SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-001029-194

DATE : March 16, 2022

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

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

JUDGMENT ON DEFENDANTS' *DE BENE ESSE* APPLICATION TO PRODUCE THE EXPERT REPORT OF VINITA M. JUNEJA DATED AUGUST 4, 2021 AND MATERIALS RELIED UPON THEREIN AND PLAINTIFFS' APPLICATION TO EXPUNGE CERTAIN ASPECTS OF THE REPORT

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1. INTRODUCTION

[1] Plaintiffs are seeking the Court's authorization to institute a class action alleging that Defendants have committed 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 in the alleged fault of Defendants having omitted to disclose material information and having made material misrepresentations about Hexo Corp.'s (**Hexo**)

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[1] CQLR, c. V-1.1.

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

[2] The Court rendered judgment on March 24, 2021[2] allowing the production of certain evidence by Defendants. That judgment summarily sets out the facts giving rise to the proposed class action, essentially misrepresentations relating 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 is in respect of its agreement to purchase an important quantity of cannabis from Hexo over the life of the supply agreement and a guaranteed amount of 20,000 pounds during the first year following the legalisation legalizing cannabis, i.e., between October 17, 2018 and October 17, 2019.

[4] Prior to the judgment, on or around February 1, 2021, Plaintiffs filed the expert report of Craig J. McCann ("**McCann Report**"), in which Mr. McCann considered whether the alleged corrective disclosures (as identified by Plaintiffs in the Re-Amended Motion for Authorization) had significantly affected the price of Hexo's securities.

[5] Then, on August 4, 2021, Defendants' counsel notified Plaintiffs' counsel a copy of the expert report of Vinita M. Juneja, Ph.D., (**Dr. Juneja**) of the firm NERA Economic Consulting (**the "NERA Report"**), a 107 page report, dated August 4, 2021.

[6] Dr. Juneja notably opines on the economic materiality of the alleged misstatements by the Defendants for the period from April 11, 2018 to March 30, 2020, and also comments on the McCann Report.

[7] Defendants have taken a *De Bene Esse* Application requesting that the Court allow the production of the NERA Report as well as the additional materials apparently relied upon by Dr. Juneja, some 120 documents, as detailed in Appendix III of the said report (Exhibit R-2).

[8] More specifically they ask the Court to:

> **AUTHORIZE** Defendants to rely upon the expert report by Vinita M. Juneja, Ph.D., of the firm NERA Economic Consulting dated August 4, 2021 (Exhibit R-1) as well as the materials relied upon by Dr. Juneja (as detailed in Appendix III of the Juneja Report, Exhibit R-2), to contest that the criteria of 575 C.C.P. have been met in the present case as it concerns Plaintiffs' civil negligence claim under article 1457 of the *Civil Code of Québec*;
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> [The Court's underlining]

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[2] *Miller* c. *Hexo Corp*., 2021 QCCS 1002.

[9] Plaintiffs allege that among those 120 additional documents (**the "Additional Documents"**), 44 are analyst reports allegedly in support of the NERA Report. This was not contested during the hearing.

[10] However, Dr. Juneja repeatedly observes that her opinion is based on her review of 191 analyst reports, although she only refers to a limited number of these in the body of her report. Plaintiffs posit that the introduction of the NERA Report would require them to review and analyze the 191 analyst reports that the expert says she considered, in addition to the other 76 documents that Defendants seek leave to introduce into the Court record, for a total of 267 documents.

[11] Plaintiffs ask that the NERA Report not be allowed into the record, or, alternatively, that significant portions of it be expunged.

[12] They express significant reserves about the proportionality of the report, in particular, the document review that would be required if the Court authorizes its production.

2. THE EXPERT REPORTS

[13] Dr. Juneja describes her mandate as being:

> […]
>
> 2. In particular, I have been asked to opine on the economic materiality of alleged misstatements by Defendants over the period from April 11, 2018 to March 30, 2020[...][3]

[14] It is also interesting to contrast her mandate with that of Mr. McCann, Plaintiffs' expert:

> d. Taking the facts alleged in the Re-Amended Motion for Authorization as true:
>
> a. Could the Defendants' written or verbal statements relating to the Quebec Supply Agreement and/or the Newstrike Acquisition reasonably be expected to have a significant impact on:
>
> i. the market price of HEXO's securities?, or
>
> ii. a reasonable investor's decision to purchase HEXO's securities?
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> b. If so, what was the impact of each statement targeted in the case at hand?[4]

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3 Expert Report of Vinita Juneja, PH.D. dated August 4, 2021, p. 2.

