislation). This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit.

The new screening provision would require a plaintiff to obtain leave of the court in order to bring an action. Before granting leave, the court must be satisfied that the action (i) is being brought in good faith and (ii) has a reasonable prospect of success at trial.

This screening mechanism, coupled with the new provision described earlier that would require court approval of a settlement agreement are procedural protections that supplement the “loser pays” cost and proportionate liability provisions retained from the 1998 Draft Legislation. Taken together, these elements of the 2000 Draft Legislation should ensure that any exercise of the statutory right of action occurs in a litigation environment different from that in the United States and less conducive to coercive strike suits. [Emphasis added; footnotes omitted; p. 7390.]

1. In sum, Part XXIII.1 *OSA* strikes a delicate balance between various market participants. The interests of potential plaintiffs and defendants and of affected long-term shareholders have been weighed conscientiously and deliberately in light of a desired precise balance between deterrence and compensation. The legislative history reveals a long, meticulous development of this balance, one that found expression in all the limits built into the scheme.
   * + 1. Analysis
2. In my opinion, a careful consideration of the context of limitation periods, the *CPA* and Part XXIII.1 *OSA* reveals that the Court of Appeal’s decision in the instant cases is not only at odds with the ordinary and grammatical meaning of the words of the provisions at issue but also broadly undermines the legislative structures and the purposes at stake in these appeals.
3. It is particularly troubling to see the anomalous result produced by the decision of the Court of Appeal in these cases, namely that a plaintiff could improve his or her position by filing a class proceeding asserting the Part XXIII.1 *OSA* cause of action, thereby causing the limitation period to be suspended by s. 28 *CPA* where it would not otherwise have been possible to do so had the same plaintiff filed an individual lawsuit. The Court of Appeal justified this result on the basis that Part XXIII.1 *OSA* is optimized for class proceedings, but did so in quoting a passage from the *Allen Committee Report* which merely states that combining class actions with the statutory scheme would provide ample protection against extortionate actions. I accept that Part XXIII.1 *OSA* is optimized for class proceedings in the sense that the statutory action that Part creates does not require proof that the plaintiff relied on the misrepresentation. However, this should not be used to undermine the strict limitation period provided for in s. 138.14 *OSA*, which is not supposed to be suspended until leave is granted.
4. The Court of Appeal wrote in the cases at bar that it was concerned about judicial economy and access to justice; it noted that the ruling in *Timminco* would force potential class members to initiate their own individual actions in order to protect their rights before leave is obtained in the class proceeding. Although I accept the importance of judicial economy as articulated by the Court of Appeal in *Logan* and *Coulson*, the rationale for those decisions cannot extend beyond the fundamental limits of class proceedings.
5. As I mentioned above, class actions are procedural mechanisms which can only *extend* the substantive rights of the representative plaintiff to the other class members. The only way s. 28 *CPA* can protect the other members is by affording them the substantive protection already enjoyed by the representative plaintiff. Before there is a right of action or a suspension of the limitation period flowing from the operation of the statutory scheme itself, the *CPA* cannot be interpreted in such a way as to create either one.
6. Karakatsanis J. states that “[w]ithout s. 28, the commencement of a proceeding by a representative plaintiff would only suspend the limitation period with respect to that plaintiff; the limitation period governing other potential class members would continue to run during the certification proceedings” (para. 175). I agree, but in the case of class actions alleging secondary market misrepresentations, the representative plaintiff, acting on his or her own, must first obtain leave in order for the limitation period to be suspended. My reading of s. 28 *CPA* simply maintains this requirement for s. 138.3 *OSA* statutory claims, while extending the suspension to all other potential class members once leave is granted. In this sense, s. 28 *CPA* still “shelters the rights of potential class plaintiffs under the umbrella of the representative plaintiff’s action” (para. 176), but it forces the representative plaintiff to proceed expeditiously to obtain leave. This interpretation promotes the purposes of the *CPA*, is compatible with the purpose and operation of Part XXIII.1 *OSA* and allows the class proceeding to remain an effective vehicle for secondary market liability claims.
7. The interpretation proposed by my colleague and by the Court of Appeal in the cases at bar gives priority to the objectives of the *CPA* at the price of contradicting the ordinary and grammatical meaning of the words of the provisions and upsetting the specific balance struck in Part XXIII.1 *OSA* even though those objectives had already been taken into account in enacting the legislation providing for the statutory claim. Part XXIII.1 *OSA* is the more recent legislation; it creates a scheme that is intended to be comprehensive, and was crafted with the *CPA* in mind. The purposes associated with the *CPA* — judicial economy, access to the courts and behaviour modification — were each explicitly considered in developing the structure of Part XXIII.1 *OSA*. Policy concerns, as compelling as they are, do not override the plain meaning of the text and the intent of the Ontario legislature. This is not altered by the fact that both the *CPA* and Part XXIII.1 *OSA* are remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature’s consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.
8. The interpretation proposed by the Court of Appeal in these cases significantly affects the protection provided against strike suits. As I noted above, the preliminary leave requirement was added because the CSA believed that the usual measures under the *CPA* did not provide appropriate safeguards. To supplement the *CPA*’s protection against unmeritorious actions, the CSA proposed a screening mechanism in which the granting of leave *as early as possible* in the litigation process was an essential component.
9. Requiring merely that a statutory cause of action be mentioned in an existing class proceeding for the limitation period to be suspended can hardly be said to achieve that purpose. It might even hypothetically force some defendants to enter in an unjust settlement when the leave application is pending — potentially during many years — and thus negatively affect the corporate defendant’s share value.
10. In my view, the Court of Appeal’s interpretation of s. 28 *CPA* not only contradicts the ordinary and grammatical meaning of the words used, but alsodisplaces the balance struck by the legislature as reflected in Part XXIII.1 *OSA*. Thus, the Court of Appeal not only upset the carefully considered design of Part XXIII.1 *OSA*, but also inverted the statutory interpretation process, using an older provision of general application to alter a more recent, comprehensive scheme.
11. The Court of Appeal wrote that the effect of *Timminco*, namely that a plaintiff does not unilaterally control whether his or her claim is brought within the limitation period (because of the starting point of the limitation period or because of delays caused by the defendant or the court), was “foreign to the concept of a limitation provision” (para. 27). In my view, the Court of Appeal failed to appreciate not only that modern limitation periods flow from an exercise in balancing the rights of plaintiffs and defendants, but also that the legislature undertook that balancing exercise in designing the limitation period in question. Section 138.14 *OSA* does not have an internal suspension mechanism, and the limitation period begins to run regardless of knowledge on the plaintiff’s part, be it on when a document containing a misrepresentation is released, when an oral statement containing a misrepresentation is made, or when there is a failure to make timely disclosure. The scheme is exacting and even harsh, but it is structured in this manner to balance the interests of plaintiffs, defendants and long-term shareholders.
12. The plaintiffs argue that the effect of *Timminco* is that leave is practically impossible to obtain. I disagree. The facts in *IMAX* suggest the opposite, given that the leave and certification motions were heard some three months before the limitation period expired. More importantly, even assuming that the plaintiffs are correct, *Timminco* does not cause this difficulty, but merely fails to relieve a specific group of litigants from the consequences of the *OSA* scheme. In other words, any adverse consequence flows naturally from the text of Part XXIII.1, which is not ambiguous.
13. Like Goudge J.A. in *Timminco*,I am unwilling to rely upon an isolated purpose of limitation periods, taken out of context, in order to give priority to one stakeholder over others, particularly where the legislature was so clearly alive to these considerations in making the choices it made generally for Part XXIII.1 *OSA*, and more specifically for s. 138.14.
14. Ultimately, in light of the underlying principle and the structure of class proceedings in Canada, the operation of s. 28 *CPA* must follow the granting of leave under s. 138.8 *OSA*. I should add that this interpretation is also compatible with the legislative choices embodied in Ontario’s statutory scheme for secondary market misrepresentation. Above all, it is consistent with the ordinary and grammatical meaning of the words of the provisions.
    * 1. Conclusion
15. After considering the ordinary and grammatical meaning of the words of the provisions as well as the entire legislative context, I am of the view that s. 28 *CPA* cannot operate to suspend the limitation period for a statutory claim for secondary market misrepresentation before leave for that claim has been granted under 138.8 *OSA*. Given my conclusion, which accords with the result in *Timminco*, there is no need to address the question whether the Court of Appeal erred in overturning its own precedent. I will now turn to the second issue of these appeals.
    1. Jurisdiction for Relief
16. The interposition of *Timminco* in the proceedings below upset the presumption on which the plaintiffs were operating. A presumption, I should add, that was based on an erroneous reading of the provisions at issue. Before the motion judges and in this Court, the plaintiffs therefore asked that equity be used to save their statutory claims. In this Court, the argument centred on whether the courts below could and should have relied upon the doctrine of *nunc pro tunc* or the doctrine of special circumstances. Although there is some confusion on this point in the motion judges’ reasons, *nunc pro tunc* and special circumstances are two separate doctrines. As a result, they need to be addressed separately.
    * 1. Doctrine of *Nunc Pro Tunc*
17. The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil Procedure*: “An order is effective from the date on which it is made, unless it provides otherwise.”
18. The history of the courts’ inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.
19. One of the oldest and most often cited cases, *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561,dealt with this very circumstance: the plaintiff had died after the hearing but before the court rendered its judgment. The court ordered that its judgment be entered *nunc pro tunc*, as of the day when the argument terminated, noting that this would not cause an injustice to the other party and that such a result was appropriate in a case in which the delay had resulted from an act of the court. A long line of Canadian cases has followed *Turner*, as courts have granted *nunc pro tunc* orders where parties have died after hearings: *Gunn v. Harper* (1902), 3 O.L.R. 693 (C.A.); *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467 (C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C.S.C.); *Monahan v. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109; *Medina v. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369.
20. LeBel and Rothstein JJ. drew upon this line of cases in *Canada* (*Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, affirming “the correctness of this approach” and concluding that the estate of any class member in a class proceeding who was alive on the date that argument concluded was entitled to the benefit of the judgment: para. 77.
21. In *CIBC*, Strathy J. suggested that a court has inherent jurisdiction to issue an order *nunc pro tunc*,but only in the case of a slip or oversight. In my opinion, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction, but is instead one example of a situation in which it may do so. To hold otherwise would run counter to the historical basis for the development of the doctrine.
22. 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.
23. Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a *nunc pro tunc* order, and is therefore an “insurmountable obstacle”: *Holst v. Grenier* (1987), 65 Sask. R. 257 (Q.B.), at para. 10. According to the second view, such a failure is merely a procedural irregularity that can be corrected by a *nunc pro tunc* order: see, e.g., *CIBC Mortgage Corp. v. Manson* (1984), 32 Sask. R. 303 (C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.
24. In my opinion, van Rensburg J. correctly stated the law onthis 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*). 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.
25. 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.
26. 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.
    * 1. Application of *Nunc Pro Tunc*
27. I must now decide whether the doctrine applies to the cases at bar. Before doing so, I should briefly outline the applicable standard of review. The standard that ordinarily applies to a judge’s discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion (*Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404). However, if the judge’s discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54. In *CIBC*, Strathy J. found that he did not have jurisdiction to make the order *nunc pro tunc*. It follows that he did not actually exercise any discretion, and there is therefore no decision to defer to. But, even if he had done so, his reasoning on whether the order should be granted *nunc pro tunc* was based on an erroneous principle in that he conflated the doctrine of *nunc pro tunc* with that of special circumstances and erroneously concluded that an order can be made *nunc pro tunc* only in the event of a slip or oversight. His decision is therefore not entitled to deference on appeal.
