

Blaneys Partners Represent Intervener in Case Before SCC

Date: April 04, 2013

Original Newsletter(s) this article was published in: Commercial Litigation Update: April 2013

Blaneys' partners [Lou Brzezinski](#) and [John Polyzogopoulos](#) made submissions to the Supreme Court of Canada on Thursday, March 21, 2013, on behalf of The Financial Advisors Association of Canada (Advocis), which had been granted Intervener status in the case of *McLean v. British Columbia Securities Commission*.

The case involved Patricia McLean, an Ontario resident and director of an Ontario reporting issuer, who reached a settlement agreement with the Ontario Securities Commission (OSC) in 2008, resulting in an order made by the OSC that same year. The OSC proceeding related to improper conduct that occurred at McLean's company in 2001 which McLean herself had brought to the attention of the OSC. The OSC had commenced proceedings in 2005 — four years later but well within the six-year window for public interest prosecutions to be commenced.

In 2010, almost nine years after the underlying misconduct, and two years after the OSC agreement and order, the British Columbia Securities Commission (BCSC) commenced its own proceedings in respect of the same 2001 misconduct, relying exclusively on the details disclosed in the OSC agreement and the terms of the OSC's order.

The BCSC argued that the limitation period to commence its secondary proceeding was reset in 2008, when the OSC agreement and order were made. The BCSC, therefore, maintained that its enforcement proceeding was within the six-year window. The OSC supported the BCSC's argument, having also been granted intervener status.

McLean argued that any enforcement proceeding commenced against her must be based on the actual misconduct completed in 2001, and therefore, the BCSC's proceeding was commenced outside the limitation period. McLean had lost at the British Columbia Court of Appeal, but was granted leave to appeal to the Supreme Court of Canada.

The securities acts of the various provinces and territories (with the exception of Quebec) contain very similar provisions and limitation periods to the ones at issue in British Columbia.

The outcome of the McLean case will, therefore, have ramifications for how enforcement proceedings to protect the public interest are conducted throughout the country, thereby impacting financial advisors in all provinces.

Advocis is an association of financial advisors with approximately 11,000 members across the country. Advocis' position before the Supreme Court of Canada was that if the BCSC's interpretation of when the limitation period commenced is correct, this will subject its members to multiple proceedings with potentially different outcomes in each province over potentially decades, as each time an order is made in one province, another province can claim the making of the order in that other province restarted the limitation period. Such an interpretation will effectively eliminate the protection of the limitation period, whose purpose is to encourage diligent prosecution by securities regulators and to provide parties with repose from ancient obligations. While Advocis is in favour of a true reciprocal enforcement regime, where the order of one province is adopted in the other Canadian jurisdictions, that is not the regime that currently exists, since each provincial regulator is currently entitled to make its own decision on what sanctions, if any, to impose in the public interest. The Supreme Court reserved its decision.

The Factum filed on behalf of the Intervener, Advocis, can be viewed [here](#).