4 Expert Report of Craig J. McCann, Ph.D., C.F.A. dated: February 1, 2021, p. 6.

[15] There seems to be a nuance between the two mandates, but the methods used are somewhat similar. Both experts analyse the behavior of the Hexo stock following the alleged corrective disclosures.

3. THE PARTIES POSITIONS

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

[16] Defendants take the position that no leave is required to produce the NERA Report and the materials that Dr. Juneja relies upon, at least with respect to the proposed class action under the QSA. They posit that the report is essential to their defense in the QSA aspect of the action.

[17] They do agree that authorization may be required in respect of the proposed action under article 574 C.C.P.

3.2 Plaintiffs

[18] Plaintiffs disagree. For them, the Court must authorize the production of the report, including in respect of the proposed action under the QSA.

[19] They argue that the rules of proportionality apply and that the Court must be wary of creating a situation where the authorization hearing becomes a mini-trial. The introduction of the NERA Report would require that Plaintiffs review and analyze all of the 267 documents that the expert states that she considered.

[20] Plaintiffs also question the admissibility of the report on the basis that it does not meet the criteria for an expert report. It will not enlighten the Court in technical areas that exceed the judge's specialized knowledge and moreover, the expert opines outside of her field of expertise.

[21] Subsidiarily, they argue that the NERA Report must be corrected to strike out portions that they consider irregular and inadmissible.

4. ANALYSIS

4.1 Is Leave required under the Proposed QSA Action?

[22] The Court stated the following in its previous judgment and believes that the same principles apply to the present applications:

> [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.

[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?
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> [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. 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.

> [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.
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> [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.[5]
>
> [References omitted]

[23] Several other judgments have now been brought to the Court's attention, which support the position adopted by Justice Duprat in *Gauthier* v. *Baazov*.[6]

[24] In *Graaf* c. *SNC-Lavalin Group Inc*., Justice Morrison was faced with an application to be authorized to examine the experts before trial. This of course is not the same situation as the present one, but, by analogy, his remarks as to the role of the Court are useful:

> *[26] Par contre, ce dernier argument de SNC a déjà été rejeté par la Cour d'appel dans l'affaire Amaya[7] dans le contexte d'une demande de documents, et ce, pour les motifs suivants :*
>
> > [100] *The judge observed, quite correctly, that the Act does not speak directly to whether document discovery is available in anticipation of the hearing under section 225.4. On the strength of that "silence", he fell back on the general rules of civil procedure, including the general provision on pre-trial discovery and disclosure in article 221 C.C.P., as well as rules applicable to class actions, to fill the gap in the Securities Act. He did so on the strength of his reading of the Preliminary Provision of the Code of Civil Procedure which provides that the rules in the Code are to "be interpreted in the light of the specific provisions it contains or of those of the law, and in the matters it deals with, the Code compensates for the silence of the other laws if the context so admits" ("il supplée au silence des autres lois si le contexte le permet").*
> >
> > [101] *In my respectful view, the judge used supplementary rules of procedure in a manner that is inconsistent with the policy of section 225.4.*
> >
> > [102] As a code in the civilian tradition, the Code of Civil Procedure has, to be sure, a suppletive vocation for other legislation and, as a code,

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5 *Miller* c. *Hexo Corp*., supra note 2.
6 2020 QCCS 2452.
7 *Amaya inc.* c. *Derome*, 2018 QCCA 120.

> it plays a role in Quebec law unlike statements of the law of procedure elsewhere. That said, when a judge is confronted with silence in a statute on a procedural matter, the Code cannot compensate for that silence with a rule that undermines legislative intent of the statute itself. The Preliminary Provision says that it operates to complete a statute "if the context so admits / si le context le permet". The Code supplements the law, it does not supplant it. The law of procedure in Quebec remains adjectival; procedure is, of course, the servant of justice and the law and cannot not, in the instant case, stand as a substitute for or contradict substantive rules of securities legislation.
>
> [103] *While the Securities Act is silent on the specific issue as to whether document discovery is possible at the pre-leave stage, the substantive legislative purpose that underpins section 225.4 is incompatible with it.*

