SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000962-189

DATE: February 5, 2021

PRESIDING THE HONOURABLE THOMAS M. DAVIS, J.S.C.

MATTHEW RANGER
-and-
CAROLINE MUNRO
Plaintiffs
v.
APHRIA INC.
-and-
VICTOR NEUFELD
-and-
COLE CACCIAVILLANI
-and-
JOHN CERVINI
-and-
CARL MERTON
-and-
SOL GLOBAL INVESTMENTS CORP.
-and-
ANDREW DEFRANCESCO
Defendants

JUDGMENT ON AN APPLICATION TO DISMISS

JD2836

OVERVIEW

[1] Matthew Ranger and Caroline Munro seek the authorization of a class action to represent the following class:

> All persons or entities in Québec who purchased or otherwise acquired Aphria securities between January 20, 2018 and December 4, 2018 inclusively (the "**Class Period**"), and held those securities at the close of trading on December 4, 2018, excluding all Aphria's subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessor, successors and assigns, and any member of the Individual Defendant's immediate families and any entity in which an of them has or had at a material time a legal or de facto controlling interest (the "**Class**").

[2] Their application is based on Aphria's alleged breach of its obligations under the secondary market provisions of the Quebec *Securities Act*[1] (**the Act**) and their affirmation of a fault having been committed under article 1457 C.C.Q. Both potential causes of action are grounded in allegations that Aphria made material misrepresentations about the activities of the company to the market, which, when publically corrected, had an adverse impact on its share price causing damage to the members of the class.

[3] Mr. Ranger and Ms. Munro allege that Aphria, the individual Defendants and the corporate Defendant Sol Global Investments Corp. (**Sol Global**) all participated in a scheme to divert money and financial value away from the shareholders into the pockets of insiders.

[4] The present applications taken by Aphria and the other Co-Defendants ask the Court to dismiss the class action, as during the Class Period, Aphria was not a reporting issuer under the Act. As such, they argue that the provisions of the Act relating to secondary market recourses are not applicable and that, therefore, the Quebec courts lack jurisdiction to hear the proposed class action.

[5] Defendants add that any fault committed in relation to article 1457 C.C.Q. would have been committed outside Quebec and the damages suffered would have been suffered out of Quebec as well.

1. THE CONTEXT

1.1 The legal regime

[6] By way of introduction, it is useful to set out certain provisions of the Act.

---

1 CQLR, c. V-1.1.

[7] Reporting issuer is defined at section 5:

"reporting issuer" means an issuer contemplated in section 68;

[8] Section 68 reads:

68. A reporting issuer is an issuer that has made a distribution of securities to the public; a reporting issuer is subject to the continuous disclosure requirements of Chapter II of this title.

An issuer is deemed to have made a distribution of securities to the public where

(1) a prospectus has been filed in respect of one of its securities and a receipt issued by the Authority;

(2) its securities, offered as consideration in a take-over bid, have been described in a circular filed with the Authority;

(3) any of its securities has been listed on a stock exchange in Québec at any time from 6 April 1983;

(4) its securities have been distributed pursuant to an agreement, merger, amalgamation or reorganization or a similar operation involving at least one reporting issuer;

(5) its existence is the result of the continuance of an issuer contemplated in subparagraphs 1 to 4;

(6) it is contemplated in section 68.1 or 338;

(7) it is so determined by regulation;

(8) it is so designated by the Authority in accordance with section 272.2 or criteria determined by regulation.

An issuer who files a prospectus subject to a receipt issued by the Authority for the sole purpose of becoming a reporting issuer is also deemed to have made a distribution of securities to the public. The prospectus must contain the information and certificates prescribed by regulation and disclose all the material facts about the securities already issued. The rules specified for a prospectus in Title II do not apply to the prospectus.

[9] The Authority **(also referred to herein as the AMF)** means the "Autorité des marchés financiers established under section 1 of the Act respecting the regulation of the financial sector."[2]

---

2 Section 276 of the Act.

[10] The general obligation of issuers in respect of disclosure is described at section 73:

> **73.** A reporting issuer shall provide periodic disclosure about its business and internal affairs, including its governance practices, timely disclosure of a material change and any other disclosure prescribed by regulation in accordance with the conditions determined by regulation.