28. Having reached this conclusion, I must now consider whether the discretion to grant leave *nunc pro tunc* should be exercised. As I mentioned above, a court’s exercise of its inherent jurisdiction to grant such an order has the potential to undermine the strict limitation period set out in s. 138.14 *OSA*. In particular, one of the clear objectives of Part XXIII.1 is to ensure that leave will be sought and obtained quickly. The requests of the plaintiffs in *CIBC* and *Celestica* for a *nunc pro tunc* order sit uneasily with this objective. As for *IMAX*, a *nunc pro tunc* order, if appropriate, can only be applicable in respect of the defendants who were parties to the original statement of claim, as I will discuss later.
29. In *CIBC*, Strathy J. wrote that he had no jurisdiction to relieve the plaintiffs from the application of s. 138.14 *OSA*. However, a close reading of his reasons suggests that he was of the opinion that he had inherent jurisdiction, but that he could not exercise his discretion, because this case did not involve a slip or oversight. As I mentioned above, however, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction to grant an order *nunc pro tunc*, but is instead one example of a situation in which it may do so. Strathy J. therefore erred in limiting the exercise of his inherent jurisdiction to a case involving a slip or oversight.
30. Had he reached a different conclusion, Strathy J. would have exercised his discretion to issue the order for “several reasons”: para. 540. One of the reasons he gave was that “the plaintiffs have been diligently pursuing the motion for leave on their own behalf and on behalf of the Class”, although it is clear from his comments that this finding of fact is inextricably linked to the idea that “[t]his is not a case in which the suspension of the limitation period would have left the parties, Class Members and the court without any guarantee that the action would be prosecuted”: para. 541. Yet lack of prejudice to the defendants and diligence are two different things. Strathy J. also stated that, had he concluded that he could exercise his inherent jurisdiction, the fact that the plaintiffs were surprised by *Timminco* would have played an important role in his decision on whether to grant the order.
31. With all due respect, what I find particularly problematic is that the plaintiffs’ request for a *nunc pro tunc* order shows that they were aware of the requirement of obtaining leave, yet they made the choice to bring a motion for leave at the same time as their certification motion rather than expediting the leave motion. Their failure to obtain leave within the limitation period is therefore a result of their own decision. The fact that the plaintiffs were surprised by the decision in *Timminco* is of no help to them, since, as Strathy J. noted, not only were they mistaken in their interpretation of the law, but they also proceeded on the assumption “that the court had jurisdiction to extend the limitation period and that the discretion would be exercised in their favour by granting leave *nunc pro tunc*”: para. 511.
32. My colleague Cromwell J. says that “[t]he plaintiffs reasonably thought that they could be granted leave after the expiry of the limitation period” (para. 139). Although the plaintiffs’ belief that they *could* *be* granted leave might be considered reasonable, it was not reasonable for them to assume that they *would* *be* granted leave. A plaintiff cannot simply assume that he or she will be granted relief, doing nothing although knowing that the limitation period is going to expire. In the instant cases, the plaintiffs could have requested an expedited hearing, but they did not even raise the issue, ultimately presenting the judge with a *fait accompli*. As Strathy J. wrote, “Had [the issue] been raised, the parties might have considered a tolling agreement. Had the parties not reached an agreement, I would have considered whether the hearing could be scheduled at an early date or whether some other order could be made to prevent potential injustice”: para. 539. Strathy J. went further, adding that “[t]he lack of prejudice to the defendants and the irreparable prejudice to Class Members as a result of the loss of their cause of action would have militated strongly in favour of some action”: para. 539. In *CIBC*, more than a year and a half passed between the filing of the first statement of claim and the filing of the notice of motion seeking leave under s. 138.8. Granting an extension of the limitation period, in the form of a *nunc pro tunc* leave order, in this context would defeat the very purpose of s. 138.14 *OSA* and would amount to an unreasonable exercise of discretion.
33. While the courts do have inherent jurisdiction to issue *nunc pro tunc* orders in relation to leave to commence claims under s. 138.3 *OSA*, that jurisdiction is not unlimited. It should be exercised bearing in mind that the leave requirement, and its interaction with the limitation period, are central to the delicate balance struck in Part XXIII.1 *OSA*. Strathy J. wrote that “extending the limitation period in this particular case would not do violence to the purposes of limitation periods, including the need of parties to order their affairs after reasonable periods of repose and to avoid evidence becoming stale or lost”: para. 543. This comment, which focuses on limitation periods in general, disregards the delicate balance achieved in Part XXIII.1 *OSA* in particular. Strathy J. correctly observed that he should refrain from undermining the strict limitation period set out in s. 138.14 *OSA*, but, with respect, he did not act accordingly in concluding that he would have issued the *nunc pro tunc* order.
34. Cromwell J. also refers to Strathy J.’s view that there is a duty to protect the rights of unrepresented putative class members and that that could justify the issuance of a *nunc pro tunc* order. I cannot subscribe to this argument, since class members do not have more rights than the representative plaintiff.
35. I would also add that the last of the reasons Strathy J. gave in support of his conclusion that he would have granted such an order was premised on an erroneous interpretation of the law: he found that the plaintiffs’ statutory claim had a reasonable possibility of success, but as I will explain below, this finding was based on the wrong threshold.
36. In my opinion, Strathy J., although in a very good position to assess and weigh all the relevant considerations, failed to proceed with the necessary caution in considering whether he would have exercised the court’s discretion in the plaintiffs’ favour. If a *nunc pro tunc* order could be made where a limitation period has expired even though the plaintiffs did absolutely nothing to prevent its expiry, the effect would be that it is very easy to override the legislature’s intent.
37. Similar considerations apply in *IMAX*. The plaintiffs waited nearly two years after leave was granted before filing a statement of claim pleading the statutory cause of action and adding defendants, even though 79 days had remained in the limitation period after leave was granted, in view of the parties’ agreement that the limitation period be suspended while the leave motion was under reserve. As a result, in my opinion, the plaintiffs’ delay in filing their action far outweighed any delays caused by acts of the court in respect of which a *nunc pro tunc* order might be justified. In this sense, the irregularity in their case is also tied to their own deliberate and informed acts.
38. Nevertheless, I am inclined to grant the *nunc pro tunc* order in relation to the defendants — IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce — who were parties to the original statement of claim. I am of the view that with respect to those defendants, van Rensburg J. exercised her discretion correctly. However, as regards the other defendants (Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble), who were not defendants in any proceeding at the time when argument on the leave application was concluded, the plaintiffs, who waited more than two years after leave was granted before issuing a first statement of claim against them as defendants and provided no valid explanation for this delay, certainly cannot be said to have acted diligently. Granting relief to the plaintiffs against those defendants in this context would undermine the strict limitation period set out in s. 138.14 *OSA* and the balance struck in the legislation.
39. Indeed, here, the plaintiffs had two things to do:  obtain leave and issue a fresh statement of claim (to include the statutory cause of action and to add new defendants). The leave application was under reserve when the limitation period technically expired. However, as mentioned before, the parties had agreed to suspend that period while the application remained under reserve. Therefore, a period of 79 days was still available, when leave was granted, to issue the fresh statement of claim. Yet, the amendment to include the statutory cause of action — even made outside the 79 days period — by nature, would have operated retroactively to the date of the initial statement of claim. In any event, as van Rensburg J. correctly noted : “An order for the effective date of an amendment is within the scope of rule 26.01, which provides that a court shall grant leave to amend a pleading ‘on such terms as are just’ at any stage of an action . . . ” (para. 99). However, I am of the view that the situation is different regarding the addition of the new defendants. Since, strictly speaking, there was no statement of claim pending against these defendants, the amendment cannot operate retroactively. It can only apply for the future. In my opinion, adding a statutory cause of action based on the same facts as the common law claim through a technical amendment, and adding new defendants, are two different things and should be treated accordingly. In exercising her discretion, van Rensburg J. failed to address or distinguish the situation of these additional defendants. She simply concluded that a *nunc pro tunc* order was enough to relieve the plaintiffs from the expiry of the limitation period. I am of the view that this question should have been addressed.
40. Moreover, van Rensburg J. found that the facts of the case before her did not allow for the doctrine of special circumstances to be applied. She wrote the following, at para. 68: “. . . I do not believe that the doctrine of special circumstances has any actual or potential application to the operation of the limitation period under s. 138.14 of the *OSA* or is relevant to the relief sought by the plaintiffs in this case.” It is worth noting that s. 21(1) of the *Limitations Act, 2002* provides that, “[i]f a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.” Some judges have said that s. 21(1) has abolished the doctrine of special circumstances for limitation periods to which the *Limitations Act, 2002* applies. See *Joseph v. Paramount Canada’s Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401. If that is true, it would be another reason why the *nunc pro tunc* order should not be granted in respect of the defendants who were added after the expiry of the limitation period. I note, however, that the case law is contradictory as regards the scope of s. 21(1) of the *Limitations Act, 2002*. See, e.g., *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764.
41. My colleague, Cromwell J., writes that “the wiser course for us . . . is not to address this issue in disposing of the *IMAX* appeal” (para. 154). I agree with him on this point. However, one may conclude that his reasons necessarily imply that s. 21 does not apply to the case at bar since he comes to the conclusion that relief *can* be granted to add defendants despite the expiry of the limitation period. Since the parties have not made complete submissions on this point and since I conclude that relief regarding the addition of new defendants should not be granted for other reasons, it is not necessary for me to address the issue of s. 21(1). I would nevertheless highlight that, at the very least, s. 21 is an explicit recognition by the Ontario legislature that amendments aiming to add parties to an existing procedure are different in nature than other types of amendments and should be made promptly. At the risk of repeating myself, for a period of almost five years and three months, the only defendants to the existing statement of claim were IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.
42. To sum up, given the agreement between the parties to suspend the limitation period while the decision was under reserve, which had the effect of leaving a period of 79 days available in the limitation period when leave was granted, and given the existence of the original statement of claim, I am of the view that a *nunc pro tunc* order is justified in relation to the defendants who were parties to that statement of claim. As regards the defendants who were not parties to any statement of claim at the time when argument on the leave application was concluded, however, the discretion to grant leave *nunc pro tunc* should not be exercised, nor do the facts of this case justify the application of the doctrine of special circumstances — assuming that it has not been abolished by s. 21(1) of the *Limitations Act, 2002*. I would therefore not issue the order in relation to Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble, but would issue it in respect of IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.
43. As for *Celestica*, because no motion for leave was filed before the expiry of the limitation period, a *nunc pro tunc* order, assuming one were available, could not remedy that expiry. This is sufficient to deny a *nunc pro tunc* order*.* Moreover, for reasons which I will explain below, I am of the opinion, with all due respect, that it was not open to Perell J. to apply the doctrine of special circumstances to salvage the plaintiffs’ claim.
    * 1. Doctrine of Special Circumstances
44. Although pinpointing the origin of an equitable doctrine is generally an exercise fraught with peril, it can be said with a limited degree of certainty that the doctrine of special circumstances originated in Lord Esher M.R.’s ruling in *Weldon v. Neal* (1887), 19 Q.B.D. 394 (C.A.). In that case, Lord Esher stated that an amendment adding a cause of action to a statement of claim after the expiry of the limitation period for that cause of action will generally be unfair and prejudice a defendant. He therefore held that a court should allow such an amendment only in“very peculiar circumstances”: p. 395*.* It is this narrow exception which has evolved into what is now known as the doctrine of special circumstances.
45. In essence, the doctrine allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. I hasten to add that, as the Court recognized in *Basarsky v. Quinlan*, [1972] S.C.R. 380, and as the word “special” — or “peculiar” — suggests, the circumstances warranting such an amendment will not often occur.
46. As an offspring of equity, the doctrine of special circumstances is naturally concerned with fairness to the parties. Indeed, this concern was at the forefront of Lord Esher’s mind in *Weldon*.Unsurprisingly, no exhaustive list of the circumstances that qualify as “special” has been proposed by the courts, and I believe it would be risky and unwise to do so. I note however that, concerned with not prejudicing a defendant, this Court has paid particular attention to whether the facts relevant to the extinguished action were pleaded in the original statement of claim and whether the defendant was aware of them during discovery: *Basarsky*; see also *Dugal*,at paras. 60-68.The factors enumerated by the Ontario Court of Appeal in *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 23, which were reiterated by van Rensburg J. in *IMAX*,are also helpful guides:

