Cassels

Pre-Leave Discovery Prohibited: Quebec Court of Appeal Brings Quebec Law in Line With Other Provinces for Securities Class Actions

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The Quebec Court of Appeal has prohibited pre-leave discovery in securities class actions, following in the footsteps of other Canadian provinces.

Key Takeaways

- **The Quebec courts will no longer permit documentary disclosure in the leave stage of securities class action proceedings.** The prohibition of a discovery at this early stage brings Quebec in line with the practice elsewhere in Canada.
- **Defendants are not bound to assist a plaintiff in establishing a viable claim.** The purpose of the leave requirement is to protect public issuers, innocent shareholders, the markets and the courts, but not plaintiff-shareholders. Defendants will not be compelled to assist a plaintiff in securing evidence because that would risk undermining the protection against potentially meritless claims.

Summary and Background

On January 29, 2018, the Quebec Court of Appeal in *Amaya inc. c. Derome*[1] overruled a decision of the court below which held that parties seeking leave to institute an action for secondary market misrepresentations under section 225.4 of the *Securities Act*[2] are entitled to compel a public issuer defendant to disclose documents and information for the purpose of the leave proceedings.

As is the case throughout Canada, Quebec plaintiffs must secure leave of the court in order to bring an action for secondary market liability under the Act. While the terms of the Act are broadly similar to those of Canada's other provinces (and, in particular, Ontario), there are points of distinction. One notable difference pertains to the rules of evidence governing what may be adduced leading up to an application for leave. Ontario courts have been resolute in their prohibition of hopeful plaintiffs seeking evidence from a defendant issuer (by way of discovery) as a means of satisfying the requirements for leave. The courts have cautioned against allowing "mini-trials" that might result at this early stage of proceedings in potential class actions, and have held that discovery is incompatible with the legislative policy for the leave requirement which, they say, is to prevent frivolous or bad faith actions (which are sometimes referred to as "strike suits") against issuers.[3]

The Appellate Decision: Harmonization of Approach

In order to advance to trial, a Quebec plaintiff must obtain from the superior court both leave under section 225.4 of the Act as well as authorization to bring a class action under article 575 of the province's *Code of Civil Procedure*.[4] Both statutes - to the extent that each pertain to class actions - require some evidence to suggest that a party has a valid claim before the action will be allowed to proceed to the merits.

It was to this end that the respondents in *Amaya* brought a preliminary motion to compel documentary disclosure, seeking from the motion judge certain private documents in order to assist them in satisfying the evidentiary burden required by the Act.

In this instance, the motion judge held that document discovery against public issuers and their respective officers and directors is available in Quebec. In coming to this decision, the judge found comfort in differences between the Quebec statutory regime and the rules applicable in Ontario and, in particular, his understanding of the rules favouring cooperation between parties and proportionality that are "guiding principles" in the Code. The judge also added that the capital market system in Canada is built on a foundation of full disclosure of all material facts and so, as a matter of fairness, a party seeking to satisfy the evidentiary burden necessary for leave should have a reasonable opportunity to obtain that evidence from the issuer through discovery.

The Appellate Court firmly disagreed, stating that document disclosure should not be allowed at this early stage of the proceedings because it is incompatible with the legislative policy underscoring section 225.4 of the Act. The Court explained that this procedural departure from other provinces cannot be justified by differences between the Quebec regime and those applicable elsewhere, nor could it be justified under any other rules in the Code.

Following a detailed analysis of the provisions of the Code and relevant jurisprudence, the Court of Appeal concluded that section 225.4 of the Act does not open the door to the disclosure of documents prior to the authorization of the class action. Kasirer, J.A., writing for the Court, clarified that the purpose of this provision is to protect public issuers, innocent shareholders, the markets and the courts, but not plaintiff-shareholders.

A defendant is not bound to assist the plaintiffs in establishing a viable claim. Courts have held, in respect of disputes as to how evidence may be adduced prior to leave, that the defendant issuers are not required to assist plaintiffs in securing evidence because that would risk undermining the protection against strike suits and amplifying the scope of the proceedings to the equivalent of a mini-trial.[5] Kasirer, J.A. warned that forcing a defendant to produce evidence would involve time and costs and would potentially prompt "fishing expeditions" undertaken in the hope of finding some document that would justify leave.

By allowing discovery, a plaintiff would have the opportunity to mine for documents that might support a suit

or simply coerce the issuer into a protracted dispute, prompting a possible settlement that the ordinary rule militating against strike suits would not allow.

The Upshot

In its ruling, the Court stated that the Quebec rules were designed to be harmonized with the provincial securities legislation elsewhere as a matter of substantive law. Discovery prior to an application for leave brought under similar provisions to section 225.4 has been prohibited elsewhere in Canada. Motion judges are mindful that, in a summary setting, the merits of the dispute will not be fully aired and that the shareholder did not have the benefit of evidence that would come from discovery.

This decision unifies the approach across Canada with respect to discovery at the leave stage of a securities class action. This unification removes any potential strategic advantage in this regard that plaintiff-shareholders may have otherwise received in electing Quebec as the jurisdiction to hear a secondary market misrepresentation class action.

The Quebec Court of Appeal's decision in *Amaya inc. c. Derome* is available here.

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[1] 2018 QCCA 120 (*Amaya*).
[2] CQLR c V-1.1 (the Act).
[3] See, e.g., *Ainslie v. CV Technologies Inc.*, 93 O.R. (3d) 200 (ONSC), interpreting evidentiary rules relating to affidavits for the purposes of section 138.8(1) of the Ontario *Securities Act*, RSO 1990, c S.5, the screening mechanism analogous to s. 225.4 of the Act.
[4] CQLR c C-25.01 (the Code).
[5] See, *e.g., Abdula v. Canadian Solar Inc.*, 2013 ONSC 5035 at para 5 (leave to appeal refused).