SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000859-179

DATE: August 7 2020

IN THE PRESENCE OF: THE HONOURABLE FRANÇOIS P. DUPRAT J.S.C.

DENIS GAUTHIER
Plaintiff
v.
DAVID BAAZOV
Defendant

JUDGMENT

(Motion for authorization to institute a class action pursuant to article 575 *C.c.p* and for authorization to bring an action pursuant to article 225.4 of the Quebec Securities act[1])

INTRODUCTION

[1] Denis Gauthier is seeking an authorization to institute a Class Action against David Baazov. The defendant, Mr. Baazov was a major shareholder of Amaya and acted at times as its President, CEO, and Chairman of the Board, Secretary and Treasurer.

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[1] CQLR, c. V-1.1.

[2] In the Motion, Amaya Inc., now known as the Stars Group Inc., is described as providing technology-based products and services in the online gaming industry. Its securities are listed on the Toronto Stock Exchange and NASDAQ.

[3] Upon reading a newspaper article on November 14th, 2016, Denis Gauthier took the decision to purchase 250 Amaya shares at a price of $ 21.41 per share. Thereafter, the price of the shares in Amaya plummeted after certain material facts became public. Plaintiff Gauthier sold his shares at a loss on November 23rd, 2016 at a share price of $ 18.49. He is seeking on his behalf, and on behalf of members of the potential Class, damages for the loss of value and punitive damages.

[4] In a nutshell, the Motion is based on an alleged market manipulation scheme by Mr. Baazov to influence and drive up the price of Amaya's shares in order to increase the value of his own stake in Amaya's shares. The legal basis for the recourse rests upon section 225.4 of the *Québec securities act* (QSA) and on article 1457 *C.c.Q*.

[5] In the re-amended Motion for authorization[2], the Class and the Class period are defined as:

> b) Class" and "Class Members" are comprised of the following, other than Excluded Persons:
>
> All persons and entities who purchased Amaya Inc. securities during the Class Period and held all or some of those securities until after the Corrective Disclosure;
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> c) "Class Period" means the period from February 1, 2016 to November 21, 2016, inclusively;

[6] Upon conclusion of the authorization hearing, the common questions to be addressed were revised as follows:

> **DECLARE** that the following questions of fact and law to be dealt with collectively are:
>
> i) Were there misrepresentations in the Impugned Documents?
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> ii) Did the Defendant mislead the public or commit a fault?
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> iii) Were the alleged faults and breaches done intentionally?
>
> iv) Is the Defendant liable to the Class Members in virtue of applicable laws or regulations?
>
> v) What are the damages sustained by the Class Members?

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2 Re-amended motion of September, 10, 2018.

> vi) Does the Defendant's conduct warrant an award in punitive damages and, if so, in what amount?

[7] Counsel for both parties agree the Court must analyse distinctly the proposed class action by taking into account the requirements set forth in the QSA and in article 575 *C.c.p*. In *Amaya*, the Court of Appeal wrote on the burden facing the plaintiff in such an authorization [3]:

> 20 In order to advance to trial, the respondents must obtain from the Superior Court both leave under section 225.4 of the ***Securities Act*** and authorization to bring a class action under article 575 of the ***Code of Civil Procedure***. In this sense, when an action in damages is brought for secondary-market securities liability as a class action, it has aptly been called a "hybrid" proceeding in that a petitioner has the twin task of satisfying distinct burdens imposed by securities legislation and by the law relating to class actions. The rules in the ***Securities Act*** and those in the Code relating to class actions both require – to differing degrees – some evidence to suggest that a petitioner has a valid claim before the action will be allowed to proceed to the merits.

[8] Mr. Gauthier alleges that himself and the proposed class members, who invested in Amaya's securities, suffered monetary damages when the value of their securities dropped as a result of the disclosure of Mr. Baazov's intentional misrepresentations in relation to his plan to acquire the shares of Amaya.

[9] Mr. Baazov contests the motion for authorization. It is argued that plaintiff has failed to meet the burden of proof under the QSA and under article 575 C.c.p.

[10] For the reasons that follow, the Court finds that the authorization to bring a class action under the QSA and the Code of civil procedure should be granted, except for the claim for punitive damages.

