

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)**

B E T W E E N :

PATRICIA MCLEAN

**APPELLANT
(Appellant)**

- and -

**EXECUTIVE DIRECTOR OF THE BRITISH COLUMBIA SECURITIES
COMMISSION**

**RESPONDENT
(Respondent)**

- and -

**FINANCIAL ADVISORS ASSOCIATION OF CANADA and
ONTARIO SECURITIES COMMISSION**

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PART I - OVERVIEW OF ADVOCIS' PERSPECTIVE

1. By order dated January 31, 2013, this Court granted The Financial Advisors Association of Canada, also known by its trade name Advocis (“**Advocis**”), leave to intervene.

2. The class of people potentially affected by this Court’s ruling on this appeal is virtually every participant in the securities market in Canada, including most, if not all, of Advocis’ approximately 11,000 Canada-wide members, as well as all consumers of financial services in Canada. This is because the *Securities Acts* in all of Canada’s common law jurisdictions contain similar provisions to the ones at issue in this appeal.

PART II – OVERVIEW OF ADVOCIS’ POSITION

3. The sole issue on this appeal is whether the six-year limitation period for the British Columbia Securities Commission (“**BCSC**”) to commence an enforcement proceeding against Patricia McLean (“**McLean**”) began to run from the time of McLean’s underlying conduct (completed in 2001) or from when the Ontario Securities Commission (“**OSC**”) made an order against McLean (in 2008). The BC Court of Appeal chose 2008. McLean says the time started to run in 2001.

4. Advocis agrees with and adopts McLean’s submissions regarding the proper interpretation of the statutory provisions in question and her conclusion that the six-year limitation period began to run in 2001, not 2008. Advocis makes three submissions which it submits will aid the Court in resolving any ambiguity found in the relevant provisions of the *Securities Act* in favour of allowing the appeal:

- (a) Ambiguity Should be Resolved in a Way that Discourages Litigation;
- (b) Ambiguity Should be Resolved in a Way that Encourages Co-Operation Between Regulators; and
- (c) Ambiguity Should be Resolved in a Way that Avoids Injustice.

PART III - STATEMENT OF ARGUMENT

A. Resolve Ambiguity in a Way that Discourages Litigation

5. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. An absurd consequence is one that violates a norm that is important to the legislature or to society in general. For example, an extremely unreasonable or inequitable consequence can lead to a finding of absurdity.¹ Interpretations that encourage litigation or unduly tax the resources of the court may also be dismissed as absurd.²

6. Advocis submits that if the appeal is dismissed, the result will be that financial advisors accused of securities offences will have less motivation to voluntarily resolve proceedings brought against them, as they will face the risk of further enforcement proceedings with potentially different outcomes for a virtually indefinite period of time. The anticipated decrease in the number of voluntary resolutions will result in securities regulatory proceedings becoming lengthier and more protracted. A backlog of cases will be created and provincial regulators will be less able to make an efficient and economical use of their scarce resources. Both financial advisors and consumers will be harmed. Consumers will face both the exposure to advisors who may pose a risk, and the increased regulatory costs that will ultimately be passed onto them.

7. Any concern that the limitation period running from the underlying events will encourage parties to “wait out the clock” and avoid or delay settlement is unfounded. It is the regulator that controls its own process and has the most influence over the length of time it takes to prosecute an enforcement proceeding.

¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27, Advocis’ Book of Authorities, TAB 4; Ruth Sullivan, *Statutory Interpretation*, 2nd ed, (Toronto: Irwin Law, 2007) at p 210, Advocis’ Book of Authorities, TAB 7.

² *Syncrude Canada Ltd. v. Alberta (Human Rights and Citizenship Commission)*, 2006 ABQB 603, aff’d 2008 ABCA 217, at para 20, Advocis’ Book of Authorities, TAB 6; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed, (Toronto: Butterworths, 2002) at p 249, Advocis’ Book of Authorities, TAB 8.

B. Resolve Ambiguity in a Way that Encourages Cooperation Between Regulators

8. While not stating a principle of statutory interpretation, in *Re Securities Act* this Court encouraged the provinces and federal government to work together towards a harmonization of securities laws across the country:³

It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.

Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.

9. Securities regulators have the jurisdiction to make enforcement orders against market participants operating in foreign jurisdictions with no direct connection to their jurisdiction.⁴

Allowing the appeal will encourage Canada's securities regulators to cooperate with one another and with foreign regulators in respect of the sharing of information and the coordination of the prosecution of securities offences on a timely and uniform basis across the whole country. This will promote the efficient and effective use of scarce administrative resources and maximize the protection of consumers across Canada while at the same time dealing fairly with securities market participants who are the subject of a proceeding.

³ *Reference re: Securities Act*, 2011 SCC 66, at paras 132, 133, Appellant's Book of Authorities, Tab 13.

⁴ *Re Biller* (2005), 28 OSCB 10131 at paras 31-36, Advocis' Book of Authorities, TAB 3; *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] SCR 132 at paras 50-56, Appellant's Book of Authorities, Tab 2; *Re Elliott*, Ontario Securities Commission, August 28, 2009 at paras 24-25, Appellant's Book of Authorities, Tab 8.

C. Resolve Ambiguity in a Way that Avoids Injustice

10. Finally, Advocis submits that the B.C. *Securities Act* is *not* a reciprocal enforcement statute because it does not conform to the characteristics of such a statute as described by this Court in *Ruttan v. Ruttan*:⁵

... I think it plain, both in logic and judicial history, that where a foreign court having jurisdiction over the parties makes an order or judgment affecting their respective rights, [...], the reciprocal provisions [...] should not endow the new jurisdiction with the right to do anything more than carry out the enforcement. Whether the judgment should be varied, changed, revoked or enforcement refused should be for the court of original jurisdiction.