[11] Section 225.4 determines the test to be used by the Court to assess whether the proposed class action should be authorized in respect of the secondary market:

> **225.4.** No action for damages may be brought under this division without the prior authorization of the court.
>
> The request for authorization must state the facts giving rise to the action. It must be filed together with the projected statement of claim and be served by bailiff to the parties concerned, with a notice of at least 10 days of the date of presentation.
>
> The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.
>
> The request for authorization and, if applicable, the application for authorization to institute a class action required under section 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.

[12] The secondary market action is available to the following persons:

> **225.2.** This division applies to any person who acquires or disposes of a security of a reporting issuer or of any issuer closely connected to Québec whose securities are publicly traded.
>
> However, this division does not apply to a person that subscribes for or acquires a security during the period of a distribution of securities made with a prospectus or, unless otherwise provided by regulation, under a prospectus exemption granted by this Act, a regulation made under this Act or a decision of the Authority; nor does it apply to a person that acquires or disposes of a security in connection with or pursuant to a take-over bid or issuer bid, unless otherwise provided by regulation, or to a person that makes any other transaction determined by regulation.

[13] The principal misrepresentation provisions are found in sections 225.8, 225.9 and 225.11, which read in part as follows:

> **225.8**. A person that acquires or disposes of an issuer's security during the period between the time when the issuer or a mandatary or other representative

of the issuer released a document containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against

(1) the issuer, each director of the issuer at the time the document was released, and each officer of the issuer who authorized, permitted or acquiesced in the release of the document;

(2) each influential person, and each director and officer of an influential person, who knowingly influenced the issuer or a mandatary or other representative of the issuer to release the document or a director or officer of the issuer to authorize, permit or acquiesce in the release of the document; [...]

225.9. A person that acquires or disposes of an issuer's security during the period between the time when a mandatary or other representative of the issuer made a public oral statement relating to the issuer's business or affairs and containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against

(1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the making of the public oral statement; [and]

(2) the person who made the public oral statement;

(3) each influential person, and each director and officer of an influential person, who knowingly influenced the person who made the public oral statement to make the public oral statement or a director or officer of the issuer to authorize, permit or acquiesce in the making of the public oral statement; [...]

225.11. A person that acquires or disposes of an issuer's security during the period between the time when the issuer failed to make timely disclosure of a material change and the time when the material change was disclosed in the manner required under this Act or the regulations may bring an action against

(1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the failure to make timely disclosure;

(2) each influential person, and each director and officer of an influential person, who knowingly influenced the issuer or a mandatary or other representative of the issuer in the failure to make timely disclosure or a director or officer of the issuer to authorize, permit or acquiesce in the failure to make timely disclosure. [...]

[14] Given the inclusion of Sol Global and Andrew DeFrancesco (**DeFrancesco**) as Defendants, it is also useful to consider the notion of influential person at section 225.3 of the Act:

> "influential person" means, in respect of an issuer, a control person, a promoter, an insider who is not a director or officer of the issuer, or an investment fund manager, if the issuer is an investment fund;

1.2 The Relevant Facts

1.2.1 The Aphria Prospectuses

[15] At this stage, the Court must consider the facts alleged in the authorization application to be true. The focus of the authorization application is that the different misrepresentations that Aphria is alleged to have made during the Class Period adversely affected the value of its shares, which are traded on the Toronto and New York stock exchanges. Both Mr. Ranger and Ms. Munro live in Quebec and purchased some shares during the Class Period.

[16] Aphria's Application to Dismiss sets out certain factual allegations, which are supported by a solemn declaration and which are not contested by Mr. Ranger and Ms. Munro:

> 20. None of the Aphria Defendants are domiciled in Québec; rather, they are domiciled in the province of Ontario.
>
> 21. Aphria also does not have any establishment in Québec, nor any employees in the province of Québec.
>
> 22. There exists no agreement under which disputes arising out of the legal relationship with shareholders would be submitted ta Québec authorities, or any indication that one of the Aphria Defendants has submitted to Québec's jurisdiction.

[17] The position of the Sol Global and the other Co-Defendants is essentially the same.