[11] Before the hearing, defendant filed a motion to strike allegations and exhibits from the plaintiff's Motion for authorization and to request leave to file relevant evidence[4]. The Court will first summarize the facts relating to the proposed action and then deal with the motion to strike and allow evidence by the defendant.

CONTEXT OF THE MOTION FOR AUTHORIZATION

[12] Three particular documents are essential in order to understand the proceedings as they form the chronology of events recounted by plaintiff and frame the Class period, i.e.: February 1, 2016 to November 21, 2016. They are referred to in the Motion as the *corrective disclosure* and *impugned documents*:

> d) "Corrective Disclosure" means the Globe & Mail's article entitled "Dubai

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3 *Amaya inc.* c. *Derome,* EYB 2018-289829, 2018 QCCA 120.

4 Application of August 23, 2019.

> firm denies backing Amaya deal; files SEG complaint" published on November 22, 2016, communicated herewith as Exhibit P-1;
>
> (…)
>
> g) First Impugned Document" means the Early Warning Report Filed Under National instrument 62-103, signed by the Defendant and filed on SEDAR on February 1,2016 by the Defendant and communicated herewith as Exhibit P-2;
>
> h) "Impugned Documents" means collectively the First and Second impugned
>
> Document;
>
> (…)
>
> k) "Second Impugned Document" means the Form 62-103F1 Required Disclosure under the Early Warning Requirements signed by the Defendant and filed on SEDAR on November 14, 2016 by the Defendant and communicated herewith as Exhibit P-3; and

[13] As per the plaintiff, it is on February 1st, 2016 that defendant, through the publication of an early warning report, started his scheme to manipulate the price of the shares by announcing his intention to acquire Amaya at a share price of CDN$ 21.00. The announcement had an immediate effect on the shares, as both the price and volume of trading escalated.

[14] On November 16th, 2016, defendant announced through an update of the early warning report of February 1st, 2016, a bid to acquire 100% of Amaya shares at a price of CDN$ 24.00. The document specified investment sources had been found, one of which being a firm designated as KBC Aldini Capital limited (*KBC*). Again, the volume of trading increased and the share price went up.

[15] On November, 22nd, 2016, The Globe and Mail published an article reporting that KBC stated it had no involvement in the proposed bid and had filed a complaint with the United States securities exchange Commission against the defendant.

[16] The facts surrounding the above mentioned events are alleged as follow in the re-amended Motion:

> 23. On January 29, 2016, AYA closed at CDN $14.99 on the TSX and at US $10.56 on the NASDAQ, the whole as appears from Yahoo! Finance's Historical Data from January 28 to February 3, 2016, communicated herewith as Exhibit P-17 en liasse;
>
> 24. On February 1, 2016, within two (2) weeks of the transactions referred to above, the Defendant filed the First Impugned Document on SEDAR, pursuant to his obligation to file an early warning report as established by Regulation 62-103

Respecting The Early Warning System and Related Take-Over Bid and insider Reporting issues ("Regulation 62-103"), in which he announced his intention to make an all-cash proposal to acquire Amaya at a price of CDN $21 per share ("Acquisition Offer") which represented a 40% premium to the previous day's dosing price, as appears from Exhibit P-2;

25. At that time, the Defendant owned approximately 18.6% of Amaya's common shares ("Common Shares"), as appears from Exhibit P-2;

26. As will be demonstrated below, the Defendant released the First Impugned Document to commence a market manipulation scheme to drive up the price of Amaya's shares in order to increase the value of the Defendant's substantia! stake in Amaya through a phantom offer;

27. The Defendant intentionally released the First impugned Document knowing that it contained a misrepresentation because he did not have the requisite financing to make the Acquisition Offer and never intended to go through with the purported transaction;

28. On that same day, following the publication of the First Impugned Document, Amaya's share price increased 16.7% on the TSX to close at CDN $18 on a high trading volume of 3,430,600 and increased 18.33% on the NASDAQ to close at US $12.93 on a high trading volume of 2,026,200, as appears from Exhibit P-17 en liasse;

29. This market manipulation scheme materially increased Amaya's share price and thereby Increased the value of the Defendant's holdings in Amaya by over $73 million;

30. Although Amaya's special committee of independent directors ("Special Committee") had previously asked the Defendant to confirm the terms of his proposal, on March 2, 2016, Amaya had not yet received a formal acquisition offer from the Defendant, the whole as appears from the news release communicated herewith as Exhibit P-18;