As such, “special circumstances” include factors such as:   the relationship between the proposed claim and the existing action; the true nature of all of the claims; the progress of the action; and the knowledge of the parties . . . . [*IMAX*, at para. 71]

1. Here, the legislature specifically barred a plaintiff from commencing a statutory action under s. 138.3 *OSA* without first obtaining leave of the court. This leave requirement, and its interaction with the limitation period, is central to the delicate balance which Part XXIII.1 *OSA* strikes between the various participants in the market.
2. The doctrine of special circumstances is of no avail to any of the plaintiffs in the three cases before us. This is because neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3. In all three cases, this doctrine does not provide the plaintiffs with an effective remedy, since it cannot on its own overcome the leave requirement of s. 138.8 *OSA*.
3. In the case of *Celestica*, in which the limitation period expired before a motion for leave was even brought, applying the special circumstances doctrine to grant relief to the plaintiffs would necessarily provide judges with general authority to extend limitation periods, which would frustrate the purpose of s. 138.14 *OSA*. It is also striking that Perell J., in discussing the “special circumstances” justifying this discretionary remedy, did not conclude that the plaintiffs had been diligent, but focused instead on the absence of prejudice to the defendants.
   1. Threshold of Reasonable Possibility of Success
4. In *CIBC*, the defendants challenged the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA*. One of the conditions that must be met to obtain leave is that the court must be satisfied that “there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff”: s. 138.8(1)(b) *OSA*. Strathy J. interpreted this statutory language as establishing a relatively low threshold according to which leave will be denied only if, “having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs’ case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success”: para. 374. The Court of Appeal upheld this interpretation of s. 138.8(1)(b).
5. The defendants in *CIBC* argued in this Court that the threshold articulated by Strathy J. is too low.
6. I will address the point briefly, given the Court’s recent decision in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106.
7. In *Theratechnologies*,the Court was asked to interpret s. 225.4 of the *Securities Act*, CQLR, c. V-1.1 (“*QSA*”), the Quebec counterpart to s. 138.8 *OSA*. That section, which introduces a leave requirement for a statutory claim based on a secondary market misrepresentation in Quebec, provides that there must be a “reasonable possibility that [the action] will be resolved in favour of the plaintiff” for leave to be granted. The Court stated that for an action to have a “reasonable possibility” of success under s. 225.4, there must be a “reasonable or realistic chance that [it] will succeed”: *Theratechnologies*,at para. 38. Claimants must “offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim”: *Theratechnologies*,at para. 39.
8. There is no difference between the language of s. 138.8 *OSA* and that of s. 225.4 *QSA*.Moreover, both provisions relate to leave applications for statutory claims based on secondary market misrepresentation, albeit in different jurisdictions. Accordingly, the threshold test under s. 225.4 *QSA* articulated in *Theratechnologies* applies in the context of s. 138.8 *OSA*.
9. Although there may be differences in the records that need to be produced in support of the leave applications in Quebec and Ontario (*Theratechnologies inc. v. 121851 Canada inc.*,2013 QCCA 1256, at paras. 125-26 (CanLII)), this does not affect the threshold a plaintiff must meet.
   1. Preferability
10. In *CIBC*,the plaintiffs sought certification for seven common issues relating to a common lawmisrepresentation claim. Strathy J. held that reliance, a necessary element of a common law misrepresentation claim, “is not an issue that is capable of resolution on a common basis”: para. 600. He added that “a class proceeding would not be the preferable procedure for resolving a reliance-based claim, as it would give rise to individual issues of causation and reliance that would be unmanageable”: para. 610. In the result, he refused to certify all seven issues relating to the common law negligent misrepresentation claim.
11. The Court of Appeal upheld the motion judge’s decision not to certify the issues relating to reliance and damages. However, it held that five out of the seven issues proposed by the plaintiffs related to the intent and conduct of the defendant CIBC, and should be certified as against CIBC in order to advance the litigation against it. The Court of Appeal therefore allowed the appeal in part and certified those five issues.
12. In this Court, the defendants argued that none of the issues relating to the common law misrepresentation claim should be certified in this case. The defendants further argued that the common law misrepresentation claim fails the preferability analysis required under s. 5(1)(d) *CPA*,because the common law cause of action is not preferable to the statutory cause of action under Part XXIII.1 *OSA*. The defendants raised several arguments to the effect that the procedure created by Part XXIII.1 was specifically intended by the legislature to be the preferable procedure for class actions: CIBC’s factum, at paras. 89-111.
13. CIBC’s argument is premised in part on *AIC Limited v. Fischer*,2013 SCC 69,[2013] 3 S.C.R. 949, in which this Court stated that the preferability analysis focuses not just on the alternative procedure, but also on the effect that the procedure may have on the achievement of substantive results: para. 34.
14. I am unable to accept CIBC’s arguments. First, they run counter to the language of s. 138.13 *OSA*,which provides that the statutory right of action under s. 138.3 *OSA* is meant to be “in addition to, and without derogation from, any other rights”. Moreover, the preferability analysis under s. 5(1)(d) *CPA* requires a court to assess whether a class proceeding is the preferable *procedure*. The Court’s dictum in *Fischer* does not stand for the proposition, essentially advanced by the defendants, that a cause of action must be the preferable one in order for a claim based on it to be certified as a class proceeding. It merely indicates that the effect of a procedure on substantive rights is relevant to its preferability for the pursuit of a given cause of action. In short, the defendants’ argument confuses procedure with substantive causes of action.
15. Conclusion
16. For the reasons stated above:

* In *CIBC*, I would allow the appeal except in respect of the Court of Appeal’s conclusion that five of the seven issues proposed by the plaintiffs should be certified.
* In *IMAX*, I would allow the appeal and only issue a *nunc pro tunc* order granting leave to commence the statutory action in relation to the defendants who were parties to the original statement of claim, that is, IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T.  Joyce.
* In *Celestica*, I would also allow the appeal.
* Finally, in *CIBC* and *Celestica*, I would award costs to the appellants throughout. In *IMAX*, I would also award costs to the appellants throughout regardless of my decision to grant a *nunc pro tunc* order for some defendants.

