Securities and class actions: screening authorizations

February 9, 2018

Author

Laurence Bich-Carrière

Partner, Lawyer

Anyone who wants to bring an action in damages relating to the secondary securities market must prove that the action is brought in good faith and has a reasonable chance of success (s. 225.4 QSA). In Quebec,[1] as elsewhere in Canada,[2] no prior disclosure of evidence may be obtained by plaintiff for the purpose of meeting this burden. The procedure prescribed by the QSA is complete and sufficient, so recourse to the rules Code of Civil Procedure is unwarranted.

Where such an action is brought by way of class action, the court must furthermore be convinced that the criteria for authorizing a class action are also met. The Court of Appeal does not expressly rule on whether prior disclosure is available to the investor to sustain the proposed class action.

These specific rules have no impact on the general rules regarding insurance, such as a plaintiff's direct right of action against the insurer of the person who caused the damage (art. 2501 CCQ). Regardless of the subject matter (the secondary market) or the procedural vehicle (class action), a court may order a defendant to disclose such documents which are necessary for a meaningful exercise of this right, such as insurance policies.

In its recent decision in *Amaya Inc. v. Derome*, 2018 QCCA 120, the Court of Appeal ruled on the interaction between the *Securities Act*, CQLR, c.V-1.1 (QSA) and the rules specific to class actions in relation to applications by investors for prior disclosure of documents by a public issuer. We summarize here a much-anticipated decision.

The Specific Framework of the QSA

The QSA governs actions relating to financial markets. Although such actions may be introduced on

an individual basis, class actions are regarded as the preferred vehicle, “given that publicly-traded issuers generally have many investors in like circumstances and, if something goes wrong, they are likely to come together to avail themselves of the advantages of a class action.”[3] Class actions are merely one of the available vehicles, and it is in no way a requirement to use this type of proceeding.

With respect to actions relating to the secondary market, section 225.4 QSA requires that any investor, whether acting personally or as representative of a proposed group, be authorized by the court before bringing the proposed action. This restriction was enacted –and similarly so across Canada–[4] to preserve public confidence in stock markets,[5] but also to protect public issuers against opportunistic actions brought in hopes of obtaining a settlement rather than to obtain compensation for actual damage.[6] Accordingly, an investor who claims to have been defrauded will have to prove to the court from which authorization is requested that the proposed action is “in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff” (s. 225.4 para. 3 QSA). Motions for authorization should be addressed as early as possible, so that judicial resources are allocated only to meritorious cases.

Interaction With Class Actions

If the action takes the form of a class action, the investor must also meet the criteria for authorization of a class action (art. 575 CCP), a burden which has been established to be a light one, since it simply involves proving that “the facts alleged appear to justify the conclusions sought” (art. 575(3) CCP).[7]

Not only do the QSA and the CCP impose different burdens, but the authorization they require arises at different moments in the course of the proceedings o: the authorization required by section 225.4 QSA must, necessarily, precede the authorization required by article 575 CCP. As the Court of Appeal points out: “This is eminently logical: where leave is required under the *Act*, there is no action upon which the class action, as a procedural vehicle, can rest until that leave is granted.”[8] Of course, both issues can be disposed of in one judgment.[9]

With these distinctions made, it is clear that any application brought for the purpose of enabling an investor to meet the burden established by section 225.4 QSA must be analyzed pursuant to the rules set out in that provision and not the rules that generally apply to class actions.[10] The judgment appealed from was therefore not a “pre-authorization class action judgment”; it was a “judgment prior to leave under the [QSA]”.[11] Accordingly, it had to be reviewed in accordance with the requirements and the spirit of the QSA.[12]

The Judgment Under Appeal

The trial judge had granted an application for documentary disclosure, relying on the parties’ general duty to cooperate set forth by article 20 of the CCP.[13] He thus arrived at a solution that is unique in the Canadian legal landscape.[14]

Though rendered during a case management conference, the judgment under appeal went significantly beyond the confines of case management. Accordingly, the application for leave should follow the rules applicable to judgments rendered in the course of proceedings, set out in article 31 para. 2 CCP.[15] The trial judge's decision has addressed a point of law regarding to discovery, which impacted “the character of the proceedings themselves,” and which, if decided wrongly could cause

[16]

irreparable harm to defendant, regardless of the expenses involved. Leave was granted and the Court of Appeal had to consider, on the merits, whether the trial judge was correct in applying the general principles of Quebec civil procedure to the applications for documentary disclosure that were before him.