31. On October 18, 2016, Amaya published yet another news release stating that although the Defendant had still not sent a formal offer to the Special Committee, the Defendant was nonetheless interested in purchasing all of Amaya's outstanding stock, the whole as appears from the news release communicated herewith as Exhibit P-19;

32. On November 11, 2018, AYA closed at CDN $18.34 on the TSX on a trading volume of 171,900 and at US $13.60 on the NASDAQ on a trading volume of 112,300. the whole as appears from Yahoo! Finance's Historical Data from November 11 to 23, 2016, communicated herewith as Exhibit P-20 en liasse;

33. On November 14, 2016, the Defendant filed the Second Impugned Document on SEDAR in which he purported to make a non-binding ail-cash offer

to acquire 100% of Amaya's Common Shares, on behalf of himself and others identified as the Equity Financing Sources ("Acquisition Proposal"), the whole as appears from a news release dated November 14, 2016 communicated herewith as Exhibit P-21;

34. Amaya confirmed its receipt of the Acquisition Proposal that same day;

35. The Second Impugned Document particularized the following:

i) The document updated the information contained in the First impugned Document;

ii) Each AYA share would be acquired at CDN $24;

iii) The Defendant is deemed to be acting jointly or in concert with Head and Shoulders Global Investment - HS Special Event Segregated Portfolio, Goldenway Capital SPC - Special Event SP, Ferdyne Advisory Inc. and KBC (collectively, the "Equity Financing Sources");

Iv) The Defendant entered into binding equity commitment letters with each of the Equity Financing Sourcesfor comprised aggregate commitmnets of US $3.65 billion which represents 100% of the funds required to complete the proposed transaction;

v) Each Equity Financing Source has committed to contribute capital to a "to-be- formed" entity led by the Defendant for the purpose of acquiring Amaya ("BidCo"};

vi) BidCo is prepared to provide a US $200 million deposit into escrow upon execution of a definitive agreement; and

vii) In the event that Amaya's US $400 million deferred payment obligations to the previous owners of OSdford becomes due prior to the closing of the proposed transaction, BidCo will cause the deposit to he released from escrow and converted into a one-year structurally subordinated debt obligation to fund the deferred payment and to be convertible into equity following the closing of the proposed transaction;

as appears from Exhibit P-3;

36. The Defendant signed the Second Impugned Document and certified that ail of the information it contained was "true and complete in every respect", as appears from Exhibit P-3-

37. At that time, the Defendant owned 17.2% of Amaya's Common Shares, as appears from Exhibit P-3;

38. At the time the Acquisition Proposal was made, the Defendant neither had the intention or the financing to complete the transaction;

38.1 When the Defendant published the Second Impugned Document, he was already the target of:

i) 23 charges Filed by the AMF in relation to the Oldford acquisition;

ii) two (2) parallel AMF investigations;

iii) an investigation led by FINRA;

iv) a cease trade order granted by the Tribunal administratif des marchés financiers; and

v) a class action further to misrepresentations in documents published by Amaya;

38.2 is it very dubious that in light of these allegations, a credible financial institution wouid agree to enter into a transaction of this magnitude with the Defendant;

39. The filing of the Second Impugned Document and the Acquisition Proposai were intentional steps taken by the Defendant in furtherance of the scheme noted above to raise Amaya's share price for the benefit of the Defendant and his associates;

40. On November 14, 2016, subsequent to the release of the Second Impugned Document, Amaya's share price increased by CDN $2.64 on the TSX to close at CDN $20.88, on a high trading volume of 2,807,700, whereas it increased by US $1.90 on the NASDAQ to close at US $15.50, on a high trading volume of 997,900, as appears from Exhibit P-20 en liasse This represents an increase of approximately 12% on both the TSX and NASDAQ;

40.1 That same day, La Presse published an article which informed Its readers of the Defendant's intention to purchase all of Amaya's shares, the whole as appears from the article communicated herewith as Exhibit P 38. More specifically, the La Presse article informed its readers that Baazov entered into binding equity commitment letters with Head and Shoulders Financial Group, Goldenwav Capital, KBC Aldini Capital and Ferdyne Advisory Inc., as appears from Exhibit P-38;