[18] However, on or around September 17, 2020, Mr. Ranger and Ms. Munro produced an Application to Amend the Authorization Application. The principal purpose of the Application to Amend was to add a paragraph describing Aphria as a reporting issuer:

> 4 a) Aphria is a reporting issuer in Quebec, as shown in the extract from in the Autorité des Marchés Financiers AMF list dated September 15, 2020, (https://lautorite.qc.ca/fileadmin/lautorite/reg-emetteur/EmetteursFR.pdf) communicated herein as Exhibit P-2A.

[19] Exhibit P-2A is a list issued by the AMF of reporting issuers as at September 17, 2020, which includes Aphria. The list does not demonstrate when Aphria became a reporting issuer.

[20] Defendants did not oppose the amendment, but in consideration of the amendment, asked the Court to allow the production of certain prospectuses issued by Aphria.[3] Mr. Ranger and Ms. Munro did not contest the production of the documents and in the circumstances, the Court decided that their production was essential for a proper analysis of Mr. Ranger and Ms. Munro's cause of action and whether the Quebec Courts have jurisdiction.

[21] The reasoning for this is the same as that the Court would adopt to determine whether to allow appropriate evidence to be adduced. The prospectuses that Aphria seeks to produce allow the Court to consider whether the factual allegation set out in the amendment is clearly false.

[22] Despite the fact that the prospectuses show that Aphria only registered as a reporting issuer with the AMF in November 2019, Mr. Ranger and Ms. Munro maintain their position that the Quebec courts have jurisdiction, as even if it was not a reporting issuer, Aphria had a close connection with Quebec.

[23] For the Defendants, during the Class Period, Aphria was not a reporting issuer, and the amendment does not demonstrate otherwise. The combination of Exhibits D-3, D-4 and D-5 provides an irrefutable demonstration that Aphria only became a reporting issuer in Quebec on November 22, 2019.

[24] Starting with Exhibit D-4, it is a prospectus entitled:

> PRELIMINARY SHORT FORM BASE SHELF PROSPECTUS DATED NOVEMBER 13, 2019 IN THE PROVINCE OF QUEBEC AND THE TERRITORIES OF CANADA AND AMENDED AND RESTATED PRELIMINARY SHORT FORM BASE SHELF PROSPECTUS DATED NOVEMBER 13, 2019 AMENDING AND RESTATING THE PRELIMINARY SHORT FORM BASE SHELF PROSPECTUS DATED AUGUST 23, 2019 IN ALL OTHER PROVINCES OF CANADA

[25] In the introduction of the prospectus, one sees the following:

> A copy of this preliminary short form base shelf prospectus has been filed with the securities regulatory authority in the Province of Québec and the territories of Canada, and a copy of this amended and restated preliminary short form base shelf prospectus has been filed with the securities regulatory authorities in each of the provinces of Canada, other than the Province of Québec, but has not yet become final for the purpose of the sale of securities. Information contained in this preliminary short form base shelf prospectus and amended and restated preliminary short form base shelf prospectus may not be complete and may have to be amended. <u>The securities may not be sold until a receipt for the short form base shelf prospectus is obtained from the securities regulatory authorities</u>.

---

3 Exhibits D-3, D-4 and D-5; Exhits D-1 and D-2 relating to proceedings in Ontario were also produced.

> This short form prospectus and amended and restated short form prospectus are base shelf prospectuses. This short form prospectus has been filed under legislation in the Province of Québec and the territories of Canada, and this amended and restated short form prospectus has been filed under legislation in each of the provinces of Canada, other than the Province of Québec, that permits certain information about these securities to be determined after this prospectus has become final and that permits the omission from this prospectus of that information. The legislation requires the delivery to purchasers of a prospectus supplement containing the omitted information within a specified period of time after agreeing to purchase any of these securities.
>
> [The Court's underlining]

[26] The preliminary prospectus is dated November 13, 2019.