[27] Toujours dans l'affaire Amaya, la Cour d'appel souligne l'importance d'éviter l'injustice qui pourrait résulter dans le cadre d'une demande en autorisation d'une action selon l'article 225.4 LVM, si la preuve déposée amène les parties à participer dans un miniprocès au stade de l'autorisation, et ce, tel qu'exprimé de la façon suivante :

> [105] *None of the provisions cited, alone or grouped with the others, justifies allowing discovery in a manner that would amount to a change in the policy underlying section 225.4 of the Act. Importantly, it is not "unfair" to require a plaintiff-shareholder to show, according to the terms of the screening mechanism, that his or her proposed action is not a strike suit given the policy behind that rule to protect issuers, innocent shareholders, the markets and the courts. On the other hand, it would potentially be unfair to the issuer and to innocent shareholders, as well as to the justice system, to subject the parties to a "mini-trial" that might result if discovery was allowed. When section 225.4, paragraph 3, refers to the requirement that the putative plaintiff show "a reasonable possibility that it [i.e. the proposed action in the annexed projected statement of claim] will be resolved in favour of the plaintiff", the legislature refers to a reasonable possibility of that outcome at a trial down the road, one at which, where appropriate, discovery can be sought. At this stage, however, the evidentiary bar is lower than at trial – just some credible evidence to support the view that the suit is not destined to fail.*

[28] La demande d'obtention de documents a été refusée par la Cour d'appel comme étant incompatible avec l'objectif législatif de l'article 225.4 LVM. La Cour s'exprime ainsi:

> [81] *I agree with the appellant. Document disclosure should not be allowed at this early stage of the proceedings because it is incompatible with the legislative policy pursued in section 225.4 of the Act. It is not justified by differences between the Quebec regime and that applicable*

> *elsewhere, nor do rules promoting cooperation between the parties in the Code of Civil Procedure warrant a departure from the policy common to securities legislation in Quebec and the other provinces*.[8]
>
> [References omitted]

[25] Justice Morrison concluded that there could be no questioning of the experts without the authorization of the Court. Justice Vauclair, refused leave to appeal:

> *[…] Compte tenu de la formulation employée dans les conclusions et des motifs du juge, je ne suis pas convaincu que le juge excède ses pouvoirs de gestion. Au contraire, le juge semble rechercher une solution ponctuelle afin de donner plein effet au processus de filtrage tout en respectant le principe de proportionnalité compte tenu de la nature de la preuve dans le dossier dont il est saisi. À mon avis, il s'agit d'une décision de gestion qui n'est pas déraisonnable au regard des principes directeurs de la procédure, mais aussi de l'arrêt Theratechnologies inc. c. 121851 Canada inc. 2015 CSC 18 (CanLII), [2015] 2 R.C.S. 106, que le juge cite à bon droit et qui rappelle que le processus d'autorisation ne doit pas se transformer en mini-procès. Manifestement, il revient au juge de rechercher un équilibre.*[9]
>
> [The Court's underlining]

[26] The characterization of the QSA recourse by the Supreme Court of Canada in *Theratechnologies Inc.* v. *121851 Canada Inc.* also gives credence to the role of the Court as an overseer of the evidence before the authorization hearing:

> [39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a minitrial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.[10]
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> [The Court's underlining]

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8 2020 QCCS 1232.
9 *Groupe SNC-Lavalin inc.* c. *Graaf*, 2020 QCCA 1189.
10 2015 SCC 18.

[27] Similar words were used by Justice Kasirer, then on the Quebec Court of Appeal in *Amaya*:

> [84] The screening mechanism in section 225.4 is indeed designed, above all things, to protect public issuers against frivolous lawsuits brought by investors who have no meaningful evidence to show that they have been the victims of misconduct in the secondary market. It also serves to protect long-term shareholders of the issuer who, not party to the unmeritorious action, would bear the cost of any settlement paid to opportunistic plaintiffs. The screening mechanism thus contributes to protect the public confidence in the capital markets by ensuring that investors will not be held hostage to frivolous litigation.[…][11]

[28] In the Court's view, these authorities lead to a conclusion that gone are the days where the parties can produce evidence in a QSA class action without being subject to the oversight of the Court. But, what does this mean from a procedural perspective?

[29] Absent a provision like article 574 C.P.C. in the QSA, Defendants are correct that, in the strict sense of the word, the Court's permission is not required for the production of the NERA Report as Justice Schrager stated in *Kegel* c. *National Bank of Canada*.[12] This said, it is really a question of semantics, as the Court remains the overseer of what can be appropriately adduced into evidence, even in a QSA application. Article 158(2) C.C.P. allows the Court, as part of its case management role, to assess the usefulness of the production of an expert report.[13] One of the criteria that the Court might also consider is proportionality.

