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CLASS ACTION

AN UNPRECEDENTED DECISION OF THE COURT OF APPEAL: A JUDGMENT AUTHORIZING A CLASS ACTION UNDER THE SECURITIES ACT MAY BE APPEALED

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INTRODUCTION

On July 17, 2013, the Court of Appeal issued an unprecedented judgment in Quebec in the case of *Theratechnologies inc.* v. *121851 Canada inc.*[1] Justice Clément Gascon, writing for the court, held, in a unanimous decision, that a judgment having authorized a class action for damages under section 225.4 of the *Securities Act* (Quebec)[2] (hereinafter the "**S.A.**") can be appealed despite the rule laid down in the *Code of Civil Procedure* (Quebec) (hereinafter the "**C.C.P.**") to the effect that judgments authorizing the institution of a class action are unappealable.

FACTS UNDERLYING THE DISPUTE

In this case, 121851 Canada Inc. (hereinafter "**121CAN**") accused Theratechnologies, a corporation listed on the Toronto Stock Exchange, and its officers (hereinafter collectively "**Thera**") of failing to disclose a "material change" through the publication of a press release, which Thera was required to do on the basis of its status as a reporting issuer under the S.A. and its related continuous disclosure obligations under sections 73 S.A. and 7.1 of the *Regulation 51-102 respecting continuous disclosure obligations*.[3] Since 121CAN had held 190,000 common shares of Theratechnologies, it applied for an authorization to institute a class action.

PROCEEDINGS IN THE SUPERIOR COURT

In the Superior Court of Quebec, 121CAN filed a motion for authorization to institute a class action based only on the provisions of the C.C.P. Thera then filed an application for dismissal on the ground that the prior authorization required under subparagraph 1 of section 225.4 S.A. had not been obtained. Indeed, since Bill 19[4] came into force, a specific civil remedy has been available allowing secondary market investors to bring an action in damages for verbal or written misrepresentation or the failure of the issuer to comply with its disclosure obligations.

At the hearing on the motion for dismissal filed by Thera, Justice Marc André Blanchard of the Superior Court authorized an amendment which allowed 121CAN to add a second motion for authorization under sections 225.4 and following of the S.A.[5]

Both motions were heard at a joint hearing at the end of which Justice Blanchard allowed both motions and authorized a class action for damages.[6]

THE JUDGMENT OF THE COURT OF APPEAL

In the Court of Appeal, acknowledging that the authorization under article 1003 C.C.P. could not be appealed since such an appeal is clearly prohibited by the second paragraph of article 1010 C.C.P., Thera applied for leave to appeal the authorization granted under section 225.4 S.A., arguing that such an appeal exists under the S.A.

Leave for appeal is normally dealt with by a single judge, but on account of the unprecedented nature of the issue, it was referred to a full panel of the Court.[7]

In a unanimous decision drafted by Justice Gascon, the Court of Appeal allowed the motion for leave to appeal filed by Thera, and then dismissed the appeal. In this bulletin, we will mainly consider the issue of leave to appeal an authorization judgment under section 225.4 S.A., rather than the reasons underlying the dismissal of the appeal on the merits.

Leave to appeal - Decision of Justice Gascon

As the basis for his analysis and decision on the issue, Justice Gascon reviewed in detail the context of the adoption of the liability regime implemented through the introduction of Bill 19 and sections 225.2 and following of the S.A. and the purpose of this new remedy.

Historically, to prevail in an action in damages under the S.A., the plaintiff was required to prove a fault, a loss and causation, as in any civil liability action. However, in the specific context of the financial markets, these requirements constituted nearly insurmountable barriers for investors, who had to demonstrate that they had relied on [translation] "false information or the failure to disclose a material change for the purchase of the security and that the change in the market price of the security resulted from the false declaration or the failure to disclose".[8] These requirements also made it very difficult to institute a class action because the facts having led to each of the investments by the members of the class could be different.

It was in this context that the Allen Committee of the Toronto Stock Exchange published a report in 1997 which proposed the creation of a specific liability regime for breaches of the statutory continuous disclosure requirements. The recommendations in this report formed the basis for the adoption of *Bill 19*.

