SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-001029-194

DATE : March 24, 2021

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

ANNE MILLER
and
MARTIN DIONNE
Plaintiffs
v.
HEXO CORP.
and
SÉBASTIEN ST-LOUIS
Defendants

JUDGMENT ON AN APPLICATION TO ADDUCE RELEVANT EVIDENCE AND TO EXAMINE PLAINTIFFS

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1. INTRODUCTION

[1] Plaintiffs are seeking the Court's authorization to institute a class action alleging faults, both under the primary and secondary provisions of the Quebec *Securities Act*[1] (**the "QSA"**) and article 1457 C.C.Q. The cause of action is grounded on the alleged fault of Defendants having made material misrepresentations about Hexo Corp.'s

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[1] CQLR, c. V-1.1.

(**Hexo**) business that had a negative impact on the share price and the consequent damage to investors.

[2] Simply put, the principal misrepresentations relate to statements made about a supply agreement between Hexo and the *Société québécoise du cannabis* (**SQDC**) and representations made about the purchase of the Newstrike growing facility in Ontario.

[3] The representation relating to the SQDC referred to its agreement to purchase an important quantity of cannabis over the life of the supply agreement and a guaranteed amount of 20,000 pounds over the first year following the legalisation legalizing cannabis, between October 17, 2018 and October 17, 2019.

[4] The Newstrike representation allegedly failed to mention certain licencing issues which had an important impact on the production capacity at the facility and the ability of Hexo to generate revenues from this investment.

[5] More generally, Plainiffs allege that Hexo made misleading statements about its revenue projections and controls surrounding its procurement, inventory, and financial reporting systems.

[6] When the misrepresentations were corrected, the price of the stock plummeted, causing damages to the investors.

[7] The class is defined as follows:

> "Class" and "Class Members" are comprised of the following, other than the
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> "Excluded Persons":
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> (i) Primary Market Sub-Class: All persons and entities [...] who acquired HEXO securities in an Offering on or after April 11, 2018, and held some or all of those securities until after the close of trading on: (1) June 12, 2019; [...] (2) October 9, 2019; (3) October 28, 2019; [...] (4) November 15, 2019, (5) December 13, 2019, (6) December 30, 2019, (7) March 16, 2020; or (8) March 27, 2020; excluding investors who acquired HEXO securities in an Offering in the United States between January 23, 2019 and March 30, 2020; and
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> (ii) Secondary Market Sub-Class: All persons and entities [...] who acquired HEXO securities on the secondary market on or after April 11, 2018, and held some or all of those securities until after the close of trading on: (1) June 12, 2019; [...] (2) October 9, 2019; (3) October 28, 2019; [...] (4) November 15, 2019, (5) December 13, 2019, (6) December 30, 2019, (7) March 16, 2020; or (8) March 27, 2020; excluding investors who acquired HEXO securities on a U.S. exchange between January 23, 2019 and March 30, 2020;

[8] By the present application, Defendants seek to adduce certain evidence in accordance with article 574 C.C.P. They also seek permission to examine Plaintiffs.

[9] The proposed evidence includes various press releases issued between June 14, 2018 and October 29, 2019, the most recent versions of the actions instituted in both the United States Federal Court and New York State Court and the Memorandum and Order dated March 8, 2021 and the Judgment dated March 9, 2021 rendered in the Federal Court proceedings, which granted Defendants' motion to dismiss the action in its entirety.

2. THE PARTIES POSITIONS

2.1 Defendants Hexo and Sébastien St-Louis (St-Louis)

[10] Although in their application, Defendants take the position that the Court's authorization is not required to adduce evidence in the context of a class action under the QSA, they nonetheless refer the Court to the recent judgment of Justice Duprat in *Gauthier* c. *Baazov*,[2] where he opined that there are indeed limits on the production of evidence in a QSA action and that the evidence should show "a prima facie relevance to the corresponding allegations and exhibits filed by plaintiff", and should "not [be] disproportionate to the evidence already part of the record [and] complete the record as it stands and shed light on the evidence."[3]

[11] As to the examination of Plaintiffs, Defendants posit that the examination of Plaintiffs might prove useful to the Court in determining whether or not the criteria of article 575(2) and (4) C.C.P. are met. Furthermore, Plaintiffs' examination may also prove useful to properly describe the Putative Class or any eventual subclass, as well as to identify the issues to be dealt with collectively and the conclusions sought should the class action be authorized.

[12] The parties have agreed on a framework for the examination of Plaintiffs, but it still must be approved by the Court.

2.2 Plaintiffs

[13] For Plaintiffs, introducing the foreign proceedings at this stage of the matter would uselessly burden the file.

[14] As to exhibits D-3 to D-14, without any admission, Plaintiffs defer to the Court's discretion as to the need to consider them to properly assess whether the criteria of article 575 C.P.C. have been satisfied. They do not believe that the documents will assist the Court.