[27] The receipt to which it refers was issued on November 22, 2019,[4] as was the final short form base prospectus.[5]

[28] Following the close of arguments, the prospectus dated August 23, 2019 was produced by Mr. Ranger and Ms. Munro. It indicates that it was not filed in Quebec. Moreover, in response, as permitted by the Court, Aphria's counsel provided the Court with a decision of the AMF confirming that Aphria was not a reporting issuer in October of 2019.[6]

1.2.2 The Other Class Actions

[29] Quebec is not the only jurisdiction where the alleged misrepresentations of Aphria have been called into question by disgruntled shareholders. There was a flurry of actions taken in Ontario. On June 19, 2019, Justice Perell granted carriage to Rochon Genova for an action instituted on behalf of Vecchio Longo Consulting Services.[7] The proposed class includes all Quebec residents. It is in fact a worldwide class, at least in respect of shares acquired on the TSX. The Class Period is essentially the same as the one proposed in the Quebec application:

> (f) "Class" and "Class Members" means all persons, wherever they may reside or be domiciled, who purchased or acquired TSX securities of Aphria Inc. during the Class Period, except for Excluded Persons;
>
> (g) "Class Period" means the period from, and including, January 10, 2018 to December 4, 2018;[8]

---

4 Exhibit D-3.
5 Exhibit D-5.
6 Exhibits D-3 and D-4.
7 Court file No. CV-19-0061408600 CP.
8 *Ibid.*, par. 2 (f) and (g).

[30] This effectively put an end to the class action instituted in Ontario on behalf of Allan DeSouza by the Merchant Law Group.[9]

1.2.3 The Allegations

[31] The Court can be brief here, as the principal allegation has been outlined in the overview above.

[32] The first alleged misrepresentation of Aphria occurred beginning on January 29, 2018 with others occurring on July 17, September 27 and October 5, 2018.[10]

[33] The principal allegation against Sol Global and DeFrancesco relates to the acquisition of companies that were later sold to Aphria at prices well in excess of the actual value. On May 27 2018, there was an apparent misrepresentation by Sol Global about the value of one of the assets that it had acquired in South America. There is no allegation that Sol Global was (or is) a reporting issuer in Quebec.

2. ISSUES IN DISPUTE

[34] Both corporate Defendants raise two issues that they believe give rise to the dismissal of the authorization application.

[35] The principal one is the lack of competency, *ratio materiae*, of the courts of Quebec. If this ground is rejected, then they raise the doctrine of *forum non conveniens*.

[36] They argue that Mr. Ranger and Ms. Munro have the burden to demonstrate that the Quebec courts have jurisdiction to hear their application.

3. DISCUSSION

3.1 The Plaintiffs' Burden

[37] The Court concurs with the Defendants that Mr. Ranger and Ms. Munro must demonstrate that the Quebec courts are competent to hear the matter.[11]

3.2 Is the Issue a Pure Question of Law?

[38] In the recent matter of *Godin* c. *Aréna des Canadiens inc.*,[12] the majority reasons of Justice Bich caution against deciding questions other than pure questions of law at

---

9 Exhibit D-1, Court File No. CV-18-00610710-00CP.

10 Amended authorization application, par. 23-26; it is unclear why January 20, 2018 is chosen as the beginning of the Class Period.

11 *DDH Aviation Inc.* v. *Fox, 2002* CanLII 41085 (QC CA), par 22.

12 2020 QCCA 1291.

the authorization stage. The Court must be cognizant of this, but makes two distinctions. Firstly, the purpose of the present decision is not to decide whether to authorize the action, but whether the Court is even competent to hear it.

[39] Mr. Ranger and Ms. Munro have the burden of showing this. To meet that burden in their amended application they allege that Aphria is a reporting issuer. The evidence that the Court authorized Aphria to produce goes to whether this affirmation is false and clearly it is. No further proof at trial would change this because the status of whether Aphria is a reporting issuer depends on the very documents that have already been admitted.

[40] The issue of whether Aphria is closely connected to Quebec might give rise to evidence that goes beyond the prospectuses or the final receipt issued by the AMF, but as the Court will discuss below, the close connection must relate to the distribution of securities. None of the allegations of the authorization application would give rise to any evidence in relation to such a connection being administered at an eventual authorization hearing

3.3 Are the Quebec Courts Competent?

[41] In response to this question, the Court must consider both the applicable provisions of the Civil Code and those of the Act. First, article 3148 of the Civil Code:

3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants: 1° Le défendeur a son domicile ou sa résidence au Québec; 2° Le défendeur est une personne morale qui n'est pas domiciliée au Québec mais y a un établissement et la contestation est relative à son activité au Québec; 3° Une faute a été commise au Québec, un	**3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases: (1) the defendant has his domicile or his residence in Québec; (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec; (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in

préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée; 4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé; 5° Le défendeur a reconnu leur compétence. Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.	Québec or one of the obligations arising from a contract was to be performed in Québec; (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship; (5) the defendant has submitted to their jurisdiction. However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

[42] Consideration of paragraph 1 is straight forward. None of the Defendants are domiciled here.