The following are the reasons delivered by

Cromwell J. —

1. Introduction
2. I agree with my colleague Côté J.’s interpretation of the limitation and leave provisions which leads to the conclusion that the actions in these appeals were commenced after expiry of the limitation period. I also agree that the Ontario Superior Court of Justice has a discretionary power to grant leave, *nunc pro tunc*, after the expiry of that period, to commence a statutory claim for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (“*OSA*”). I part company with my colleague, however, on the question of whether the appeals in *Canadian Imperial Bank of Commerce et al. v. Green and Bell* (“*CIBC*”) and *IMAX Corp. et al. v. Silver and Cohen* (“*IMAX*”) are proper cases in which to exercise that discretion. In my view they are and I would dismiss the appeals. As for the appeal in *Celestica Inc. et al. v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* (“*Celestica*”), I agree with Côté J.’s reasons and disposition, including as to costs.
3. The possible limitation period problem was not on anyone’s radar before the Ontario Court of Appeal’s decision in *Sharma v. Timminco* *Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, in February 2012. These proceedings had been underway for years before that, since 2006 in the case of the *IMAX* action and 2008 in the case of the *CIBC* action. In both matters, the motion judges found that the plaintiffs had prosecuted their claims with diligence, that the claims had a reasonable prospect of success, that the defendants had been well aware of the nature of the claims from the beginning and that there was no hint of prejudice to them resulting from the passage of time. The record suggests that the defendants were as surprised as the plaintiffs to learn that they might have a limitation defence when *Timminco* was released. Failing to exercise the *nunc pro tunc* discretion in these cases permits the defendants to avoid facing the merits of the plaintiffs’ claims on purely technical grounds that even the defendants did not assert until after the fact.
4. *CIBC*
5. The motion judge in the *CIBC* appeals, Strathy J. (as he then was), found that the plaintiffs’ secondary market misrepresentation claim brought under Part XXIII.1 of the *OSA* was time-barred because they had not obtained leave of the court to commence it within the three-year limitation period found at s. 138.14 of the *OSA*: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225. I agree with this conclusion. Strathy J. also found, however, that he had no authority to grant the plaintiffs leave *nunc pro tunc* in order to avoid dismissing the plaintiffs’ action as time-barred. I agree with Côté J. that this conclusion was wrong and that the motion judge in fact had a discretion to grant the order *nunc pro tunc*.
6. The question then becomes whether that discretion ought to be exercised in the plaintiffs’ favour. The motion judge stated that if he had jurisdiction to extend the limitation period by granting leave *nunc pro tunc*, he would do so. Before turning to his reasons for reaching that conclusion, it is worth noting how well placed he was to assess the factors relevant to this question. Any legal errors that he made were irrelevant to his assessment of the equities in relation to whether or not to allow the claim to proceed.
7. The motion judge had been the case management judge assigned to this file since the fall of 2009. He had conducted the 8-day hearing which led to his decision. The record before him was voluminous. It consisted of some 25 affidavits, excerpts from thousands of documents, 29 days of cross-examination and the evidence of 18 witnesses. The reasons for decision demonstrate that the motion judge had an encyclopedic grasp of this material. He was, therefore, ideally placed to assess and weigh all of the many considerations that are relevant to the question of whether the court’s discretion should be exercised in the plaintiffs’ favour. His assessment of those considerations and the weight to be given to them should, in my view, be treated with deference on appeal.
8. The motion judge gave five reasons why he would exercise his discretion to grant leave *nunc pro tunc* in the plaintiffs’ favour. I see no error in the principles that he applied, in the factors that he considered relevant or in his assessment of the evidence. In short, I see no basis to interfere with his conclusion that this is a proper case to exercise the *nunc pro tunc* discretion in the plaintiffs’ favour.
9. The motion judge began by finding that the plaintiffs had been diligent in pursuing their action:

First, unlike the situation in *Timminco Ltd.*, the plaintiffs have been diligently pursuing the motion for leave on their own behalf and on behalf of the Class. This is not a case in which the suspension of the limitation period would have left the parties, Class Members and the court without any guarantee that the action would be prosecuted. [para. 541]

He reviewed the history of the litigation in detail: para. 494. He found that while the action had moved slowly, there had never been any doubt about the plaintiffs’ intention to seek leave and that a “great deal of time, effort and resources ha[d] been expended to develop a substantial record”: para. 495. He noted that the plaintiffs had faced some challenges along the way and that “[t]heir conduct [could not] be described as dilatory”: para. 495. He observed that the action had been under case management from the outset. I see no basis on which we could reach a different assessment of the plaintiffs’ diligence than did the motion judge who had been immersed for several years in this file.

1. The motion judge then noted that the limitation issue came as a surprise to the bar when the *Timminco* decision was released in February 2012:

Second, *Timminco Ltd.* was a case of first impression. It is fair to say that it came as a surprise to the bar. There are other decisions of this court, specifically those of Perell J. in *Timminco Ltd.*, of Rady J. in *Nor-Dor Developments Ltd.* and of van Rensburg J. in *Silver v. Imax Corp.*, that suggested that the course of action proposed by the plaintiffs was appropriate. [para. 542]

1. The motion judge elaborated on this point by noting that, until the *Timminco* decision, the limitation period issue had not been the subject of discussion between the parties or counsel: “There is nothing in the communications between counsel, leading up to the certification and leave motions, to suggest that either party had considered the possibility that the limitation period . . . might expire if the certification and leave hearing did not occur and leave was not granted before December 6, 2010” (para. 497). He observed that *Timminco* was released on the second to last day of the original hearing of the motion (i.e. February 16, 2012) and that counsel for the individual *defendants* described it at the time as a “thunderbolt”: para. 475. It was only then that counsel requested an opportunity to make further submissions on the issue of whether this action was time-barred and additional factums and authorities were delivered and further argument heard in April 2012: para. 476.
2. The plaintiffs reasonably thought that they could be granted leave after the expiry of the limitation period. The defendants did not suggest otherwise until after *Timminco* was released. The “thunderbolt” remark suggests that the defendants were as surprised by the ruling — and the possibility that the claim was irremediably statute‑barred — as everyone else. The point is not whether, with the benefit of hindsight, we think that these views were wrong. Neither is the point that the plaintiffs’ decision to seek leave *nunc pro tunc* was an intentional strategic choice. The point, in my view, is that this strategic choice had a reasonable basis at the time it was made. No one apparently had ever thought otherwise. The motion judge concluded that this was a factor favouring exercising his discretion in favour of the plaintiffs. I see no reason to differ from that conclusion.
3. The motion judge next turned to the fact that exercising his discretion would not undermine the purposes of limitation periods:

Third, extending the limitation period in this particular case would not do violence to the purposes of limitation periods, including the need of parties to order their affairs after reasonable periods of repose and to avoid evidence becoming stale or lost. The defendants have known of the action from an early stage and have mounted a full evidentiary response.  The limitation period could have been extended without unfairness to the defendant and without impairing public confidence in the administration of justice. [para. 543]

1. This is a proper consideration and I see no error in the motion judge’s reliance on it here. I would put the point more bluntly. Holding that the plaintiffs’ claim is irremediably statute-barred is to defeat that claim by allowing the defendants to take advantage of an after-the-fact “gotcha” — a technical defence, the application of which in this case does not further either the purpose of the limitation defence or reinforce public confidence in the administration of justice.
2. The motion judge next considered the duty to protect unrepresented putative class action members:

Fourth, this is a proposed class action and the court has a duty to the unrepresented putative Class Members to ensure that their rights are protected. At least up until the decision in *Timminco Ltd.*, it was reasonable for unrepresented Class Members to assume that their rights could shelter under the umbrella of this action. Their rights will now be lost as a result of the expiry of the limitation period. [para. 544]

1. I see no basis to object to the motion judge’s reasoning on this point.
2. The final basis for exercising discretion in the plaintiffs’ favour was that their claim has a reasonable prospect of success:

Finally, I have found that the plaintiffs’ statutory claim has a reasonable possibility of success. In the next section of these reasons, I will set out my conclusion that the statutory claim would be suitable for certification under the *C.P.A.* As a result of the expiry of the limitation period, this class action, which has a reasonable possibility of success, will not be resolved on its merits, an unfortunate conclusion, under the circumstances. [para. 545]