For the Code of Civil Procedure to "compensate[e] for the silence of the other laws if the context so admits," as provided by its preliminary provision, such a silence must exist. In the opinion of the Court of Appeal, considering the purpose and history of section 225.4 QSA – in particular its goal of screening out opportunistic actions as soon as possible[17] – and the uniformity of legislation on this subject in Canada,[18] no such silence can be found to exist. On the contrary: in order to avoid short-circuiting the requirement for prior authorization and avoid fishing expeditions and mini-trials, judges who are responsible for authorizing actions of this nature must require that applicants meet their burden themselves.[19] Neither the combination of articles 20 and 221 CCP or the specific context of class actions can sidestep that prohibition.[20]

Insofar as it was sought to allow the investor to meet the burden imposed by section 225.4 QSA, the application for documentary disclosure should have been dismissed. By contrast, the application to obtain disclosure of the insurance policies did not fall within the specific context of section 225.4 SA, and the trial judge's order was left undisturbed, Given the principle of cooperation (art. 20 CCP), but most importantly the long-settled principle that a third party seeking to exercise their right of action against the insurer of the person who caused the damage they suffered (art. 2501 CCQ) such applications can be justified in that they allow potential parties to the case to be identified.[21] The Court of Appeal's decision does not directly address whether class counsel may succeed in a request for "relevant evidence to be submitted" within the meaning of article 574 para. 3 CCP; such requests are traditionally considered to be properly made to contest the application, that is, necessarily by defendant, given that the allegations in the application for authorization to institute a class action must be assumed to be true at that stage.[22]

Summary

Section 225.4 QSA is the expression, in Quebec law, of an intent common to all Canadian legislatures to create a screening mechanism for actions relating to the secondary market, in order to preserve investor confidence and deter frivolous suits. Accordingly, where an applicant seeks prior disclosure in order to meet the criterion for authorization set out in section 225.4 QSA, his or her application should be dismissed, including in a class action context. Where the objective of the application for prior disclosure is not one germane to the QSA, for instance, where an applicant seeks information to join an insurer to the proceedings, such application needs to be considered under the ordinary rules of Quebec law.

---

1. *Theratechnologies Inc. v. 121851 Canada inc.*, [2015] 2 SCR 106, 2015 SCC 18
2. *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 SCR 801, 2015 SCC 60
3. Par. 52
4. Par. 97
5. Par. 84
6. Paras. 49 and 84; following, *inter alia*, *Theratechnologies Inc. v. 121851 Canada inc.*, [2015] 2 SCR 106, 2015 SCC 18 or *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 SCR 801, 2015 SCC 60
7. Para. 50
8. Para. 46.
9. Paras. 20, 46 and 54
10. Para. 45
11. Paras. 42, 45 and 55
12. Para. 55

13. *Derome v. Amaya inc.*, 2017 QCCS 44, paras. 79 *et seq.*
14. Para. 36; compare: *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641 and *Mask v. Silvercorp Metals Inc.*, 2014 ONSC 4161 – leave to appeal ref'd: *Mask v. Silvercorp Metals, Inc.*, 2014 ONSC 464 (Ont. Div. Ct); *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864; *Silver v. Imax*, (2009) 66 B.L.R. (4th) 222, leave to appeal ref'd, *Silver v. Imax,*2011 ONSC 1035 (Ont. Div. Ct)
15. Paras. 73 to 79
16. Paras. 66 *et seq.*; leave to appeal had been referred to a panel of the Court: *Amaya inc. v. Derome*, 2017 QCCA 335.
17. Paras. 49 and 84
18. Paras. 9 and 97
19. Paras. 9 and 93
20. Paras. 106 and 107
21. *Collège d'enseignement général et professionnel de Jonquière (CÉGEP) v. Champagne*, 1996 CanLII 4413 (CA)
22. *Benizri v. Canada Post Corporation*, 2016 QCCS 454, para. 6