[43] Nor do the corporate Defendants have a place of business in Quebec.

[44] Therefore, the only pertinent paragraph of article 3148 C.C.Q. is the third one. Whether or not a fault was committed here does give pause. However, in the Court's view, the alleged fault did not occur here.

[45] This is clearly the case for Sol Global and DeFrancesco, whose actions took place in Ontario and elsewhere. Neither has engaged in any activity here.

[46] As for Aphria, the contestation is related to misrepresentations affecting the value of Aphria's shares sold only on the Toronto and New York Stock Exchanges. Residents

of Quebec can purchase these through their brokers or likely through on-line platforms and, like all investors, may rely on the information released by Aphria.

[47] The accounts of both Mr. Ranger and Ms. Munro are based in Ontario: their orders for shares were made through RBC Direct investing in Ontario and settlement of transactions occurred there.[13]

[48] Moreover, the alleged fault of the Defendants is not in the sale or trading of shares in and of itself, but rather transactions with third parties, apparently generated from Ontario, that involve foreign corporations and, more importantly, the alleged misrepresentations made in respect of same by Aphria in Ontario. No doubt, the prejudicial effect of these misrepresentations and the complicity between the Defendants extended beyond Ontario, but the fault occurred outside of Quebec.

[49] This finding, however would not end the debate if either the injury was suffered in Quebec or if the stipulations of the Act apply to Aphria as a reporting issuer in Quebec and it is deemed to have committed fault here either through, or because of, the misrepresentations committed in Ontario.

[50] The Court will first consider the Act and in this part of the analysis should be mindful of the Private International Law principals of courtesy, order and equity,[14] but a full analysis is not really needed given that the Court concludes that Aphria was not a reporting issuer during the Class Period.

[51] The description of reporting issuer at section 68 of the Act makes the status of reporting issuer contingent on the corporation having made or being deemed to have made a distribution of securities to the public in Quebec. A distribution of securities to the public will only have occurred or be deemed to have occurred when: "a prospectus has been filed in respect of one of its securities [of the issuer] and a receipt issued by the Authority".

[52] There is no doubt that Aphria is currently an issuer, but it is also clear from the various prospectuses that have been produced that it was not an issuer during the Class Period.

[53] Yet, Mr. Ranger and Ms. Munro urge the Court to find jurisdiction on the basis of section 236.1 of the Act, which reads:

> 236.1. Any action under this Title or any action under the ordinary rules of law in respect of facts related to the distribution of a security or to a take-over bid or issuer bid may be brought before the court of the plaintiff's residence.

---

13 Exhibits P-12 and P-13.

14 *Anvil Mining Ltd.* c. *Association canadienne contre l'impunité*, 2012 QCCA 117, par. 55 and 56.

> In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.
>
> Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is without effect.

[54] They posit that their action relates to the distribution of a security. The Court does not agree, even giving a broad remedial reading to the section. Mr. Ranger and Ms. Munro have framed their proposed action under the secondary market provisions of the Act and their allegations do not relate to the distribution or "placement" of securities, but rather to misrepresentations made in respect of already distributed securities. They rely on section 225.2 of the Act that reads in part:

> **225.2** This division applies to any person who acquires or disposes of a security of a reporting issuer or of any issuer closely connected to Québec whose securities are publicly traded.

[55] The allegations of the authorization application also rely on Aphria being a reporting issuer:

> 21. As a reporting issuer and traded on the TSX and the NYSE, Aphria is required to provide periodic disclosure about its business and internal affairs. Aphria is also required to provide timely and meaningful disclosure about any and all material changes to its business or internal affairs.

[56] The following allegation is also important to consider:

> 38. The Applicants plead and seek authorization pursuant to s. 225.4 of the *Securities Act*, CQLR c V-1.1 to pursue a claim for secondary market misrepresentation as found in Title VIII, Chapter II, Division II of the *Securities Act*.