1. There is no basis to interfere with the motion judge’s assessment of the potential merit of the plaintiffs’ claim or with his conclusion that this factor supported exercising discretion in their favour. I note that my colleague Côté J. does not take issue with the motion judge’s conclusion that this action had a reasonable prospect of success.
2. To conclude, the motion judge identified relevant considerations, weighed them carefully and decided that if he had jurisdiction to do so, he would exercise his discretion in the plaintiffs’ favour. I see nothing wrong with his analysis, let alone anything that justifies second-guessing his conclusion on appeal.
3. Other issues were raised in the *CIBC* appeals. With respect to the threshold for leave under s. 138.8 of the *OSA*, I agree with my colleague Côté J.’s conclusion as to the applicable threshold and with my colleague Karakatsanis J. that the *CIBC* plaintiffs met it. I also agree with Côté J.’s analysis and disposition of the certification of common issues.
4. In *CIBC*, therefore, I would apply the *nunc pro tunc* doctrine to grant leave to commence the statutory action, and dismiss the appeals.
5. *IMAX*
6. Like my colleague Côté J., I agree that the motion judge in this matter, van Rensburg J. (as she then was), was correct to exercise her *nunc pro tunc* discretion. I part company with my colleague, however, in overturning the motion judge’s decision to exercise her curative discretion in relation to the defendants whom she permitted to be added to the amended statement of claim.
7. Like my colleague, I do not think that this case is an appropriate one to finally decide whether the limitation defence in relation to the claims against additional defendants is beyond the reach of the court’s discretion by virtue of s. 21(1) of the *Limitations Act, 2002*,S.O. 2002, c. 24, Sch. B. The point is an important one in Ontario law, the Ontario jurisprudence is not settled and we received no argument on it in this appeal, and only brief submissions in the appeal in *Celestica*.
8. Section 21(1) of the *Limitations Act, 2002* prevents the addition of a party where a limitation period has expired with respect to the claim against that party. However, s. 20 provides that the *Limitations Act, 2002* (and therefore s. 21(1)) “does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act”. The relevant limitation period here, of course, is found not in the *Limitations Act, 2002* but in the *OSA*. The limitation period is therefore “under another Act”. The question that arises is whether the discretion which the motion judge exercised to make an amendment to add parties after expiry of a limitation period is an “extension, suspension or other variation of a limitation period . . . by or under another Act” and therefore not ousted by s. 21(1).
9. The Ontario jurisprudence is not settled on this question. In *Joseph v. Paramount Canada’s Wonderland*, 2008 ONCA 469,90 O.R. (3d) 401,the issue was whether the amendment powers under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, could be used so as to extend a limitation period under the *Limitations Act, 2002*. The court’s conclusion in the negative does not precisely resolve the question in this case. Moreover, the Ontario Court of Appeal has held that the doctrine of special circumstances continues to be available with respect to limitation periods other than those set out in the *Limitations Act, 2002*: see, e.g., *Bikur Cholim Jewish Volunteer Services v. Langston*,2009 ONCA 196, 94 O.R. (3d) 401. In the Ontario Superior Court of Justice, there are conflicting decisions in relation to the impact of ss. 20 and 21 on the court’s inherent jurisdiction: see, e.g., the three motion judges’ decision in the present appeals and *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764. Recent commentary takes the view that the discretionary jurisdiction may apply to other limitation periods contained in different legislation, such as the *OSA* in this case: C. Porretta and R. Punjani, “The Clock Strikes: A Review of the Limitations Act, 2002, A Decade Later” (2015), 44 *Adv. Q.* 346, at p. 375.
10. The motion judge reviewed the Ontario jurisprudence and concluded that the Superior Court of Justice continues to have discretion in relation to amendments that have the effect of overcoming the limitation period set out in the *OSA*: *Silver v. IMAX*, 2012 ONSC 4881, at paras. 67-88 (CanLII). She found that s. 20 of the *Limitations Act, 2002* preserved that jurisdiction: paras. 82‑83. The Court of Appeal did not consider this aspect of the case, given its conclusion that the action was not statute-barred: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402. The appellants in this case did not rely on ss. 20 and 21 of the *Limitations Act, 2002*, although the appellants in the *Celestica* appeal did advance brief argument on this point: A.F., at paras. 76-78.
11. In my view, the wiser course for us in these circumstances is not to address this issue in disposing of the *IMAX* appeal. The issue is an important point of Ontario limitations law on which the Ontario Court of Appeal has not definitively ruled. The point is also far from straightforward, as evidenced by the conflicting views of the motion judges in these cases. We have nothing in the reasons of the Court of Appeal in this case to assist our consideration of the question and the parties to the *IMAX* appeal did not address it. I would therefore dispose of this appeal without deciding this point. To be clear, I am treating this as an issue not before us for decision in this appeal and my reasons should not be understood as implying anything else.
12. I focus, therefore, on the motion judge’s exercise of the discretion, assuming that she had it to exercise. I find nothing to fault and no basis for reaching a different conclusion.
13. The application to dismiss the statutory claim on the basis of the limitation period was heard more than two years after leave to proceed and certification had been granted. The motion judge noted that the defendants had actual notice of the nature of all of the claims against them well within the limitation period. She observed that, in fact, this actual notice “far exceeded the detail of what would have been pleaded in a statement of claim” by virtue of the requirement that the plaintiffs file affidavits in support of their leave motion: para. 89. The motion judge also found that the motion for leave was brought promptly and pursued vigorously without inappropriate delay.
14. The motion judge also dismissed the defendants’ argument that time continued to run until the plaintiffs actually filed their amended statement of claim, a step which did not occur until some two and one-half years after the expiry of the limitation period. Giving effect to this argument, she found, would be “arbitrary and unfair”: para. 95. In her view, the plaintiffs had “moved promptly to make the amendments as soon as they reasonably could have done so”: para. 95. She explained:

The defendants sought to appeal the leave decision, such that it was only on February 14, 2011, with the release of the decision refusing leave to appeal, that the order granting leave under s. 138.8 became final. Any attempt to amend the Statement of Claim in the interim would have been premature. Considering the issues, and the attempt to obtain the defendants’ approval to the amendments, many of which were in relation to aspects of the claim other than the pleading of the statutory cause of action, the plaintiffs moved promptly to make the amendments as soon as they reasonably could have done so. [Emphasis added; para. 95.]

1. The motion judge was intimately familiar with the progress of this file with which she had been dealing over several years. I see no basis on which to interfere with her assessment of the equities of the situation or of the plaintiffs’ diligence. In particular, there is nothing that permits us to second-guess on appeal her conclusion that the plaintiffs moved promptly to make the amendments to their statement of claim as soon as they reasonably could have done so.
2. Disposition
3. I would dismiss the appeals in *CIBC* and *IMAX*. I agree with Karakatsanis J.’s disposition as to costs.

The reasons of Moldaver, Karakatsanis and Gascon JJ. were delivered by

1. Karakatsanis J. — These appeals concern class proceedings asserting both the statutory cause of action for secondary market misrepresentations and the common law tort of negligent misrepresentation. The question here is whether s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*CPA*),can suspend the limitation period for the statutory cause of action found in Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (*OSA*), where leave has not yet been granted under that Part. My colleague Côté J. concludes that it cannot. I disagree, and would hold that it can.
2. As long as the class proceeding is properly commenced, s. 28 of the *CPA* will suspend the limitation periods applicable to all of the causes of action asserted (that is, fully pleaded) within the proceeding. As leave under s. 138.8 of the *OSA* is not a constituent element of the statutory cause of action set out in s. 138.3, the “assertion” of that cause of action does not require the prior obtaining of leave. Thus, I conclude that s. 28 of the *CPA* will suspend the limitation period in s. 138.14 of the *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.
3. Neither the text nor the purpose of s. 28 supports my colleague Côté J.’s conclusion that this provision will not suspend the class members’ limitation period until the representative plaintiff obtains leave under s. 138.8 of the *OSA*. Such an interpretation is not consistent with the purposes of the *CPA* as a whole, nor is it harmonious with the purposes or text of Part XXIII.1 of the *OSA*, a statutory framework intended to operate effectively with the class proceeding vehicle. Concretely, excluding the statutory cause of action from s. 28 protection until leave has been granted removes compliance with the limitation period from the plaintiff’s control. It would also necessarily oblige potential class members to file a multitude of individual motions for leave to commence the statutory claim, thus unnecessarily adding procedural steps and increasing costs and delays for all parties involved. Such an obligation is not required by the text of s. 28, nor by the context or purposes of the *CPA*. Such a result serves neither judicial economy nor access to justice. Rather, it undermines the harmonious operation of class proceedings in the securities context.
4. In my view, the five-member panel of the Court of Appeal in this case (the *Green* panel) was correct to overturn that court’s earlier interpretation of the application of s. 28 of the *CPA* to the s. 138.14 limitation period. For the reasons below, I would dismiss the appeals.
5. Facts and Judicial History
6. The appeals in these three cases stem from motions in class proceedings brought before different judges of the Ontario Superior Court of Justice: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 (*CIBC*), per Strathy J.; *Silver v. IMAX*, 2012 ONSC 4881 (*IMAX*), per van Rensburg J.; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264 (*Celestica*), per Perell J. In each case, the plaintiffs claimed damages under the common law tort of negligent misrepresentation and under the statutory cause of action in Part XXIII.1 of the *OSA* for alleged misrepresentations in respect of shares trading in the secondary market. None of the plaintiffs obtained leave to commence the statutory claim before commencing the class proceeding. In all of the cases, the limitation period, if not suspended, would have run out prior to leave being obtained: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402 (*Green ONCA*), at para. 2.
7. During the course of these class proceedings, the Ontario Court of Appeal released its decision in another matter, *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, in which it interpreted the application of s. 28 of the *CPA* to the limitation period in s. 138.14 of the *OSA* for the first time. The panel (per Goudge J.A.) held that s. 28 did not suspend the s. 138.14 limitation period until leave was obtained: para. 20. Prior to this decision, the parties in the present appeals assumed that s. 28 suspended the limitation period whether or not leave had been granted. As Strathy J. noted, “Counsel for the individual defendants aptly described [*Timminco*], at that time, as a ‘thunderbolt’”: *CIBC*, at para. 475.
8. The motion judges presiding over the present cases found that the panel’s interpretation of s. 28 in *Timminco* governed the claims. Van Rensburg J. and Perell J. applied the common law doctrines of *nunc pro tunc* and special circumstances to save the *IMAX* and *Celestica* claims from being statute-barred. Strathy J. found that those doctrines were inapplicable, and that the statutory claim in *CIBC* could not be saved.
9. On appeal, all three cases were heard together by a five-member panel of the Ontario Court of Appeal: *Green ONCA*, at para. 5. The panel overturned *Timminco*, holding that s. 28 of the *CPA* suspends the limitation period for all class members once the statutory cause of action is asserted in a class proceeding by a representative plaintiff, even if leave has not yet been granted, as long as the facts that found the action and the intent to seek leave to commence the action have been pleaded: *Green ONCA*, at paras. 6 and 78.
10. Following these decisions, the Ontario legislature amended Part XXIII.1 of the *OSA* so that the limitation period is suspended on the filing of a motion for leave under s. 138.8 (s. 138.14(2), am. S.O. 2014, c. 7, Sch. 28, s. 15). Despite this amendment, the question at issue in these appeals requires determination for the parties before us and for other class proceedings brought prior to the amendment of the *OSA*.
11. Analysis
    1. The Issues
12. Section 28 of the *CPA* is engaged upon the “commencement of the class proceeding” and operates to suspend “any limitation period applicable to a cause of action asserted” in the class proceeding. Part XXIII.1 of the *OSA* provides, first, that an action under that Part cannot be commenced “without leave of the court granted upon motion with notice”: s. 138.8(1). Second, it provides that “[n]o action shall be commenced” after the expiration of the applicable limitation period: s. 138.14.
13. The combined operation of these provisions in the context of these class proceedings raises the following questions in relation to s. 28 of the *CPA*:

Is leave required in order for the plaintiff to “assert” the Part XXIII.1 statutory cause of action?