[30] In exercising this role, the Court must also be mindful that it does not jeopardize a party's right to assert its position. This is particularly important given the policy reasons behind the threshold set out in section 225.4 C.P.C. that the Court has alluded to. Issuers do have the right to defend themselves when faced with a claim, but the means used must be proportional and appropriate.

[31] In sum, at the risk of repetition, the Court considers that the appropriate prism through which to consider the admissibility of an expert report is that set out by Justice Duprat in the *Baazov*[14] judgment.

[32] In addition, whether under the QSA portion of the proceeding or the 574 C.C.P. portion, the Court retains its role as the gate keeper of expert evidence under article 241 C.C.P. The proposed report must meet the standards set out in articles 238 C.C.P. and following.

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11 *Supra* note 7.
12 2013 QCCS 7168, par 7.
13 *Municipalité de Grenville-sur-la-Rouge* c. *Canada Carbon inc*., 2018 QCCA 804.
14 *Gauthier* v. *Baazov*, *supra* note 6.

4.2 Which Analysis Should Proceed First?

[33] The parties are not on all fours as to whether the Court should first analyse admissibility under the QSA or under article 574 C.C.P.

[34] As the Court has said, the debate under the QSA is not one of admissibility, but of usefulness to the proceedings. In addition, given the higher burden that a defendant faces under the QSA application, the initial analysis that the Court will proceed with is the one under the QSA, but as one can see from the analysis of Justice Tremblay in *Gauthier* v. *Bombardier inc.*,[15] and from the judgment of the undersigned in *Nseir* c. *Barrick Gold Corporation*,[16] concluding that the fault under section 1457 C.C.Q. will be the one set out in the statutory regime, the analysis of the Court with respect to each prong of the proposed action cannot be done in a vacuum.

[35] Hence, if the Court determines that the report is useful for the QSA proceeding, it will also form part of the record for the regular class action proceeding, although the use that the Court makes of the document for the purposes of article 575 C.P.C. should respect the criteria for the use of proof presented by a defendant under that article

[36] Justice Courchesne provides a thoughtful analysis of the path for the Court to follow when considering if evidence is admissible in a regular class action in *Option Consommateurs* c. *Samsung Electronics Canada inc*.:

> *[11] Le Tribunal rappelle certains principes émis par les tribunaux et qui doivent être considérés lorsqu'une demande d'interrogatoire et de communication de documents pré-autorisation lui est soumise :*
>
> *- le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;*
>
> *[…]*
>
> *- la vérification de la véracité des allégations de la demande relève du fond;*
>
> *- le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;*
>
> *- à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême, soit la démonstration d'une cause défendable ; le*

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15 2019 QCCS 4555.
16 2020 QCCS 1697, par. 298.

> *tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;*
>
> *- le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé ; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;*
>
> *- la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée ; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;*[17]
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> [References omitted]

[37] In the present matter, the use of the report would largely be to evaluate whether the factual allegations of the authorization application are clearly false with the ultimate goal of determining whether "the facts alleged appear to justify the conclusions sought".

4.3 Should the Report be admitted?

4.3.1 Introduction

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

> **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.

[39] Section 225.4 determines the test to be used by the Court to assess whether the 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.
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> 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.

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[17] 2017 QCCS 1751.

[40] One sees from this section that the burden of a plaintiff is to demonstrate a reasonable possibility that he or she will be successful. To help establish this, in the present matter, Plaintiffs have chosen to file a concise report that opines that certain of the misrepresentations or omissions, when corrected, led to a drop in the share price.

[41] Defendants' choice to file their own report is, at first bluff, not an unreasonable course of action. A defendant has the right to try to demonstrate, even at the authorization stage, that there is not a reasonable chance that a plaintiff's action will succeed.

[42] This said, the analysis of competing expert reports at the authorization stage will not be nearly as exhaustive as it would be at the trial on the merits if the action is authorized. The debate between the experts is best left for the merits,[18] precisely to avoid the risk of embarking on a mini-trial. To fully consider whether the criticism of the McCann Report proffered by the NERA Report is warranted at this stage is not possible without the benefit of cross-examination of Dr. Juneja and the testimony of Mr. McCann, but this is not the time for that.