[57] These allegations show that the action is not about the distribution of securities, but about the purchase and sale of securities that have already been distributed and the effect of the misrepresentations on the owners of those securities. Hence, section 236.1 of the Act does not assist Mr. Ranger and Ms. Munro.

[58] Does section 225.2, give the Quebec courts jurisdiction on the basis that Aphria is closely connected to Quebec?[15] It could; however, Mr. Ranger and Ms. Munro would have to meet their burden to demonstrate jurisdiction by showing this close connection. They have not.

---

[15] It is of no importance with regard to Sol Global and Mr. Ranger and Ms. Munro did not argue otherwise.

[59] They rely on several elements to propose this close connection.

[60] Firstly, they refer to the following words in the short form prospectus:

> Information in respect of prior sales of the Common Shares and other Securities distributed under this Prospectus and for securities that are convertible or exchangeable into the Common Shares or such other Securities within the previous 12-month period will be provided, as required, in a Prospectus Supplement with respect to the issuance of the Common Shares and/or other Securities pursuant to such Prospectus Supplement.[16]

[61] For Mr. Ranger and Ms. Munro, these words present the likelihood that the shares were sold in Quebec during the Class Period.

[62] The Court does not share that view. Firstly, Quebec was the last jurisdiction where the prospectus was filed and the words apply equally to other Canadian provinces, where Aphria may already have been a reporting issuer, as it was in Ontario. Moreover, and more importantly, for shares to be sold in Quebec Aphria needed to be a reporting issuer and it was not. Selling shares in Quebec is not the same thing as shares being sold to Quebec residents. Certainly, the shares were available to Quebec residents, but on the secondary market on the Toronto and New York exchanges. Indeed, the shares that Mr. Ranger and Ms. Munro purchased were not even sold in Quebec, but in Ontario.

[63] The other element raised by Mr. Ranger and Ms. Munro relates to Aphria's commercial agreements with the *Société Québecoise de cannabis* to supply it with product. This, in the Court's view, does not create a close connection for the purposes of litigation instituted due to alleged breaches of a reporting issuer's obligations under securities legislation.

[64] This conclusion also suffices to dispose of the claim as against Sol Global and DeFrancesco. Even if they are influential persons, any action against them is contingent on Mr. Ranger and Ms. Munro having acquired or disposed of securities of a reporting issuer, or an issuer closely connected to Quebec. This was not the case.

[65] The Court will now turn to the other element of article 3148 C.C.Q.; was the injury or damage suffered here?

[66] In some measure, this matter is similar to *Infineon Technologies AG* v. *Option consommateurs*,[17] where the alleged fault was a conspiracy, hatched outside of Quebec, to inflate the price of a product eventually purchased by a consumer in Quebec. For Aphria, *Infineon* supports their position that the damage or monetary loss

---

[16] Exhibit D-4, p. 16.
[17] 2013 SCC 59.

to Mr. Ranger and Ms. Munro was only accounted for in Quebec and, therefore, no actual prejudice was suffered here.

[67] The Court agrees. Mr. Ranger and Ms. Munro's accounts were not administered in Quebec. The impugned transactions were not concluded in Quebec, but rather in Ontario. Their damages were ultimately accounted for or recorded in Quebec, but the substantive situs of the injury or damage was Ontario

[68] The words of Justice Kasirer (as he then was) writing for the Court of Appeal in *Infineon* are helpful. They are considered by the Supreme Court of Canada as follows:

> [46] *Quebecor Printing*, a case the appellants rely on, should not be read so broadly as to systematically exclude a purely economic loss as a type of damage to which art. 3148(3) applies. Rather, that case indicates that where financial damage is merely *recorded* in Quebec, that fact is not sufficient to ground jurisdiction under art. 3148(3). To satisfy the requirement of art. 3148(3), the damage must be suffered in Quebec. As Kasirer J.A. explained in the judgment of the Court of Appeal in the case at bar, there is a distinction between damage that is substantially suffered in Quebec and damage that is simply recorded in Quebec on the basis of the location of the plaintiff's patrimony:
>
> > [*Préjudice*] is to be distinguished from the "*dommage*/damage" that is the subjective consequence of the injury relevant to the measure of reparation needed to make good the loss. As a result, in specifying "damage was suffered in Québec/*un préjudice y a été subi*" as the relevant connecting factor, article 3148(3) seeks to identify the substantive *situs* of the "bodily, moral or material injury which is the immediate and direct consequence of the debtor's default" (article 1607 C.C.Q.) and not the *situs* of the patrimony in which the consequence of that injury is recorded. [para. 65][18]

[69] Given the Court's conclusion that the damage was not suffered here, Mr. Ranger and Ms. Munro cannot ground jurisdiction on the basis of article 3148 C.C.Q. This suffices to decide the matter, but the Court will nonetheless briefly discuss the issue of *forum non conveniens*.