Is leave a pre-condition for the commencement of a class proceeding asserting both the Part XXIII.1 statutory cause of action and the common law tort of negligent misrepresentation?

1. I agree with the five-member panel of the Ontario Court of Appeal and would therefore answer these questions as follows.

The statutory cause of action can be asserted in a class proceeding statement of claim before leave is obtained under the *OSA*.

Section 28 of the *CPA* applies once *the class proceeding* is commenced with respect to a *cause of action* asserted. Where the statutory cause of action is asserted in a class proceeding that has been properly commenced with respect to a common law tort, s. 28 will suspend the limitation period for all causes of action.

* 1. Section 28 of the CPA

1. The *CPA* creates and governs the procedural vehicle of class proceedings. It is a remedial statute designed to improve judicial economy, increase the access of plaintiffs to the court system for claims that would otherwise be too costly, and promote behavioural modification of wrongdoers: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; Ontario Law Reform Commission, *Report on Class Actions* (1982) (*OLRC Report*), vol. I, at pp. 117 and 212. Section 28 is an integral part of this scheme:

**28.** (1)[Limitations]Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

1. The French version of s. 28(1) states that “*tout délai de prescription applicable à une cause d’action invoquée dans un recours collectif est suspendu en faveur d’un membre du groupe à l’introduction du recours collectif*”.
2. Section 28 protects potential class members from the expiration of their individual limitation periods during the representative plaintiffs’ pursuit of their rights through a class proceeding by suspending the limitation period for all potential class members for any “cause of action asserted in a class proceeding”. In this way, s. 28 promotes two of the purposes guiding the *CPA ―* judicial economy and access to justice: *OLRC Report*, vol. III, at p. 779.
3. Regardless of when the representative plaintiff commences proceedings within the limitation period, the length of the certification process is inherently uncertain: see *OLRC Report*, vol. III, at p. 779. Without s. 28, the commencement of a proceeding by a representative plaintiff would only suspend the limitation period with respect to that plaintiff; the limitation period governing other potential class members would continue to run during the certification proceedings. Thus, potential class members would have to initiate parallel individual proceedings to protect their rights from becoming statute-barred. Neither outcome ― the inundation of the courts by parallel individual proceedings or the expiration of plaintiffs’ individual rights due to a delayed or failed certification process ― is desirable: *ibid.*, at pp. 779-80.
4. Section 28 offers protection against both outcomes: *Report of the Attorney General’s Advisory Committee on Class Action Reform* (1990), at p. 47. Section 28 shelters the rights of potential class plaintiffs under the umbrella of the representative plaintiff’s action. As long as the representative plaintiff commences a class proceeding within the applicable limitation period, s. 28 will suspend the limitation periods of all potential class members during the certification process.
5. As the text of s. 28 indicates, the suspension applies to any “cause of action asserted in a class proceeding” ― “*une cause d’action invoquée dans un recours collectif*”. In these appeals, this Court must determine whether s. 28 shelters the rights of potential class members with respect to a Part XXIII.1 statutory cause of action that is fully pleaded (that is, asserted), but where leave has not yet been granted.
   1. Part XXIII.1 of the OSA
6. Part XXIII.1 is remedial legislation intended to promote the twin purposes of facilitating and enhancing access to justice for investors and deterring corporate misconduct and negligence. It was introduced to the *OSA* following a series of “high profile and well publicized incidents of alleged misrepresentations and questionable disclosure” by Canadian public companies: Canadian Securities Administrators, “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of ‘Material Fact’ and ‘Material Change’”, CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383, at p. 7385. The Toronto Stock Exchange Committee on Corporate Disclosure (the Allen Committee) recommended the inclusion of a statutory civil liability regime in the *OSA* to remedy two gaps in the *OSA* enforcement measures: (1) the inability of regulators to effectively enforce compliance with disclosure in the secondary market; and (2) the inadequacy and inaccessibility of existing civil remedies for secondary market misrepresentations (*Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997) (the *Allen Committee Report*), at pp. vi-vii).
7. In response to this need, Part XXIII.1 seeks to deter misleading disclosure without unduly penalizing innocent market participants or unreasonably increasing the cost of disclosure: CSA Notice 53-302, at p. 7387. To do so, it provides investors who incurred losses as a result of a misrepresentation or lack of timely disclosure on the secondary market with a statutory cause of action: *OSA*, ss. 138.3 and 138.4. This statutory cause of action exists over and above any other causes of action the plaintiff may have: s. 138.13. The scheme balances provisions to facilitate recourse for plaintiff investors, such as deemed reliance on the misrepresentation, with protections for corporate defendants. Two such protections are the restrictive limitation period and the leave requirement.
8. First, the limitation period is restrictive in that it runs from the occurrence of the misrepresentation, or from a news release advising that leave has been granted to commence an action based on such misrepresentation, rather than from a prospective plaintiff’s discovery or awareness of that event:

**138.14** [Limitation period]No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

three years after the date on which the document containing the misrepresentation was first released, and

six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

Similar limitation periods are prescribed for a misrepresentation in a public oral statement (s. 138.14(b)) and for the failure to make timely disclosure (s. 138.14(c)). This legislative choice protects corporate defendants from untimely claims and forces plaintiffs to act promptly.

1. Similarly, the leave requirement acts as a screening mechanism, allowing courts to protect corporate defendants from unmeritorious claims:

**138.8** (1) [Leave to proceed] No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

* 1. Relationship Between Section 28 of the CPA and Part XXIII.1 of the OSA

1. It is not a coincidence that the balancing of interests under Part XXIII.1 of the *OSA* is most evident in the context of a class action ― the most effective procedural vehicle for securities liability claims. In recommending an expansion of Ontario’s class action regime, the Ontario Law Reform Commission highlighted the inadequacy of the then-available procedural vehicles to address claims in the securities context:

Although losses stemming from wrongdoing in relation to the trading of securities may be large in the aggregate, individual losses may be comparatively small; when the small size of the claim is combined with the cost of litigating complex issues in securities cases, access to the courts to redress wrongdoing may not be economically feasible for the individual investor. Moreover, . . . there is not, at present, an effective means of aggregating claims that arise in the securities context.

(*OLRC Report*, vol. I, at p. 236)

The Allen Committee, tasked more than a decade later with recommending a statutory civil liability scheme in the securities context, concluded that

the combination of class actions with statutory civil liability for a misrepresentation in continuous disclosure, properly designed, would provide the benefits of better disclosure without unduly facilitating meritless litigation.

(*Allen Committee Report*, at para. 4.6)

