

Québec Court of Appeal harmonizes Canadian law by prohibiting pre-leave discovery in securities class actions

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Authors: [Éric Préfontaine](#), [Fabrice Benoît](#), [François Laurin-Pratte](#), Frédéric Plamondon

In its decision released January 31, 2018, *Amaya inc. c. Derome*, the Québec Court of Appeal overturned a ruling by the Québec Superior Court in holding that parties seeking leave to institute an action for secondary market misrepresentations under Section 225.4 of the *Québec Securities Act* (QSA) were entitled to compel a public issuer defendant to disclose documents and information for the purpose of the leave proceedings. Harmonizing the regime in Québec with those of the other Canadian provinces, the Court of Appeal held that such pre-leave disclosure is incompatible with the legislative policy for the leave requirement, which is to prevent strike suits against public issuers.

Background

On March 23, 2016, the Autorité des marchés financiers (the AMF) issued a press release announcing that it had filed penal proceedings against, among others, David Baazov, then president, chief executive officer, board chairman and shareholder of Appellant, Amaya Inc. (now The Stars Group Inc.). The AMF accused these persons of having used privileged information pertaining to Amaya, and having conspired to commit offences under the QSA. A proposed class action pursuant to Article 574 of the *Code of Civil Procedure* (CCP) and Section 225.4 of the QSA was immediately brought against Amaya and certain of its directors.

Before the hearing on their requests for leave under the QSA, and for authorization of the class action, the proposed class representatives filed a preliminary motion to compel documentary disclosure from Amaya, as well as from the AMF and the RCMP. In their motion, the proposed class representatives sought the production of documents, the majority of which were not publicly available, in order to assist them in meeting the evidentiary burden on their leave application under Section 225.4 of the QSA.

The Superior Court granted their motion, holding that plaintiffs requesting leave to institute an action for secondary market misrepresentations pursuant to Section 225.4 of the QSA were entitled to compel a public issuer to disclose documents and information for the purpose of the leave proceeding, even in situations where such disclosure is prohibited elsewhere in Canada. In his reasons, the motion judge relied on, among other things, differences between the wording of the relevant provisions in the statutory regime and rules applicable in Québec and Ontario. Amaya appealed the decision.

Reasons of the Court of Appeal

The Court of Appeal reversed the Superior Court decision, holding that documentary disclosure should not be permitted at the leave stage, as allowing it would run counter to

legislative policy underlying Section 225.4 of the QSA; in particular the protection of public issuers against strike suits.

The Court of Appeal agreed with Amaya, finding that the Québec regime was intended to be harmonized with equivalent provincial regimes in Canada.

While the Court of Appeal agreed with the motion judge that the Ontario rules and the Québec rules were not identical, it held that their differences did not impact the threshold that the proposed class plaintiffs had to meet at the leave stage. To the contrary, the Court of Appeal held that the Québec securities regime, *“as a matter of substantive securities law, reflects the same legislative policy as that in Ontario”* [para. 95]. Given that such pre-leave discovery is prohibited in all other Canadian provinces, there was no reason for an exception in Québec.

The Court of Appeal further held that Québec’s CCP, in particular Article 20 (duty for parties to co-operate), did not create an independent right to pre-leave disclosure in secondary market misrepresentation cases.

Commentary

The Court of Appeal’s decision in this case harmonizes the law across Canadian provinces with regard to the prohibition against discovery at the leave stage of a securities class action. In doing so, it eliminates a potential tactical advantage to proceeding in Québec on behalf of a national class in secondary market misrepresentation cases.

This decision could be subject to an application for leave to appeal before the Supreme Court of Canada.

[1] The authors of this Osler Update represented all of the defendants in the proposed class action, and appeared before the Québec Court of Appeal in this matter.