3.4 Forum Non Conveniens

[70] Article 3135 C.C.Q. reads:

3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du	**3135.** Even though a Québec authority has jurisdiction to hear a dispute, it may,

[18] *Ibid.*; see also *Nakisa inc.* c. *Kumar*, 2020 QCCS 2487, pars. 30 to 32.

Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.	exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

[71] The question of *forum non conveniens* in a class action proceeding was considered by Justice Hamilton, as he then was, in *Zuckerman* c. *Target Corporation*:

> [31] Target raises *forum non conveniens* before the class action has been authorized. As a result, the only "dispute" that exists at this stage is the motion to authorize the bringing of a class action, and not the class action itself. The class action will not exist unless and until it has been authorized. At this stage, the *forum non conveniens* argument must therefore be considered with respect to Zuckerman's individual claim and his request for authorization to bring a class action.
>
> [32] If the Court dismisses the *forum non conveniens* argument and authorizes the class action, the Court will consider the jurisdiction and f*orum non conveniens* arguments in relation to the other potential class members when it defines the class.
>
> [33] The question at this stage is therefore whether the Court should decline jurisdiction over Zuckerman's claim and his request for authorization to bring a class action on the basis of *forum non conveniens*.
>
> [34] The criteria that the Court should apply in the forum *non conveniens* analysis are quite well established:
>
> > 37 The doctrine of *forum non conveniens* confers on the court a supplementary power to decline to exercise a jurisdiction that is otherwise granted to it by one of the conflict of laws rules provided for in the C.C.Q. The law attaches an exceptional character to this power, although the exercise of the power is not regarded as unusual (*Spar Aerospace Ltd.* v. *American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, at paras. 77 and 81; *GreCon Dimter inc.* v. J.*R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, at para. 33). Furthermore, the judge may exercise it only at the request of a party, and not on his or her own initiative. The application of this doctrine requires a review of various, and variable, criteria. On the basis of the Quebec Court of Appeal's decision in *Lexus Maritime inc.* v. *Oppenheim Forfait GmbH*, 1998 CanLII 13001 (QC CA), [1998] Q.J. No. 2059 (QL), at para. 18, Professor J. A. Talpis enumerated the most important factors as follows:
> >
> > The criteria most commonly used in the Quebec jurisprudence on forum non conveniens include: 1) the residence and domicile of the parties, 2) the location of the natural forum, 3) the location of the evidence, 4) the

> place of residence of the witnesses, 5) the location of the alleged conduct and transaction, including the place of formation and execution of the contract, 6) the existence of an action pending in another jurisdiction between the same parties (in an imperfect lis pendens situation) and the stage of such proceeding, 7) the law applicable to the dispute, 8) the ability to join all parties, 9) the need for enforcement in the alternative court, 10) the juridical advantages for the plaintiff, and 11) the interests of justice. As the Quebec Court of Appeal observes in *Oppenheim Forfait G.M.B.H.* v. *Lexus Maritime inc.*, these and other less frequently used criteria, have evolved from the jurisprudence in Quebec as well as in the common law jurisdictions. [Footnotes omitted].[19]

[72] From this, one can conclude that the general principles of *forum non conveniens* may be applied in a class action, but for the Quebec court to decline competence, the situation must be exceptional and the foreign court must be better placed to hear the matter.[20] The number of occasions in a class action context that these two conditions have been found to exist are extremely few.