11. Rather, as the British Columbia Court of Appeal held in this case, it is clear from the language of the provisions at issue that the BCSC is expected to exercise its own judgment and discretion to determine whether to make an order in the public interest and if so, what order to make. The court below recognized this when it expressed the concern that in failing to provide reasons to enforce the OSC order, the BCSC may have fettered its discretion and simply enforced the OSC order without asking itself what order BC's public interest required. That is why it remitted the matter back to the commission to provide reasons.⁶

12. *Res judicata* and issue estoppel are fundamental tenets of our justice system. In *Danyluk v. Ainsworth Technologies Inc.*, this Court stated as follows:⁷

An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

13. In a true reciprocal enforcement regime, limitation periods, *res judicata* and issue estoppel are of no concern. An order is made in one jurisdiction and is simply enforced in other jurisdictions. There is no unfairness to defendants in such a regime, as they are certain not to be

⁵ *Ruttan v Ruttan*, [1982] SCJ No 35 at para 8, Advocis' Book of Authorities, TAB 5.

⁶ *McLean v. British Columbia (Securities Commission)*, 2011 BCCA 455 at para 29, Appeal Book, TAB 4.

⁷ *Danyluk v Ainsworth Technologies Inc.*, [2001] SCJ No. 46 at para 18, Advocis' Book of Authorities, TAB 1

punished differently in different jurisdictions for the same offence and are not at risk of having to re-litigate issues already determined.

14. However, in the case of securities law enforcement, the legislatures of the provinces have determined that it is not desirable to implement a true reciprocal enforcement regime. Defendants of securities enforcement proceedings are subject to multiple hearings and potentially different outcomes in each jurisdiction. The check and balance to this policy choice is the limitation period. While defendants are subject to multiple proceedings with potentially different outcomes, it is only for a limited period of time.

15. What the regulator is attempting to do in this case is to remove that check and balance. If this Court dismisses the appeal, Advocis' members and all securities market participants will be subjected to the risk of multiple enforcement proceedings in each Canadian jurisdiction with potentially different outcomes for a virtually unlimited duration. Advocis submits that such a system is absurd and is not conducive to fairness, justice or certainty.⁸

16. Absurdity may also arise where the efficient and orderly administration of justice is impeded by a possible interpretation of a statute:⁹

Another important category of absurdity is based on the efficient and orderly administration of justice. The courts have always regarded law enforcement as a matter particularly suited to judicial supervision. In exercising their supervisory role various principles based on the rule of law have been developed to protect individual subjects from arbitrary law enforcement.

17. If the appeal is dismissed, market actors will be subjected to arbitrary law enforcement, as there will be no predictable limitation period governing enforcement proceedings. Again, such an interpretation is absurd and should be avoided.

⁸ *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra*, at para 27, Advocis' Book of Authorities, TAB 4; Ruth Sullivan, *Statutory Interpretation*, *supra*, at p 210, Advocis' Book of Authorities, TAB 7.

⁹ *Syncrude Canada*, *supra*, at para 20, Advocis' Book of Authorities, TAB 6. Sullivan and Driedger, *supra*, at p 249, Advocis' Book of Authorities, TAB 8.


18. Support for Advocis' submissions may be found in the February 27, 2013 decision of the U.S. Supreme Court in *Gabelli v SEC* regarding the limitation period applicable to securities enforcement proceedings commenced by the Securities Exchange Commission ("SEC").¹⁰ The court determined in that case that there should be a predictable and fixed date after which exposure to government securities enforcement efforts ends. Accordingly, the court refused to apply the discoverability principle to the five-year limitation period applicable to SEC enforcement actions, even where the enforcement action is in respect of fraud. Among the policy reasons cited by the court for its decision were that the SEC's very mandate was to investigate securities violations and to impose sanctions in the public interest, and that the SEC had a vast array of investigative tools and resources available to it to fulfill that mandate. Advocis submits that the reasoning and policy considerations enunciated by the United States Supreme Court apply equally to the case at bar.

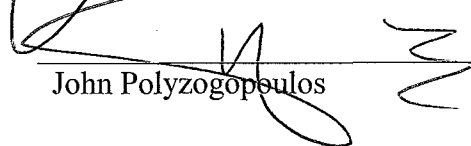
PART IV - ORDER SOUGHT

19. Advocis submits that no costs order be made in its favour or against it.

20. Further, Advocis respectfully requests that it be permitted to make oral submissions for 10 minutes at the hearing of this appeal on March 21, 2013.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of March, 2013.


 Lou Brzezinski


 John Polyzogopoulos

¹⁰ *Gabelli v. Securities and Exchange Commission*, 568 U.S. ____ (2013), Advocis' Book of Authorities, TAB 2.

PART V - TABLE OF AUTHORITIES

<i>Case law</i>	<i>Paragraph(s) cited</i>
<i>Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)</i> , 2001 SCC 37, [2001] SCR 132.	9
<i>Danyluk v Ainsworth Technologies Inc.</i> , [2001] SCJ No. 46.	12
<i>Gabelli v. Securities and Exchange Commission</i> , 568 U.S. ____ (2013).	18
<i>McLean v. British Columbia (Securities Commission)</i> , 2011 BCCA 455.	11
<i>Re Biller</i> (2005), 28 OSCB 10131.	9
<i>Re Elliott</i> , Ontario Securities Commission, August 28, 2009.	9
<i>Reference re: Securities Act</i> , 2011 SCC 66.	8
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 SCR 27.	5, 15
<i>Ruttan v Ruttan</i> , [1982] SCJ No 35.	10
<i>Syncrude Canada Ltd. v. Alberta (Human Rights and Citizenship Commission)</i> , 2006 ABQB 603, aff'd 2008 ABCA 217.	5, 15