41. Upon reading the (...) La Presse article, the Plaintiff purchased 250 AYA shares at CDN $21.41 per share, the whole as appears from an email entitled Notification - Exécution d'une transaction (Achat), communicated herewith as Exhibit P-22;

42. On November 21, 2016, Amaya's share price closed at CDN $19.86 on the TSX and at US $14.85 on the NASDAQ, as appears from Exhibit P-20 en liasse;

43. On November 22, 2016, the Corrective Disclosure was released and

> revealed that one of the Defendant's alleged Equity Financing Sources, KBC had "«no involvement» whatsoever in the privatization offer" for Amaya, as appears from Exhibit P-1 and from KBC's news release dated November 22, 2016, communicated herewith as Exhibit P-23;
>
> 44. On that same day, AYA's value dropped approximately 6.4% to close at CDN $18.67 on the TSX on a trading volume of 1,813,700 and dropped approximately 7.2% to dose at US $13.85 on the NASDAQ on a trading volume of 1,011,700 as appears from Exhibit P- 20 en liasse;

THE MOTION TO STRIKE ALLEGATIONS

[17] Defendant is asking the Court to strike from the authorization several paragraphs which, as per the defendant, are either not relevant, clearly inaccurate or false, or are stating opinions rather than facts. The Court is also asked to strike the exhibits which are filed under the impugned paragraphs.

[18] For the sake of clarity, the Court quotes hereunder the paragraphs which are the object of the motion:

> 6. In 2014, the Defendant unlawfully shared privileged and confidential information about the company's confidential takeover talks in order to initiate a buying frenzy of Amaya's stock and artificially inflate its stock price, thus making the acquisition of Qidford Group Limited, one of the largest online gambling companies, plausible;
>
> 7 In March 2016, the AMF filed cease trade orders against individuals that had allegedly participated and profited from the insider trading scheme implemented by the Defendant;
>
> 8 On March 22, 2016, the Tribunal administratifs des marchés financiers ("TMF") (known as the Bureau de decision et révision prior to July 18, 2016) rendered a judgment in which it concluded that there existed a systematic modus operand! of insider trading led by the Defendant, as appears from a copy of the TMF's decision 2016 QCBDR 32, communicated herewith as Exhibit P-6;
>
> 9. On March 23, 2016, the AM F announced that it had filed charges against the Defendant, including a charge of influencing or attempting to influence the market price of Amaya's stock by unfair, improper or fraudulent practices as per art. 195.2 of the Quebec Securities Act, CQLR C V—1.1 ("GSA"), the whole as appears from the redacted "Constats d'infractions" issued by the AMF, communicated herewith as Exhibit P-7 and the AMF's press release, communicated herewith as Exhibit P-8;
>
> (…)
>
> 13.3 In addition to the present class action, the Defendant was and/or is also the target of:

i) 23 charges filed by the AMF in relation to the Oldford acquisition;

li) at least two (2) additional AMF investigations in relation to Amaya's acquisitions of other rival companies as well as Baazov's violations of Securities Legislation;

iii) a class action further to misrepresentations made by the Defendant in filings published by Amaya ;

iv) two (2) cease trade orders granted by the Tribunal administratif des marchés financiers;

v) a class action filed in the USA;

vi) an investigation by the FBI which led to criminal charges against G. Steven Pigeon for having, with Baazov's help, orchestrated an iilegal donation to the re-election campaign of a public official of the USA ;

vii) an investigation led by FINRA;

viii) proceedings against Amaya instituted in Florida for breach of a work agreement, promissory estoppel and unjust enrichment;

(…)

x) proceedings against Amaya Gaming Group Inc. (Kenya) instituted in Kenya further to Amaya’s failure to pay monies owed to the Lion’s Heart Self Help Group. The plaintiffs also allege that the money deposited into Amaya Gaming Group Inc. (Kenya)'s accounts at NIC Bank Limited were proceeds from illegal trading that were part of a "well-calculated money laundering scheme";

(…)

20. Notwithstanding the steady decline in the company’s share price prior to January 2016, the Defendant tipped off certain third-parties about non-public material facts about Amaya;