[73] Perhaps this is because the Court must also have regard to article 577 C.C.P.:

577. Le tribunal ne peut refuser d'autoriser l'exercice d'une action collective en se fondant sur le seul fait que les membres du groupe décrit font partie d'une action collective multiterritoriale déjà introduite à l'extérieur du Québec. Il est tenu, s'il lui est demandé de décliner compétence ou de suspendre une demande d'autorisation d'une action collective ou une telle action, de prendre en considération dans sa décision la protection des droits et des intérêts des résidents du Québec. Il peut aussi, si une action collective multiterritoriale est intentée à l'extérieur du Québec, refuser, pour assurer la protection des droits et des intérêts des membres du Québec, le désistement d'une demande d'autorisation ou encore autoriser l'exercice par un autre	**577.** The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec. If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents. If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if

[19] 2017 QCCS 110.
[20] *Groupe SNC-Lavalin inc.* c. *Siegrist*, 2020 QCCA 1004, par 119.

demandeur ou représentant d'une action collective ayant le même objet et visant le même groupe s'il est convaincu qu'elle assure mieux l'intérêt des membres.	it is convinced that the class members' interests would thus be better served.

[74] While the Quebec courts indeed recognize the perils of taxing judicial resources here when a multi-jurisdictional action with the same issues is ongoing elsewhere, the much more likely solution will be to suspend the proceedings here. This allows the courts to monitor that the interests of the Quebec class members are being protected in the litigation outside of the province.

[75] Moreover, the subsequent institution of the foreign action will not always be a bar to asking for a suspension of proceedings here.[21]

[76] This said, it is not necessary to decide the question here, given the Court's decision on the jurisdiction of the Quebec courts. Suffice to add that a more appropriate debate, if the Quebec courts had jurisdiction, may have been whether to suspend the proceedings here, given that the Ontario proceedings appear more advanced.

[77] In addition, given the recourse to the secondary market provisions of the Act, the similarity of the legislation in Ontario, and the much broader scope of the Court's role under these provisions, the appropriateness of multi-jurisdictional actions is a question worth considering in the context of the appropriate use of judicial resources.

FOR THESE REASONS, THE COURT:

[78] **GRANTS** Plaintiffs' Application for Permission to Amend an Application to Authorize to Institute a Class Action and to Appoint One or More Representative Plaintiffs and for Authorization to Institue an Action Pursuant to Title VIII, Chapter II, Division II of the *Securities Act*;

[79] **GRANTS** Defendants Aphria Inc., Victor Neufeld, Cole Cacciavillani, John Cervini and Carl Merton's Application to Adduce Appropriate Evidence being exhibits D-1 to D-5;

[80] **GRANTS** Defendants Aphria Inc., Victor Neufeld, Cole Cacciavillani, John Cervini and Carl Merton's Application to Dismiss the Application for Authorization to Institute a Class Action and to Appoint one or more representative Plaintiffs and for Authorization to Institute an Action pursuant to Title VIII, Chapter II, Divison II of the *Securities Act*;

[81] **GRANTS** Defendants Sol Global Investemnt Corp and Andrew Defrancesco's Application to Dismiss the Application for Authorization to Institute a Class Action and to

---

[21] *FCA Canada inc.* c. *Garage Poirier & Poirier inc.*, 2019 QCCA 2213, par. 72.

Appoint one or more representative Plaintiffs and for Authorization to Institue an action pursuant to Title VIII, Chapter II, Division II of the Securities Act;

[82] **DISMISSES** Plaintiffs' Application for Authorization to Institute a Class Action and to Appoint One or More Representative Plaintiffs and for Authorization to Institute an Action Pursuant to Title VIII, Chapter II, Division II of the *Securities Act*;

[83] **WITH JUDICIAL COSTS.**

THOMAS M. DAVIS, J.S.C.

Mtre Christine Nasraoui
MERCHANT LAW GROUP LLP
Lawyers for Plaintiffs

Mtre Julie-Martine Loranger
Mtre Dominique Paiement
Mtre Sarah-Maude Demers
MCCARTHY TÉTRAULT S.E.N.C.R.L., S.R.L.
Lawyers for Defendants Aphria Inc., Victor Neufeld, Cole Cacciavillani, John Cervini and Carl Merton

Mtre Guy Poitras
GOWLING WLG (CANADA) S.E.N.C.R.L., S.R.L.
Lawyers for Defendants Sol Global Investments Corp. and Andrew DeFrancesco

Hearing date: September 29, 2020

TABLE OF CONTENTS