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2 2020 QCCS 2452.
3 *Ibid.* par 42.

3. THE LEGAL PRINCIPLES

3.1 Relevant Evidence

[15] This being a hybrid class action given the request for authorization under the QSA, the principles are less well developed than those that apply to a class action instituted solely under articles 574 C.C.P. and following. A number of QSA applications have proceeded to the authorization stage with no judicial oversight on the evidence adduced into the record by the parties.[4]

[16] In *Nseir* c. *Barrick Gold Corporation*, the undersigned posed a number of questions about the quantity of evidence that had been adduced prior to the hearing of the authorization application:

> [191] The Court agrees with Justice Chatelain in *Catucci* c. *Valeant Pharmaceuticals International Inc.* that some reflection on the scope of the review of the evidence that should be undertaken at the authorization stage may well be in order. However, with respect, the Court believes that the need for reflection does not principally flow from the differences between Ontario and Quebec laws, other than the codified recognition in Quebec that the approach of the parties to litigation must be proportional. Rather, it is born of the very nature of the proceeding at the authorization stage. Should there be some limitations placed on the amount of evidence that the parties can produce, bearing in mind the legislative objective in the QSA of a robust deterrent screening mechanism? Is allowing essentially unlimited evidentiary production an appropriate use of the Court's resources at the authorization stage?[5]
>
> [Reference omitted]

[17] The Court agrees that Justice Duprat has indeed provided some useful and appropriate answers to these questions in the *Baazov* judgment. Here is how he approached the issue:

> [41] In the Court's opinion, the production of evidence should be limited by the burden of proof facing the plaintiff, whether it be article 575 C.c.p. or article 225.4 QSA, and the Court's duty to screen authorizations accordingly. All evidence should not be allowed, but only the evidence which serves to analyse the burden. A Court should therefore be weary of permitting the administration of proof which would be better suited under the merits of the case.[...]
>
> [42] In the Court's view, exhibits D-1, D-2, D-4, D-5, D-6, D-7, D-8 and D-9 should be part of the record. Firstly, the exhibits all show a prima facie relevance to the corresponding allegations and exhibits filed by plaintiff. Secondly, the documents are not disproportionate to the evidence already part of the record.

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4 *Nseir* c. *Barrick Gold Corporation*, 2020 QCCS 1697; *Catucci* c. *Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870.

5 *Nseir* c. *Barrick Gold Corporation*, *supra* note 4.

> Thirdly, generally speaking, the proposed exhibits complete the record as it stands and shed light on the evidence. [...]

[18] In so doing, he appears to have distinguished the judgment of Justice Chantal Tremblay in *Gauthier* c. *Bombardier inc.*[6] and most certainly, the judgment of Justice Schrager, then of this Court, in *Kegel* c. *National Bank of Canada.*[7]

[19] While, as Justice Schrager stated, the permission of the Court to adduce evidence may not be necessary under a QSA application, such that the required authorization under article 574 C.C.P. may be redundant, this does not remove the powers of the Court to manage the proceeding using its powers under article 158 C.C.P.

[20] From the Court's perspective, these powers extend to ensuring that the production of documents is proportional and that judicial resources are used appropriately. Of course, the Court must weigh a party's right to fully present its case in the balance. The reasoning of Justice Duprat appears to provide a good equilibrium.

3.2 The Examination of Plaintiffs

[21] Here again, Defendants posit that their right is not limited as this is a QSA application.

[22] The Court does not fully agree, given its case management powers under article 158 C.C.P. This said, there is no need to further develop this point, given the agreement between the parties, which the Court considers reasonable and will approve.

4. ANALYSIS

4.1 The Proposed Evidence

4.1.1 The U.S. Legal Proceedings

[23] Exhibits D-1 and D-2 constitute the most recent iterations of proceedings which have been filed in both the Federal Court and New York State Court against, among others, Hexo and Sébastien St-Louis. Exhibit D-1.1 is the judgment of the U.S. Federal Court dismissing the proceedings in that court.

[24] In the Federal Court action, the proposed class consisted of all persons and entities that purchased or otherwise acquired Hexo securities between January 23, 2019 and March 30, 2020, inclusive, on the NYSE or NYSE American exchanges.

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6 2019 QCCS 4555.
7 2013 QCCS 7168.

[25] In the New York State Court Action, the Class is defined as all those who purchased Hexo common stock in or traceable to the Registration Statement, which is a defined term in the proposed New York action that includes the Company's Registration Statement on Form F-10 filed with the SEC on December 12, 2018, and supplemented on January 22, 2019 and January 25, 2019, and the Registration Statement on Form 8-A filed on January 17, 2019.