21. These third-parties communicated with each other and shared information about Amaya’s

i) On January 19, 2016, Earl Levett (”Earl) purchased 500 AYA. shares In his Dundee account at $15.32 per share for a total of $7,660, the whole as appears from Exhibit D- 170 filed in support of the AMP's *Demande introductive d'instance ex parte réamendée,* communicated herewith as Exhibit P-14;

ii) On January 20, 2016, Isam Mansour ("Isam") purchased 10,000 AYA shares in his BMO account at $14.25 per share for a total of $142,850, the whole as appears from p.3 of Exhibit D-171 filed in support of the AMF's *Demande introductive d'instance ex parte ré-amendée*, communicated herewith as Exhibit

P-15;

iii) On January 21, 2016, Isam purchased an additional 5150 AYA shares in his Dundee account at an average price of $14.79 per share for a total of $76,215.51, the whole as appears from pp.1-2 of Exhibit D-171 filed in support of the AMF's *Demande introductive d'instance ex parte ré-amendée, communicated herewith as Exhibit P- 15;*

iv) On that same day, Allie Mansour ("Allie"), Isam's brother, purchased 500 AYA shares in his TD account at $14.81 per share for a total of $7,405, the whole as appears from Exhibit D-172 filed in support of the AMFs *Demande introductive d'instance ex parte ré-amendée,* communicated herewith as Exhibit P-16;

v) On January 27, 2016, Allie purchased an additional 500 AYA shares in his TD account at $14.33 per share for a total of $7,165, the whole as appears from Exhibit D-172 filed in support of the AMFs *Demande introductive d'instance ex parte ré-amendée,* communicated herewith as Exhibit P-16;

22. All of the individuals referred to above are subject to the TMF's cease trade order;

22.1. Of note are the TMF's conclusions regarding the Defendant further to his challenge of the TMF's ex *parte* decision to issue cease trading orders:

[467] Pour cet épisode, le Tribunal a particulièrement retenu de la preuve qui lui a été présentée ce qui suit.

[468] Les 19, 20, 21 et 27 janvier 2016, les intimés Isam Mansour, Allie Mansour et Earl Levett ont fait l'acquisition d'actions d'Amaya.

[469] Or, ces transactions ont précédé de peu, le communiqué de presse du 1er février 2016 du mis en cause David Baazov dans lequel il annonçait publiquement son intention, et celle d'un groupe d'investisseurs avec lequel il serait en discussion, de privatiser Amaya en offrant d'acquérir toutes les actions de cette société à un prix d'environ 21 $ par action, ce qui représenterait une prime de l'ordre de 40% par rapport au cours de clôture de ce titre lors de la séance précédente de transactions.

[470] Le Tribunal constate que les intimés Isam Mansour, Allie Mansour et Earl Levett ont, une fois de plus, rapidement fait des profits théoriques sur leur investissement en achetant des titres d'une société peu de temps avant une annonce publique importante susceptible d'accroître significativement la valeur des actions de cette entreprise.

[471] Dans cet épisode de transactions, il s'agit d'une annonce publique faite par le mis en cause lui-même, David Baazov.

[472] Cette nouvelle faisait notamment état de son intention d'acheter éventuellement toutes les actions d'Amaya qu'il ne détenait pas déjà à titre

d'actionnaire important de cet émetteur assujetti.

[473] Au moment de l'audience, les profits réalisés par les intimés susmentionnés étaient encore théoriques, car ils n'avaient pas encore vendu leurs actions d'Amaya.

[474] Le Tribunal souligne que l'enquête de l'Autorité se poursuit. L'analyse de la preuve présentée au Tribunal concernant cet épisode de transactions démontre toutefois, de l'avis du Tribunal, que le réseau composé des intimés et du mis en cause David Baazov serait toujours actif au début de 2016.