[43] However, it is fair game for the Court to consider a report offered by a defendant from the perspective of whether a plaintiff's report is so flawed that it does not support the contention that a plaintiff's action has a reasonable chance of success. The focus of expert reports at the authorization stage should be on the necessary elements of a plaintiff's right of action under the QSA, but this focus will generally be a broader one than the limited one permitted under article 574 C.P.C.

[44] The provisions set out in sections 225.8, 225.9 and 225.11, set out the principal rights of action that a person might have against an issuer or its directors in the event an issuer releases a document containing a misrepresentation or fails to make a timely disclosure of a material change.

[45] Perhaps the two that are most important for the purposes of the present matter are "misrepresentation" and "material fact".

[46] Misrepresentation is defined at section 5:

> "misrepresentation" means any misleading information on a material fact as well as any pure and simple omission of a material fact; [...]

[47] The meaning of misrepresentation, therefore, turns on the definition of "material fact", also set out in section 5 of the Act:

> "material fact" means a fact that may reasonably be expected to have a significant effect on the market price or value of securities issued or securities proposed to be issued; […]

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[18] *Swisscanto* v *BlackBerry*, 2015 ONSC 6434, par. 48; *Catucci* c. *Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, par. 182.

[48] One can see generally from the relevant sections that, as an issuer, Hexo is generally required to advise investors and potential ones of any material fact or change to its business that might affect the value of its securities and to provide information that is not misleading.

[49] The right of action against the issuer does not really arise as a result of what actually happens after a misrepresentation or the failure to disclose a material fact or a material change, but rather as a result of what might be expected to happen as a result of the issuer's failure to meet its obligations. This said, the reality is that the performance of the stock following the corrective disclosure will be often be considered as it likely provides the best perspective of the reasonably expected effect of the misrepresentation on the markets. Both experts seem to have acknowledged this and did consider the performance of the stock following the corrective disclosure.

[50] In conclusion on this point, contrary to a regular class action where the evidence proposed by a defendant is only admitted in very limited circumstances, one being to show the falsity of a plaintiff's allegations, the scope for admitting evidence should be broader under a QSA action. There is nothing inherently untoward about allowing a defendant to produce an expert's report, as the Court has said, if only to try to show that a plaintiff's case has no reasonable chance of success.

[51] This is essentially what Defendants wish to do with the NERA Report and the Court will allow its production, but with significant limitations in an attempt to provide more proportionality and to lessen the risk of a mini-trial at the authorization stage.

[52] In addition, from the Court's perspective, Dr. Juneja has in some measure gone beyond what is appropriate at this stage. To consider why, the Court will take the Plaintiffs' representations on the parts of the report that they seek to expunge into account.

4.3.2 Plaintiffs' Affirmation that Parts of the Report be expunged

4.3.2.1 Introduction

[53] Certain elements of the report have been described as either being irrelevant, unnecessary to assist the trier of fact, or, usurping the role of the judge.

4.3.2.2 The Alleged Irrelevant Aspects of the Nera Report

[54] Dr. Juneja's "Summary of Opinions" at the outset of her report gives pause. Contrary to her view, the economic logic of Hexo's decision on whether to enforce the Take-or-Pay provision is not relevant to the analysis that the Court will be required to undertake at the authorization stage. What is important is how and when the decision not to enforce the provision was announced to the shareholders and, if Hexo's intentions had indeed been misrepresented, what the expected impact on the share price might have been following the alleged corrective disclosure.

[55] Paragraph 5a. i) is not useful to the debate. Nor is the following sentence in paragraph 92: “I then address from the perspective of economic logic (…) never intended to enforce the Take-or-Pay provision.”, as well as the discussion around the economic analysis that Hexo might have made on whether to enforce the provision, from paragraphs 97 to 107 of the report.

[56] This, not to say that this analysis might not have a place on the merits, but the logic of Hexo’s position (or lack thereof) does not help in the determination of whether Hexo misrepresented its position and whether the misrepresentation was material.

4.3.2.3 Assistance to the Trier of Fact

[57] Next, Plaintiffs posit that there are numerous elements of the report that will not assist the trier of fact. The first of these are the factual affirmations that Dr. Juneja makes in relation to the Canadian Cannabis industry, generally. These are found at page 13, par. 16 to page 17, par. 25.