[26] In an application to re-amend the authorization application filed in September 2020, Plaintiffs described one of the goals of the proposed new amendments as being to "[b]roaden the proposed class to cover not only Quebec residents, but all persons and entities, throughout the world, other than those currently covered by parallel proceedings in the United States."[8]

[27] The new amendments were allowed by Justice Chantal Tremblay who, however, acknowledged that while Defendants did not oppose them, they reserved their rights to make representations at the pre-authorization stage of the proceeding.[9]

[28] Defendants affirm that the US proceedings will allow the Court to determine the description and scope of the putative class.

[29] Plaintiffs retort that the they will not assist the Court in determining whether the criteria set out in article 575 C.C.P. have been met, adding that the Court does not need foreign proceedings in order to determine the appropriateness of the proposed class definition.

[30] Following Justice Duprat's lead in *Baazov*, the focus of the Court at this juncture is to ensure itself that the exhibits all show a *prima facie* relevance to the corresponding allegations and exhibits filed by Plaintiff. Indeed, some parallel US proceedings were filed in support of Plaintiffs application to re-amend their authorization application, but those same exhibits have not been filed in support of the authorization application.

[31] From the Court's perspective, they are of no added value at this juncture. Justice Tremblay has already decided on the appropriateness of the amendment. More importantly, the proceedings in question are taken under the applicable US legislation and, hence, are based on a different statutory regime. They will not assist the Court in determining whether the standards for authorization under the QSA or under article 575 C.C.P. have been satisfied. The file will become unnecessarily encumbered.

[32] This is not to exclude the potential relevance of referring to these proceedings at some time in the future, remembering that under article 588 C.C.P., a judge may modify the class during the course of the proceeding.[10]

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8 Motion to reamend, September 15, 2020, par. 7.
9 *Miller* c. *Hexo Corp.*, 2020 QCCS 3860.
10 *Benamor* c. *Air Canada*, 2020 QCCA 1597, para 90.

[33] At the authorization stage, however, they are not relevant to the exercise that the Court will be called upon to undertake.[11]

4.1.2 Exhibits D-3–D-14

[34] While there might be a debate about whether these documents meet the test for the production of documents for the purposes of an analysis of the article 575 C.C.P. criteria, the Court does not need to make that determination. Given the higher threshold that Defendants must meet under the QSA application, it is appropriate for the documents to be adduced into evidence. Defendants are faced with demonstrating that the alleged misrepresentations were not as characterized or were not material. The documents that Defendnats seek to produce are generally other press releases or information provided to the market by Hexo at a period contemporaneous with its impugned actions. They will provide further insight into what information was available to investors and assist the Court in evaluating whether the impugned communications meet the QSA threshold.

4.2 The Examination of Plaintiffs

[35] The parties propose the following:

> a) There will be only one attendance by each Plaintiff, at which there will be two separate examinations conducted – one examination in respect of the motion for authorization as a class proceeding and one examination in respect of the leave application under article 225.4 of the QSA;
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> b) The attendance for each Plaintiff will be two (2) hours in the aggregate, with a grace period of 15 minutes;
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> c) The scope of each examination in respect of the motion for authorization as a class proceeding will be limited to the following subjects:
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> (i) The facts relating to their alleged purchase of their HEXO securities and subsequent disposal;
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> (ii) Their knowledge of HEXO's public disclosure documents at the time of purchase and disposal;
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> (iii) Documents, information and other factors which influenced the decision to purchase and sell HEXO securities; and
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> (iv) Their suitability as representatives of the proposed class;
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> d) No undertakings will be sought during each examination, except if reasonably required;

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[11] *Hazan* c. *Microsoft Canada Cie*, 2010 QCCS 4214.

> e) Defendants will first examine Plaintiffs on the leave application under article 225.4 of the QSA. Then, they will decide whether a distinct examination in respect of the motion for authorization as a class proceeding is necessary.
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> Defendants may decide to use the examination on the leave application under Article 225.4 of the QSA in lieu of the examination in respect of the motion for authorization as a class proceeding. In this event, Plaintiffs reserve their right to oppose such use if the scope of the examination on the leave application under Article 225.4 of the QSA is broader than the scope authorized by the Court for the examination in respect of the motion for authorization as a class proceeding.

[36] This manner of proceeding seems appropriate. Only item (e) gives pause. To resolve this immediately, the Court notes that the proposed scope of the examination at item (c) is reasonable and should assist it in both its examination of the QSA threshold and its analysis of whether the conditions of article 575 C.C.P. have been satisfied. Frankly, the Court questions the need or utility of a separate examination for each recourse.

FOR THESE REASONS, THE COURT:

[37] **GRANTS** Defendants' Amended Application To Obtain Leave To Produce Relevant Evidence And Examine Plaintiffs, in part;

[38] **AUTHORIZES** the examination of Plaintiffs Anne Miller and Martin Dionne out of court in accordance with the parties' mutual agreement as set out in paragraph 35 of the present judgment;

[39] **AUTORIZES** the production of exhibits D-3 to D-14;

[40] **WITHOUT JUDICIAL COSTS**.

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