1. The effectiveness and preferability of the class proceeding in pursuing Part XXIII.1 statutory claims depends on these balanced protections. By freeing plaintiffs from the obligation to prove their reliance on the misrepresentation, Part XXIII.1 ensures that class proceedings remain effective procedural vehicles for injured securities purchasers. However, by requiring plaintiffs to comply with the leave requirement and imposing a cap on recoverable damages, Part XXIII.1 also protects corporate defendants from meritless large-scale strike suits and extortionate liability in the class action context. This Part was intended to operate harmoniously with the *CPA*. The evidence to date indicates that this interrelationship is key: 26 of the 27 claims that have been the subject of decisions under Part XXIII.1 in Ontario thus far have been brought through the class proceedings vehicle.
   1. Joint Operation of Section 28 of the CPA and Sections 138.8(1) and 138.14 of the OSA
2. As noted above, the question is whether, in a class proceeding claiming both the Part XXIII.1 statutory cause of action and the common law tort of negligent misrepresentation, s. 28 of the *CPA* can suspend the limitation period applicable to the statutory cause of action if leave has not yet been obtained under the *OSA*.
3. This requires determining how the two statutes operate together. The Court must determine whether the statutory cause of action can be “asserted” and whether the class proceedings can be “commenced” for the purposes of s. 28 of the *CPA* before leave has been granted under the *OSA*,such that the statutory limitation period is suspended pending certification under the *CPA*. Prior to the recent amendment, Part XXIII.1 of the *OSA* was silent regarding suspension of the limitation period. This Court must seek a harmonious interpretation that respects the ordinary meaning of the text of both statutes, and the context and the purpose of the *CPA*, recognizing its intended application in the securities context.
4. As both the *CPA* and Part XXIII.1 of the *OSA* are remedial in nature, the provisions from those statutes must be interpreted broadly and purposively: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§ 15.18, 15.22 and 15.59. Moreover, in analysing the interaction between the laws of one legislature, we must presume that the laws “are meant to work together, both logically and teleologically, as parts of a functioning whole”: Sullivan, at §11.2; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 93; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47. Here, the relevant provisions in the *OSA* were enacted after the *CPA*, although the legislator clearly intended to facilitate class actions for securities litigation. However, to the extent that we must interpret provisions in Part XXIII.1 of the *OSA* to resolve this issue, it is clear that this Part was intended to operate in the context of class proceedings legislation: *Allen Committee Report*, at para. 4.6. If available, we should prefer an interpretation that does not frustrate the purposes of either law at issue.
   * 1. Is Leave Required to Assert the Part XXIII.1 Statutory Cause of Action for the Purposes of Section 28?
5. Section 28 of the *CPA* is engaged upon the “commencement of the class proceeding” with respect to “a cause of action asserted” in the class proceeding. Must a plaintiff first obtain leave under the *OSA* in order to properly “assert” the statutory cause of action for the purposes of s. 28?
6. A cause of action is “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”: *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), at pp. 242-43, per Diplock L.J.; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 27; *Dilollo Estate (Trustee of)* *v. I.F. Propco Holdings (Ontario) 36 Ltd.*, 2013 ONCA 550, 117 O.R. (3d) 81, at para. 43.
7. As the *Timminco* and *Green* panels of the Court of Appeal noted, “assert” has multiple dictionary meanings. To “assert” is defined variously as “[t]o invoke or enforce a legal right” or “make or enforce a claim to”: *Black’s Law Dictionary* (10thed. 2014), at p. 139; *Canadian Oxford Dictionary* (2nd ed. 2004), at p. 78. Applying these meanings to the s. 28 context, the *Timminco* panel endorsed the narrower definition “to enforce”: paras. 17-18. The *Green* panel disagreed, instead adopting the broader definition “to invoke/to make”: para. 46.
8. In my view, the *Green* panel’s conclusion that “asserting” a cause of action in s. 28 refers to “invoking the legal right” or “making the claim” is more consistent with the English and French text of s. 28 and with the context of s. 28. It is difficult to see how a plaintiff could ever “enforce” a claim in a pleading, practically or theoretically. A statement of claim, by its nature, is a tool of invocation, as compared to a court judgment, which by its nature is a tool of enforcement. Section 28 is engaged at a very early stage in the litigation ― the commencement of a class proceeding. At this stage, the representative plaintiff must plead the constituent elements of the cause of action founding the right or claim in order to then apply for certification: *CPA*, ss. 2(2) and 5.[[2]](#footnote-2) It is in this sense that the plaintiff “makes the claim” or “invokes the legal right”. This is the term used in the French version of s. 28: “*invoquée*”.
9. In the context of “invoking the legal right” or “making the claim”, what does it mean to “assert” the cause of action? To return to the definition of “cause of action”, the claim must assert the “factual situation” that “entitles one person to obtain from the court a remedy against another person”: *Letang*, at pp. 242-43; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at ¶¶ 4.409 and 4.412 to 4.414. Thus, in order to “make the claim” or “invoke the legal right”, the representative plaintiff must plead the essential factual elements required to constitute the cause of action. Côté J. cites *Méthot v. Montreal Transportation Commission*, [1972] S.C.R. 387, perHall J., in support of her conclusion that the “assertion” of the statutory cause of action requires the plaintiffs to first obtain leave: para. 51. However, the issue in *Méthot* was whether a notice requirement was a constituent element of the particular statutory cause of action. The Court decided that it was, and therefore that the right of action arose only once the notice requirement was fulfilled: p. 398. In contrast, as I shall explain, the leave requirement at issue in these appeals is not a constituent element of the Part XXIII.1 statutory cause of action.
10. Section 138.3 provides injured shareholders with four causes of action tied to misrepresentations in public documents, oral statements, or the failure to make timely disclosure of a material change: *OSA*, s. 138.3(1) to (4). Each cause of action will arise from the factual situation required to give the injured shareholder a “right of action for damages”. For example, s. 138.3(1) sets out the multiple factual elements that constitute the right of action for damages for misrepresentations in a document. In order to “invoke the legal right” or “make the claim” based on this cause of action, a representative plaintiff must plead all of these elements. Notably, the obtaining of leave is not one of them. Leave is not part of the “factual situation” giving rise to this cause of action. Moreover, while not decisive, the structure of Part XXIII.1 sets out the s. 138.3 causes of action under the heading “Liability”, whereas the s. 138.8 leave requirement is set out under the heading “Procedural Matters”. In view of these considerations, I conclude that the presence or absence of leave does not impact the existence of the cause of action founding the statutory claim.
11. Furthermore, treating the leave requirement as an essential component of “asserting” a claim would be inconsistent with the substance of the leave requirement itself. In order to obtain leave, the plaintiff must convince the court of two things: that “the action is being brought in good faith” and that “there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff” (*OSA*, s. 138.8(1); *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at paras. 31 and 38). To do so, the plaintiff must address the merits of the “factual situation” giving rise to the statutory cause of action by “setting forth the material facts” (*OSA*, s. 138.8(2)):