[475] De l'avis du Tribunal, la preuve administrée devant lui et le modus operandi constaté dans les épisodes précédents suggèrent les manquements apparents suivants à la Loi sur les valeurs mobilières, à savoir :

- Les intimés Isam Mansour, Allie Mansour et Earl Levett en transigeant sur les titres d'Amaya alors qu'ils disposaient d'information privilégiée, en contravention aux articles 187 et 189 de la Loi sur les valeurs mobilières.

the whole as appears from *Autorité des marchés financiers c. Baazov,* 2017 QCTMF 103 and exhibits D-20, D-49, D-73, D-151, D-156, D-173, communicated herewith as Exhibits P-33A, P-33B, P-33Ç, P-33D, P-33E, P-33F and P-33G;

(…)

38.1 When the Defendant published the Second Impugned Document, he was already the target of:

i) 23 charges Filed by the AMF in relation to the Oldford acquisition;

ii) two (2) parallel AMF investigations; in) an investigation led by FINRA;

iv) a cease trade order granted by the Tribunal administratif des marchés financiers; and

v) a class action further to misrepresentations in documents published by Amaya;

38.2 Is it very dubious that in light of these allegations, a credible financial institution wouid agree to enter into a transaction of this magnitude with the Defendant;

(…)

49.1 Given the Defendant's history, it is untenable that a credible financial institution would be willing to enter into such a public and sizeable transaction with the Defendant;

(…)

> 84.6 In 2017, it was revealed that although Amaya's filings prepared contemporaneously to its initial public offering indicated that the Defendant owned 24,525,599 shares of AYA, the Defendant secretly owned additional AYA shares a result of nominee agreements with 2748134 Canada Inc. ("Hypertec") and Yosef Ifergan, as appears from paras. 147-168 of Xavier Saint-Pierre's affidavit filed in court file no. 500-26-103321-174, communicated herewith as Exhibit P-36;
>
> 84.7 This material fact was never declared in Amaya's core and non-core documents;
>
> 84.8 At all relevant times during the Class Period, the Defendant was an insider pursuant to art. 89 of the QSA. Baazov was therefore required to file insider reports disclosing any control he exercised over Amaya's securities pursuant to art. 89.3 of the QSA;
>
> 84.9 By intentionally omitting to disclose the additional AYA shares he secretly owned as a result of his nominee agreement with Hypertec and Yosef ifergan, the Defendant violated art. 89.3 of the QSA;

[19] Courts have been reluctant at a preliminary stage to strike allegations, especially in the context of a motion to authorize a class action. Indeed, the burden of proof for the plaintiff is a limited one: under article 575 *C.p.c*., the plaintiff's allegations are narrowed to showing an arguable case[5] and under article 225.4 QSA, the plaintiff must demonstrate he is acting in good faith and that there is a reasonable chance of success the action will be resolved in his favor[6]. Under both mechanisms, the Court must avoid a full analysis of the evidence presented. The notion that an allegation is irrelevant, untrue or is simply stating an opinion must be weighed accordingly.

[20] The request to strike the allegations is based upon article 169 *C.c.p.* which reads*:*

> Art. 169: A party may apply to the court for any measure conducive to the orderly conduct of the proceeding.
>
> A party may also apply to the court for an order directing another party to provide particulars as to the allegations made in the application or the defence, disclose a document to the party or strike immaterial allegations.
>
> A judgment granting such an application may require a party to do something within a specified time under pain of the originating application or the defence being dismissed or the allegations in question being struck. [The Court underlines]

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5 *L'Oratoire Saint Joseph du Mont Royal v. J.J.,* EYB 2019-312410, 2019 CSC 35, par. 58.

6 *Theratechnologies inc. v. 121851 Canada inc.,* 2015 SCC 18, par. 38-39.

[21] On the striking of allegations at a preliminary stage, Me Catherine Piché writes that the Court should bear in mind that the notion of relevance must be construed broadly and, in doubt, allow the allegation to remain unless it should be clearly excluded[7]:

> 218 – *Procédures préalables* – La discrétion du tribunal d'exclure une preuve pour des motifs d'absence de pertinence est plus difficile à exercer au stade préliminaire de la procédure. Aussi, la notion de pertinence doit être appliquée avec plus de prudence et de souplesse lors des procédures antérieures à l'enquête. À ce stade, le tribunal doit favoriser la divulgation la plus complète possible de la preuve. En cas de doute, il doit faire confiance à la partie qui fait une allégation et qui désire présenter un élément de preuve et laisser au juge saisi du fond du litige le soin d'évaluer la pertinence des faits invoqués. Lors d'un interrogatoire au préalable, la pertinence d'une preuve s'apprécie par rapport aux allégations contenues dans les actes de procédure. Quant aux expertises, elles ne seront exclues, à un stade préliminaire, que lorsqu'il est manifeste qu'elles n'ont aucune valeur probante. À cet égard, le statut du juge gestionnaire en action collective ne procure aucun avantage quant à la détermination de la pertinence d'une expertise.
>
> Ainsi, sauf dans les cas où un plaideur invoque le secret professionnel ou le caractère privilégié d'une communication, les tribunaux sont généralement réticents à rejeter une preuve avant l'enquête et préfèrent souvent laisser au juge saisi du mérite d'un litige le soin de se prononcer sur la pertinence d'une preuve.
>
> (…)En fait, la valeur probante d'une preuve doit être étudiée avec plus de souplesse dans les matières civiles, puisque le degré de preuve requis pour convaincre le tribunal est moins fort. Cependant, la seule allégation d'un fait ne le rend pas pertinent pour autant. Aussi, même si un juge rejette une demande en radiation d'allégations ou autorise une preuve lors d'un interrogatoire au préalable, le tribunal saisi du mérite de la cause peut subséquemment remédier à la situation, s'il en vient à la conclusion que la preuve n'est pas pertinente. [The Court underlines]

[22] This is essentially what the Court of appeal ruled in *Association des propriétaires* de *Boisés de la Beauce* v. *Monde Forestier,* wherein the relevance of an allegation must be looked at with prudence and in the context of the proposed litigation[8]:

> 18 L'article 2857 C.c.Q. pose la règle que tout fait pertinent est recevable :
>
> 2857. La preuve de tout fait pertinent au litige est recevable et peut être faite par tous moyens.
>
> 19 La pertinence d'un fait s'évalue au regard de l'objet du litige. Il s'agit de vérifier

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7 Piché, C. Notions générales La preuve civile, J.-C. Royer, 5e édition par C. Piché, 2016 2016 EYB2016PRC19.

8 EYB 2009-153015, 2009 QCCA 48, J.E. 2009-228.

> si la preuve du fait tend à établir l'existence ou non du droit réclamé. Elle s'apprécie en fonction de l'obligation qui incombe aux parties de faire la preuve des éléments sur lesquels repose la réclamation. Comme l'indique le professeur Jean-Claude Royer « un fait est notamment pertinent lorsqu'il s'agit d'un fait en litige, s'il contribue à prouver de façon rationnelle un fait en litige ou s'il a pour but d'aider le tribunal à apprécier la force probante d'un témoignage ».
>
> 20 Le fondement de la règle de la pertinence vise à restreindre la preuve à ce qui est nécessaire au litige pour éviter la confusion et la prolongation inutile des débats associés à l'administration d'une preuve non pertinente.
>
> 21 Lorsqu'il est saisi d'une requête en radiation d'allégations pour défaut de pertinence, le juge doit être prudent avant de retrancher des allégations d'un acte de procédure, car il est parfois difficile d'évaluer hors contexte la portée exacte de la preuve et son impact sur l'issue du recours. En cas de doute, la prudence commande de laisser au juge saisi du fond du litige le soin d'évaluer la pertinence des faits invoqués. [The Court underlines]

[23] Our colleague Courchesne J. summarizes as follow the analysis of a motion to strike allegations in the context of a class action[9]:

> 8 Au stade de l'autorisation, la Requérante doit satisfaire un fardeau de démonstration et non un fardeau de preuve. La procédure d'autorisation constitue un mécanisme de filtrage. Les faits que la Requérante allègue ainsi que les pièces qu'elle dépose sont tenus pour avérés.
>
> 9 Dans le cadre de son analyse de la requête pour autorisation, le juge doit élaguer le texte des éléments qui relèvent de l'opinion, de l'argumentation juridique, des inférences ou hypothèses non vérifiées ou encore qui sont carrément contredites par une preuve documentaire fiable.
>
> 10 Il ne saurait cependant être question, à cette étape, d'appliquer les règles de preuve avec la même rigueur qu'au fond: le recours n'existe pas encore, du moins sur une base collective. Des documents qui seraient possiblement inadmissibles au fond pourront être pris en considération par le juge de l'autorisation. La preuve par ouï-dire est permise «dans la mesure où elle permet de faire «*paraître* » justifiées les conclusions recherchées».
>
> 11 Dans un contexte où les faits sont tenus pour avérés, les pièces produites au soutien de la procédure visent surtout à démontrer le sérieux du recours et non à prouver les allégations qu'elles supportent.
>
> 12 À l'étape pré-autorisation d'un recours collectif, le tribunal doit faire montre de prudence dans l'analyse d'une requête en radiation d'allégations et en retrait de pièces. L'absence de pertinence doit être évidente :
>
> [16] La Cour d'appel enseigne qu'au stade d'une demande préliminaire en

[9] *Baulne c. Bélanger,* EYB 2015-259622, 2015 QCCS 5750, J.E. 2016-335.