[58] The difficulty with these affirmations of the report is that Dr. Juneja is commenting on facts that have not been alleged by Plaintiffs. The general state of the industry does not form part of their application. Defendants, in their application to adduce additional evidence, did not ask the Court to permit the production of evidence on the cannabis industry, generally. So the state of the industry and its evolution at the relevant time are not in evidence. Moreover, a description of the industry, other than in relation to the performance of cannabis securities, will not assist the Court in evaluating the alleged misrepresentations of Hexo.

[59] Generally, as explained by Justice Claude Dallaire in *Syndicat des copropriétaires du Westmount Square* c. *Royal & Sun Alliance du Canada, société d'assurances*, an expert should opine on facts that have been put into evidence by the parties:

> *[55] Le rôle de l’expert est donc d’éclairer le juge sur de la preuve parfois complexe, dans une sphère hors de sa compétence habituelle, donc sur des matières spécifiques propres à chaque dossier, et à partir de faits pertinents que les parties doivent introduire en preuve, en lien avec la spécialité de l’expert, dans le cadre d’un litige particulier.*[19]
>
> [The Court’s underlining]

[60] One might also take guidance from the recent judgment of Justice Sheehan in *Farias* c*. Federal Express Canada Corporation*, where he states:

> *[44] Quant à l’utilisation de faits qui ne sont pas en preuve, il est bien établi que la valeur probante d’une expertise repose, d’abord et avant tout, sur la véracité des prémisses factuelles qui sous-tendent l’opinion de son auteur.e.*

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[19] 2020 QCCS 1079.

> *[45] Si tant est que le demandeur ait raison et que les faits sur lesquels madame Miller se base ne sont pas mis en preuve, le tribunal saisi du fond pourra écarter l'expertise comme étant non concluante, mais avant de se faire, il faut avoir donné la chance à la défenderesse de prouver les faits sur lesquels l'experte s'appuie.*[20]
>
> [Reference omitted]

[61] The distinction with the present matter is that Justice Sheehan was deciding upon the admissibility of the report in the context of a class action that had already been authorized. There was, therefore, scope for the defendants to make further evidence at trial. This is not the case here, where the Court must limit itself to the facts of the authorization application and the evidence that it has permitted Defendants to adduce.

[62] Based on these principles, the Court concludes that section 2.3, save for paragraphs 21, 22 and 26, of the NERA Report must be struck, both because it provides information that is not in the record and because it will not assist the trier of fact. The retained paragraphs relate to share prices, information that is clearly at the heart of the litigation.

[63] Plaintiffs further posit that from pages 24 to 35, Dr. Juneja essentially comments on the authorization application and that this is not necessary or appropriate for her report. There is indeed a significant amount of regurgitation that is of little value to the Court, but it appears that the expert is providing context, so these elements of the report will not be expunged. This said, to the extent they contain any undocumented contradiction with the allegations of the authorization application, the Court will only consider the allegations of the application.

[64] Next, Plaintiffs ask that numerous paragraphs commenting on analysts' reports following alleged corrective disclosures between June and December 31, 2019 be struck. Plaintiffs posit that portions of the report constitute a disguised defense. The Court will allow these paragraphs to remain in the record, as they relate to Dr. Juneja's discussion of the effect of said disclosures. This said, the Court has reservations about the qualifications of Dr. Juneja to analyse the significance of statements in analysts' reports, although, this element will go to the probative value of her report and may be debated at the authorisation hearing.

[65] This leads to another concern with the NERA Report as evidenced by the following paragraph:

> 120. The results of my review of analyst reports are also not consistent with the alleged corrective disclosure on June 13, 2019 having led to any movement in HEXO's share price, as it shows that the market was focused on other aspects of HEXO's disclosures.[21]

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20 2021 QCCS 4677.

21 Expert Report of Vinita Juneja, PH.D. dated August 4, 2021.

[66] Firstly, the method of scientific analysis that she used to arrive at the result is not mentioned.

[67] Then, in the body of the report, there is only summary discussion of a limited number of reports, and certainly not the 191 reports that Dr. Juneja says that she looked at. This will also go to the probative value of the report, and, moreover, a statement that 191 reports were looked at will not assist the Court, absent any specific reference to those reports.

4.3.2.4 Proportionality

[68] The Court acknowledges that these observations may not assuage the concern of Plaintiffs around the proportionality of the report. It is also not fully evident how all of the documents that Dr. Juneja refers to are used in the report to draw the proffered conclusions. Let us look first at a couple of examples.

