



## The Extra-Territorial Effect of Orders in the Public Interest

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Before entering into a settlement agreement with your provincial Securities Commission, it is important to consider how such consent orders will be viewed and applied in other provinces. In September, 2008 Patricia McLean entered into a settlement agreement with the Ontario Securities Commission; less than two years later, she was before the British Columbia Court of Appeal asking that they overturn a similar order made by the BC Securities Commission.<sup>1</sup>

Section 161 of the British Columbia *Securities Act* grants power to the commission or the executive director to make an order in the public interest if the person, elsewhere in Canada, has been convicted of an offence relating to securities, found to have contravened securities law, is subject to an order made by a securities regulator or has agreed to be subject to an order made by a securities regulator. However, this is not intended to be a rubber stamp reciprocal enforcement: an order cannot be made without first providing an opportunity to be heard. There are similar provisions in all other provincial and territorial Securities Acts in Canada.<sup>2</sup>

The Court of Appeal clarified two points: the interpretation of the limitations period contained in the BC *Securities Act* and the duty of the Commission to give reasons.

### Operation of Limitation Period

On appeal, Patricia McLean argued that the BC Commission was out of time, as it had been more than six years since the actions underlying the Ontario order had occurred. The court determined by a plain reading of ss.159 and 161 (ss.129.1 and 198(1.1) in the Ontario *Securities Act*) the limitation period does not begin to run until an order or conviction is made in another province.

### Duty to Give Reasons

The Act grants the power to make an order in the public interest: this requires more than a mere statement that it is in the public interest to do so.

*The British Columbia order essentially replicates the substance of the Ontario order. Absent an explanation for the sanctions it imposes, there is a risk that the Commission merely reciprocally enforced the Ontario order, which would not be consistent with its mandate under s.161 and which might amount to a fettering or discretion.<sup>3</sup>*

The appeal was allowed and remitted to the Commission.

Entering into an agreement with your local securities regulator starts the clock running on orders in the public interest across the country. You aren't out of the woods until those limitation periods have expired.

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<sup>1</sup> *McLean v British Columbia (Securities Commission)*,  
2011 BCCA 455,  
<http://www.canlii.ca/en/bc/bcca/doc/2011/2011bccca455/2011bccca455.html>

<sup>2</sup> *Securities Act, RSA 2000, c S-4, s.198(1.1)*; *The Securities Act, CCSM c S50, Part 2, s.148.4(1)*, *Securities Act, SNB 2004, c S-5.5*; *Securities Act, RSNL 1990, c S-13, s. 127 (1.1)*; *Securities Act, SNWT 2008, c10, s.60(3)*; *Securities Act, RSNS 1989, c 418, s 134(1A)*; *Securities Act, SNU 2008, c 12, s.60(3)*; *Securities Act, RSO 1990, c S.5, s.127(10)*; *Securities Act, RSPEI 1988, c S-3.1, s.60(3)*; *Securities Act, RSQ, c v-1.1, s.318.2*; *Securities Act, 1988, SS 1988-89, c S-42.2, s.134 (1.1)*; *Securities Act, SY 2007, c 16, s.60(3)*

<sup>3</sup> *McLean at para29*.