Justice Gascon assessed this new liability regime in the following terms:

> [Translation]
>
> [62] The purpose of the remedy is to contribute to improving the quantity and quality of the information disclosed on the market; it serves first as a deterrent, then as a means of compensating victims.
>
> [63] So to balance strengths, the new remedy establishes a presumption in favour of the investor: when the security is acquired or transferred concurrently to a misrepresentation or failure to disclose a material change, the fluctuation in the value of the security is presumed to be attributable to this fault. The investor is therefore freed of a heavy burden, that is, to demonstrate that he relied on the false information or the failure to disclose a material change and that the variation of the price of the security is the result of such information or omission.
>
> [64] In return, to avoid abuse, an authorization mechanism for investors' remedies is instituted to weed out remedies instituted in bad faith and which do not offer a reasonable possibility of success.
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> (our emphasis)

Considering that in no case the silence of the law constitutes a denial of the right to appeal and that furthermore, neither the Allen report nor the parliamentary debate preceding the adoption of Bill 19 discussed such a prohibition, he concluded that the legislator voluntarily chose not to prohibit the right to appeal in section 225.4 S.A.

Considering then that the portion of the judgment having authorized the action in damages as being an interlocutory judgment, Justice Gascon, for the Court, was of the view that the general principles governing the right to appeal, as set out in articles 29 and 511 C.C.P. had to be applied in the circumstances to decide on the issue and that, accordingly, the judgment was appealable upon leave. The Court therefore agreed with Thera's position.

Reminding in passing that the remedy under section 225.4 S.A. may be exercised both as an individual remedy and a class action, the Court granted to Thera leave to appeal.

Comments

In this judgment, the Court of Appeal clearly establishes a distinction between the rules applicable to the regime of authorization to institute a class action under articles 999 and following C.C.P. and those applicable under the special liability regime brought about by the amendments to the S.A. made under Bill 19. In fact, despite the joint hearing of these two applications for authorization, the Court of Appeal refused the analogy suggested by 121CAN whereby the two applications had to be dealt with in the same way and, accordingly, that the Court should refuse leave to appeal the portion of judgment authorizing the exercise of an action in damages. Although the Court acknowledged that the procedural vehicle of a class action is often the most appropriate in such circumstances for the investors, it insisted on the purposes of these two mechanisms which it deems to be specific and separate:

> [translation]
>
> [69] It follows that the purpose of the authorization mechanism under sec. 225.4 S.A. is different from that under the Code of Civil Procedure provisions dealing with class actions. While the purpose of the latter is to ensure the quality of the legal syllogism proposed trough a burden of demonstration and not evidence, the purpose of the former is to weed out opportunistic remedies where good faith is lacking and where the proof of the fault is not "reasonably established."

In the case under review, the parties found themselves in a situation where, without access to the specific regime under the S.A., they would have been deprived of the Court of Appeal clarifications on issues directly related to the authorization of the class action.

This case illustrates the fact that the Court of Appeal could validly play the role of "gate keeper" which would be entrusted to it if the appeal of an authorization judgment was possible upon leave.

We are also of the view that such a right to appeal would restore a balance between the forces present by putting an end to this procedural asymmetry.

In this respect, it is useful to mention that the Quebec Bar issued a favourable recommendation for this avenue as part of the consultation on the reform of the Code of Civil Procedure (Bill 28) in a context where such a right to appeal would be in line with the rules governing the appeal of interlocutory judgments.

Lastly, although the *Theratechnologies* may rightly be considered as a particular case, we also wonder about the practical consequences of such a decision in the future. For example, what about a situation where the authorization of the class action would be granted under the C.C.P. without this judgment being appealable, even where the Court of Appeal would be of the view that there is no reasonable possibility for the plaintiff to be successful under the S.A.?

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[1] 2013 QCCA 1256.
[2] R.S.Q., c. V-1.1.
[3] R.R.Q, c V-1.1, r. 24, (Securities).
[4] This Bill has been incorporated into the S.A. on November 9, 2007 as sections 225.2 to 236.1 S.A. under the title "Civil Actions".
[5] *See 121851 Canada inc.* v. *Theratechnologies inc.*, 2010 QCCS 6021.
[6] *121851 Canada inc.* v. *Theratechnologies inc.*, 2012 QCCS 699.
[7] Par. [32] of the judgment.
[8] See 2013 QCCA 1256, supra note 1, at par. 58.