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

1. In this regime, the leave requirement relates directly to the merits of the action. If obtaining leave were also a constituent element of the statutory cause of action, the court would be required to assess whether leave could be granted as an underlying pre-condition of the ultimate decision on whether to grant leave. Such an outcome would represent a sort of “catch-22” ― you cannot get leave without proving you can get leave. Certainly, this would not be consistent with the scheme of the *OSA*.
2. Effectively, obtaining leave under s. 138.8 of the *OSA* is a procedural requirement. A proceeding with respect to the statutory cause of action cannot be commenced without leave. Though the leave requirement impacts the plaintiff’s ability to bring suit, it does not form part of, or affect, the factual elements comprising the statutory cause of action. Leave is necessary for the right arising from s. 138.3 to be ultimately exercised, adjudicated at trial and enforced (to obtain damages). However, “asserting” the statutory cause of action for the purposes of s. 28 of the *CPA* ― that is, “invoking the legal right” or “making the claim” ― does not require the representative plaintiff to first obtain leave.
   * 1. Is Leave a Pre-condition for the Commencement of a Class Proceeding Asserting the Part XXIII.1 Statutory Cause of Action?
3. As noted above, s. 28 only suspends the running of the limitation periods upon the “commencement of the class proceeding”. Ontario’s *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, define a “proceeding” as “an action or application”: r. 1.03(1). A proceeding is commenced by the issuance of an originating process, such as a statement of claim, a notice of action, or a notice of application: r. 1.03(1), “originating process”. “Commencement” for the purposes of s. 28 refers to the commencement of an intended class proceeding under the *CPA* prior to certification:  *Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (C.A.), at paras. 21-23. To commence a class proceeding, the representative plaintiff must file a statement of claim: r. 1.03(1), “action”.
4. With respect to an individual statutory cause of action under Part XXIII.1 of the *OSA*, s. 138.8(1) provides: “No action may be commenced under section 138.3 without leave of the court . . . .” It may well be that a plaintiff could not “commence” an individual statutory action without leave; however these appeals concern class actions, not individual actions. Further, we need not decide the issue of whether a class proceeding based solely on the statutory cause of action may be commenced without leave. The issue before us is whether *these class proceedings* have been properly commenced within the meaning of s. 28 of the *CPA*.
5. There is no question that a class proceeding asserting the common law cause of action based on the tort of misrepresentation may be properly commenced simply by issuing a statement of claim. However, the appellants say that a class proceeding must be capable of being commenced separately for each cause of action asserted. I disagree.
6. The text of s. 28 clearly recognizes the realistic prospect that multiple causes of action (with differing limitation periods and procedural requirements) could be asserted in a single statement of claim. The commencement of the “class proceeding” is sufficient to suspend “any limitation period applicable to a cause of action asserted” in the class proceeding. Section 28 does not condition the “commencement” of the class proceeding on the prior fulfilment of all procedural requirements in respect of every cause of action asserted in the proceeding. Nor does it contemplate separate class actions, or different commencement dates, for the different causes of action. Rather, on a plain reading of s. 28, the limitation periods applicable to all causes of action asserted in the proceeding are suspended upon the commencement of the class proceeding, regardless of whether some (such as the Part XXIII.1 statutory cause of action) would require leave to proceed individually.
7. In my view, this understanding of s. 28 best accords with the words, scheme and purpose of the *CPA*, as well as the language, purpose and operation of Part XXIII.1 of the *OSA*.
8. Unlike my colleague Côté J., I do not find it troubling that the intended class proceeding asserting the statutory cause of action (alongside the common law tort) “commences” under s. 28 prior to leave being obtained: para. 50.As stated above, the statutory cause of action arises prior to leave being obtained. It seems to me that a more troubling inconsistency flows from my colleague’s interpretation of s. 28: the class proceeding could have different commencement dates for each cause of action. Her interpretation could also result in multiple class proceedings arising from the same facts. This result is neither required nor preferred by the language of s. 28.
9. My colleague and the appellants suggest that the purpose of s. 28 is merely to shelter potential class members under a cause of action that could otherwise be commenced as an individual action ― and not to broaden the rights of the representative plaintiff by sheltering a statutory cause of action under a properly commenced class proceeding. They rely heavily on the fact that an individual plaintiff who brings an individual action (as opposed to a class action) does not benefit from a suspended limitation period simply by asserting the statutory claim in her statement of claim.
10. With respect, such a view misses the larger point. Section 28 will never apply to an individual plaintiff; it applies only in the context of class actions. It responds to the interrelated need to protect the interests of class members and to avoid the duplication of redundant individual proceedings by class members; such needs are simply not present in individual proceedings. The provision forms part of a larger scheme that seeks to make class actions an effective and accessible procedural vehicle. Moreover, the comparison my colleague draws between the rights of individual and class plaintiffs is somewhat theoretical, since, as noted earlier, 26 of the 27 claims that have been the subject of decisions under Part XXIII.1 in Ontario have been brought through the class proceedings vehicle. Indeed, this Part of the *OSA* was specifically designed to work effectively with class proceedings.
11. I recognize my colleague’s point that the class action is a procedural vehicle, not intended to increase the parties’ substantive rights. However, the class action nonetheless provides class members with tools and advantages that “mak[e] pursuing one’s substantive rights feasible . . . in a way that allows mass claims to be adjudicated efficiently”: W. K. Winkler et al., *The Law of Class Actions in Canada* (2014),at p. 6. For example, where damages are certified as a common issue, ss. 23 and 24 of the *CPA* allow the court to admit otherwise inadmissible statistical information to determine issues relating to the quantum or distribution of a monetary award, and to undertake an aggregate assessment of the quantum of monetary damages owed to the class members: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at paras. 40-58; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at paras. 41-53; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at paras. 119-39; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57,[2013] 3 S.C.R. 477, at paras. 131-35; see also *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 107-18. These mechanisms, like the protection offered by s. 28 from the running of limitation periods, are not available to individual plaintiffs. These mechanisms make the pursuit of the substantive right of action “feasible” and “efficient” in the context of a collective suit. Far from being “anomalous” (see Côté J. reasons, at para. 71), the benefits provided by these provisions are consistent with the intention to make the class proceeding an effective and feasible vehicle for the collective pursuit of substantive claims.
12. Moreover, an interpretation that suspends the limitation period where leave has not yet been granted: (1) promotes the purposes of the *CPA*; (2) is harmonious with the language, purpose and operation of Part XXIII.1 of the *OSA*; and(3) allows the class proceeding to remain an effective vehicle for the pursuit of Part XXIII.1 statutory claims while respecting the policy underpinnings of limitation periods.
13. First, such an interpretation of s. 28 furthers the *CPA*’s goals of judicial economy and access to justice. It guarantees the class members’ access to the courts by maintaining one of the main benefits of the class action: the suspension of the limitation period for all class members. Section 28 protects potential class members, including the representative plaintiff, from the running of their individual limitation periods during the collective pursuit of their claims through the class proceeding vehicle. This protection ceases and the individual limitation periods resume running on the occurrence of any of the six events set out in s. 28(1) that end that collective pursuit. Effective protection of potential class members during the collective pursuit of their claims necessarily entails protecting the rights that those class members seek to pursue in a class proceeding as opposed to in individual actions. This interpretation of s. 28 protects class members’ individual rights from becoming statute-barred during the pursuit of the class proceeding. This protection, in turn, obviates the need for class members to initiate duplicate individual proceedings to protect these rights, thus promoting judicial economy. My colleague’s conclusion that s. 28 does not protect individual class members prior to the obtaining of leave “could go a long way toward eliminating the economic advantage of class proceedings for any class member with a small claim”: *Logan v. Canada (Minister of Health)*, 2003 CanLII 20308 (Ont. S.C.J.), at para. 23, per Winkler J., aff’d *Logan* (Ont. C.A.). As Feldman J.A. noted in the present appeals, one of the effects of the decision in *Timminco* was that “[o]ne of the main benefits of the class action, the suspension of the limitation period for all members of the class, has been removed”: *Green ONCA*,at para. 64.
14. Second, such an interpretation is harmonious with the balance struck by Part XXIII.1 of the *OSA*. Even if the limitation period is suspended, the leave requirement remains. The leave requirement still serves its screening function, because in order to obtain leave, the representative plaintiff must address the merits of the statutory cause of action: *OSA*, s. 138.8. Moreover, the service of the class action claim still satisfies the recognized policy rationales for the limitation period, and for limitation periods generally: protecting the defendant from liability for ancient obligations, putting the defendant on notice of the claims against her, guaranteeing the preservation of relevant evidence, and ensuring that plaintiffs act in a timely manner (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-30; *Novak v. Bond*, [1999] 1 S.C.R. 808). If the plaintiff does not commence a class proceeding and assert the statutory claim in the proceeding before the limitation period runs out, her claim will be statute-barred. As well, the inclusion of the statutory claim and the facts underlying it gives notice to the defendants of the particulars of the claim against them and ensures that the defendants will be able to preserve evidence relevant to the claim. Indeed, as class proceedings are actively managed both pre-trial and during the trial, the managing judge is empowered to take appropriate measures to ensure that the claims proceed expeditiously and that leave is sought in a timely manner: Perell and Morden, at ¶¶ 4.234 and 4.235; *CPA*, ss. 12 and 34. Far from “displacing” the balance struck by the legislature in Part XXIII.1, this interpretation of s. 28 maintains that balance and furthers the legislative intent that Part XXIII.1 operate harmoniously with class proceedings legislation. Indeed, legislative reactions in Manitoba and Ontario to the release of the *Timminco* decision indicate that the interpretation endorsed by my colleague “interprets [Part XXIII.1 of the *OSA*] in an unintended way and limits the access to justice that the new remedy was intended to provide”: *Green ONCA*, at para. 73.
15. Finally, such an approach ensures that the class proceeding remains the most effective and available vehicle through which to pursue Part XXIII.1 statutory claims. As the facts of the *IMAX* appeal illustrate, even a plaintiff who discovers the misrepresentation quickly and initiates her claim in a timely manner may be unable to obtain leave and “commence” the statutory action within the three-year limitation period: paras. 5, 22 and 90 (CanLII). Tying the running of the limitation period to the granting of leave removes compliance with the limitation period from the plaintiff’s control. It gives defendants both the incentive and, potentially, the means to delay the proceedings on the leave motion until the expiry of the limitation period. As Feldman J.A. noted, it “undercuts the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period”: *Green ONCA*, at para. 66. Such an approach also jeopardizes the adjudicative role of the court, as the cases under appeal illustrate. If unsuspended, the limitation period in the *IMAX* appeal would have expired while the leave and certification motions were under reserve, and the limitation period in the *CIBC* appeals would have expired between the filing of the notice of motion seeking leave and the hearing: *IMAX*, at para. 41; *CIBC*, at paras. 494 and 497. Such an interpretation risks the effect of forcing the court to decide whether to allow plaintiffs’ rights to expire or to risk the rights of others by deferring other urgent matters to prioritize leave motions: see, for example, *CIBC*, at para. 539.
16. In contrast, tying the suspension of the limitation period to the assertion of the statutory cause of action in a class proceeding, rather than to the granting of leave by the court, avoids these undesirable consequences. Potential plaintiffs can effectively pursue Part XXIII.1 statutory claims through the class proceeding vehicle. Courts are not put in the difficult position of deferring other cases to avoid an injustice.
17. Conclusion
18. In my view, as long as the Part XXIII.1 statutory cause of action is asserted in a properly commenced class proceeding, s. 28 of the *CPA* will suspend the limitation periods applicable to all causes of action asserted ― including the limitation period governing the statutory claim ― regardless of whether leave has been obtained. This interpretation is consistent with the language of s. 28 and the purposes guiding the *CPA*, and is harmonious with the language and purposes driving Part XXIII.1 of the *OSA*. In the cases before us, the class proceedings were properly commenced with respect to the common law tort of negligent misrepresentation.
19. In contrast, the interpretation adopted by my colleague Côté J. seriously undermines the viability of the class action vehicle in the context of Part XXIII.1 statutory claims. As the *Green* panel noted, this obliges class members to “do what s. 28 was intended to obviate: commence their own action with leave in order to try to ensure that their action is brought within the limitation period” (para. 65). By rendering the class action an ineffective vehicle to pursue Part XXIII.1 statutory claims, my colleague’s interpretation effectively bars Part XXIII.1 from fulfilling either of its goals; it can neither facilitate access to justice for investors nor deter corporate misconduct.
20. The defendants in the *CIBC* appeals additionally challenge the articulation of the standard to obtain leave under s. 138.8 of the *OSA* adopted by Strathy J. and the *Green* panel. I agree with my colleague Côté J. that the reasonable possibility of success threshold test articulated by this Court in *Theratechnologies* applies to a motion for leave under s. 138.8 of the *OSA*. In my view, the *CIBC* plaintiffs have met this threshold. I also agree with my colleague’s discussion and disposition of the *CIBC* defendants’ appeals concerning the certification of common issues.
21. Disposition
22. In each of the three cases appealed to this Court, the respondent plaintiffs commenced class proceedings and pleaded the constituent facts of the tort of negligent misrepresentation and of the Part XXIII.1 statutory cause of action in their statements of claim. In my view, this pleading constitutes an assertion of the statutory cause of action for the purposes of s. 28 of the *CPA*. Thus, the limitation periods for the statutory claims at issue in these appeals are suspended as of the date of filing of their statements of claim. None of the claims are statute-barred. In light of this conclusion, it is not necessary to address the availability of *nunc pro tunc* or the special circumstances doctrine. However, I should not be taken to agree with either the analysis or conclusions of Côté J. on these issues.
23. I would dismiss the appeals with costs throughout.

*Appeals in CIBC and IMAX dismissed with costs throughout,* McLachlin C.J. *and* Rothstein *and* Côté JJ. *dissenting in part.*

*Appeal in Celestica allowed with costs throughout,* Moldaver*,* Karakatsanis *and* Gascon JJ. *dissenting.*

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Solicitors for the respondents Marvin Neil Silver and Cliff Cohen: Siskinds, London; Sutts Strosberg, Windsor.

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Solicitor for the intervener the Ontario Securities Commission: Ontario Securities Commission, Toronto.

Solicitors for the intervener the Insurance Bureau of Canada: Stikeman Elliott, Toronto.

1. For the sake of clarity, I will consistently refer to the respondents in the instant cases as the “plaintiffs” and to the appellants in the instant cases as the “defendants”. [↑](#footnote-ref-1)
2. The court may only certify a class proceeding in respect of the causes of action “disclose[d]” in the pleadings: *CPA*, s. 5(1)(a). [↑](#footnote-ref-2)