[69] One is the reference to *Erica P. John Fund, Inc., et al.* v. *Halliburton Co., et al*., found at footnote 123 is as an authority to justify the use of the Holm-Bonferroni adjustment.

[70] Another example is: Ontario Takes a Phased Approach to Cannabis Retail Licensing, Due to National Supply Shortages, found at footnote 40; an Ontario document in a case largely around a Quebec supply agreement, the text of which is not quoted.

[71] Is it proportional to allow Defendants to rely on these documents, as they have asked, or, more to the point, to put the onus on Plaintiffs to analyze each of them?

[72] Proportionality is an issue over which the Court has an important role and, in a matter such as this one, it must balance the risk of permitting strike suits to go forward with the risk that the barriers put in front of legitimate plaintiffs will dissuade them from exercising their rights.

[73] To allow Defendants to rely on these reports (which have not been presented to the Court), over and above the limited use that is made of them in the NERA Report, would be to allow them to circumvent the gatekeeping process that the Court has discussed hereinabove.

[74] The solution is to ensure that the playing field is somewhat level, which can best be done by allowing only those documents and reports that are specifically referred to in the NERA Report to form part of the record.

[75] In order to perhaps allow the parties to attempt to level the field on their own, the Court made the following request to Defendants' lawyers:

> *Afin que je puisse terminer mon jugement sur l'admissibilité du rapport NERA je demande aux défendeurs de me préparer une liste des rapports et documents qui*

> *ont mérité une référence spécifique dans le rapport de Dre Juneja et de me la communiquer après vérification par les demandeurs. Merci*.[22]

[76] After being advised by Plaintiffs' lawyers on January 24, 2022 that they had received a 34 page compilation of documents from Defendants' lawyers the Court communicated the following:

> *Maitres,*
>
> *L'idée de mon courriel de décembre dernier était que vous identifiez les documents que l'experte a discutés spécifiquement dans son rapport, et ce, dans le but de respecter la proportionnalité. Beaucoup des documents semblent avoir été cités dans les notes de bas de page, sans avoir été traités spécifiquement. Je vous ai demandé de faire l'exercice dans l'espoir que cela irait plus vite et pour s'assurer que le Tribunal ne passe pas outre des documents dans sa propre analyse de la question. Tant mieux si vous aviez pu vous entendre sur les documents spécifiquement discutés par l'experte. Or, il me semble, avec égards, que l'exercice a déjà pris beaucoup de temps. Ainsi, si je n'ai pas de vos nouvelles d'ici le 4 février, je procéderai à compléter mon jugement sans votre intervention.*
>
> *Merci.*

[77] Finally, on February 3, 2022, the Court received an explanatory letter from Dr. Juneja as well as some eight tables of documents of different categories, only one of which, Table A, sets out the documents specifically referred to in the report. Plaintiffs allow that the documents in Table A might be properly admitted into evidence and the Court agrees, to the extent that the documents referred to therein have not been used solely in relation to expunged portions of the Nera Report.

[78] But, what about the other tables and the documents referred to therein?

[79] Table B: "Sources Relied Upon but Not Referenced in the Text or Footnotes of the Juneja Report" refers to one document. Its production will not be permitted. It cannot help the Court at this juncture if it has not been referenced in the report.

[80] Table C: **"**Additional Sources Relied Upon in Exhibit A of the Juneja Report" will not be admitted either. Exhibit A sets out the number of times that competitors were mentioned by analysts during the proposed class period. Allowing the production of these reports would not be proportional where the task of the Court is essentially to consider the effect of Hexo's alleged misstatements and where market data on the performance of cannabis stocks is generally available. The number of times competitors have been mentioned will not assist with this.

[81] Table D: "Additional Sources Referenced in Exhibit B of the Juneja Report", which relates to the Canadian cannabis industry generally. The Court has already opined that

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[22] Email of November 30, 2021; a follow-up request was sent on December 28.

this aspect of the Nera Report is not relevant, so these documents will be treated in the same way.

[82] Table E meets the same fate for the same reason.

[83] Table F: “Additional Analyst Reports Consulted for Paragraph 5-a-ii and Section 6.1 and/or Table 6 of the Juneja Report”. Paragraph 5 a) relates to reports mentioning the Take or Pay provision. In the report Dr. Juneja describes her work as follows:

> To gauge the overall level of importance assigned by the market to the Take-or-Pay Provision, I obtained 178 analyst reports issued during the Proposed Class Period and 13 additional reports published over the 10 trading days following the end of the Proposed Class Period, for a total of 191 reports.147 Only three of these reports mentioned the Take-or-Pay Provision as summarized in Table 8 below.

[84] Clearly the reports mentioning Hexo or the Take or Pay provision are relevant. The others are not.

[85] Table G: **“**Additional MD&As Consulted to Determine Range of Shares Outstanding Set Out in Paragraph 13 and Footnote 22”. The production of the two reports referred to therein will be permitted as they refer to Hexo and their relevance cannot be eliminated.

[86] Table H: “SEDAR Pages with Timestamps Used to Determine/Verify the Timing of Certain Disclosures”. It is vague and does not appear to be useful to the Court.

4.3.2.5 Usurping the Role of the Court

[87] Plaintiffs set out a number of elements in the report where they believe that Dr. Juneja usurps the role of the Court.

[88] The Court agrees with Plaintiffs that the determination of whether Hexo made a misrepresentation, what Hexo should have disclosed and whether there was a public correction of any misrepresentation is the role of the Court, not an expert. In addition, as the mandate of Dr. Juneja was to opine on the economic materiality of the alleged misrepresentations, it was not even her requested role to comment on what might be a misrepresentation and what isn’t. This said, the Court does not have trouble with her adopting the characterization of those statements that were alleged as being misrepresentations or corrective disclosures. For the moment, this is what they are: allegations. At the authorization hearing, it will be up to Plaintiffs to demonstrate that their characterizations of the representations or the corrective disclosures are the ones that the Court should adopt.

[89] Dr. Juneja can also comment on whether, in her opinion, the misrepresentation led to a fall in the price of the stock. This does not usurp the role of the Court, which does not have independent knowledge as to why a stock might fall in price.

[90] Plaintiffs have also asked that the following words at paragraphs 5 e.i) and 71 be stricken from the report:

> "first, to articulate clearly what the Company could and should have disclosed during the Proposed Class Period"
>
> 71. A necessary first step in assessing economic materiality is to identify the specific incremental information to be assessed—i.e., to articulate what a correct or accurate public disclosure allegedly would have been.

[91] The Court agrees that they are not within the purview of the expert and should be struck. It is the role of the Court to determine what Hexo should have disclosed.

[92] The next observation of Plaintiffs is that paragraphs 150 and 151 be expunged. The Court agrees. It has the task of determining whether the March 17 announcement is a public correction and relates to the alleged misstatements. In addition these paragraphs do not provide an opinion, only commenting on the authorization application.

[93] Paragraphs 153 to 168 will not be struck, as they relate to the question before the Court, but as the Court mentioned earlier, this analysis will likely have limited probative value, as Dr. Juneja does not state how she did her analysis of the various reports. In addition, the Court can read the reports for itself, once they are properly identified.

FOR THESE REASONS, THE COURT:

[94] **GRANTS** in part Defendants' De Bene Esse Application for Leave to Produce the Expert Report by Vinita M. Juneja, Ph.D., dated August 4, 2021 **(the Nera Report)**, and the Materials Relied Upon (Exhibit R-2);

[95] **ALLOWS** the production of the Nera Report and the materials describes in Exhibit R-2 in part;

[96] **ORDERS** that the production of the materials relied on (Exhibit R-2) be limited to the documents set out in: Table A, Table F, limited to the reports mentioning Hexo or the Take or Pay provision, and Table G of the description of the "Items referenced in Appendix III" prepared by Dr. Juneja on February 3, 2022;

[97] **GRANTS** Plaintiffs' Application in part;

[98] **ORDERS** that the following elements of the Nera Report be struck:

- Paragraph 5a. i);
- The following words at paragraph 5e. i):

- "In order to assess whether the alleged misrepresentations were economically material, it is necessary, first, to articulate clearly what the Company allegedly could and should have disclosed during the Proposed Class Period."

- Section 2.3, save for paragraphs 21, 22 and 26;

- Paragraph 71;

- The following sentence in paragraph 92: I then address, from the perspective of economic logic, the factors bearing on HEXO's decision regarding whether to enforce the Take-or-Pay Provision.;

- Paragraphs 97 to 107;

- Paragraphs 150 and 151;

[99] **WITHOUT JUDICIAL COSTS.**

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Hearing date: November 2, 2021, Additional materials received on February 3, 2022.