> radiation d'allégations et de pièces, le Tribunal doit faire preuve de prudence. Cet énoncé est encore plus vrai au stade préliminaire d'une requête en autorisation d'exercer un recours collectif, qui, en quelque sorte, est elle-même une procédure préliminaire à l'exercice d'un recours. Ce n'est qu'exceptionnellement, alors qu'une allégation, de manière évidente, est non pertinente, qu'elle pourrait être radiée avant même l'audition de la requête en autorisation.
>
> 13 C'est dans le contexte particulier de la requête pour autorisation que la demande de radiation d'allégations et de retrait de pièces formulée par les Intimés doit être analysée. Ce moyen préliminaire doit faire œuvre utile en vue de simplifier l'étape de l'autorisation. [The Court underlines]

[24] The motion to strike targets 3 different types of allegations: a) alleged past actions by the defendant (par. 6, 20, 84.6 to 84.9), b) other proceedings and investigations against defendant (par. 7, 8, 9, 13.3 i) to viii), 13.3. x), 21, 22, 22.1, 38.1), and c) opinion of plaintiff or counsel, (par. 38.2 and 49.1).

[25] On the first type of allegations, defendant argues the plaintiff is attempting through past actions allegations to introduce an entirely different factual situation which has no relevance to the basis of the proposed class action. The Court disagrees.

[26] As such, it is not because allegations refer to the past conduct of the defendant and are not within the time frame of the Class that they should be seen as being irrelevant. If accurate, and established at trial, the allegations may serve to attack the defendant's credibility and show a propensity to use information for his own benefit. At this stage, the Court is therefore unable to conclude that such allegations, and the exhibits filed in their support, should be struck. This will not prevent in any way the debate on relevancy from eventually taking place and a trial judge would be in a much better position to assess the relevancy of the allegations and the evidence which relates to them. Furthermore, at the authorization stage, those allegations must be taken for granted, and the authorization motion, read as a whole, justifies it, as it does relate to defendant's conduct.

[27] As for the argument that paragraphs 84.6 to 84.9 must be struck as they relate to other alleged misrepresentations which bear no relevance to the proposed Class action, the Court also disagrees for the same reasons: first, it is not evidently clear those allegations are irrelevant at the authorization stage and furthermore, the allegations may prove to be relevant in regards to the defendant's conduct. In *Caron v. Voyer*, the Court of appeal made the following comments in the context of a leave to adduce new evidence and its relevance[10] :

> 76 Elle est également indispensable à cause de sa pertinence et elle est susceptible d'entraîner un jugement différent. En effet, l'issue du litige repose essentiellement sur la crédibilité des témoins dans la mesure où Caron et Voyer présentent deux versions contradictoires d'un même fait juridique : Caron

[10] 2013 QCCA 1335, EYB 2013-225414.

> prétend que Voyer agissait comme prête-nom, donc à son bénéfice, lorsqu'il a acheté les actions de Plexmar, alors que Voyer, pour sa part, plaide que Caron lui a prêté l'argent nécessaire à l'achat des actions qu'il a alors acquises pour son propre compte.
>
> 77 L'admissibilité d'une preuve de faits similaires doit s'apprécier au regard du critère de sa pertinence. Un fait est notamment pertinent lorsqu'il a pour but d'aider le tribunal à apprécier la force probante d'un témoignage. En l'espèce, les faits similaires que Caron veut mettre en preuve concernent les mêmes titres que ceux qui font l'objet du litige, la même société émettrice, les mêmes formulaires de souscription, la même méthode de paiement. Par ailleurs, les gestes reprochés à Voyer, bien que connus postérieurement, ont été posés entre janvier 2009 et septembre 2010, soit dans l'année précédant celle du procès en première instance et dans les semaines le suivant. Ils visent à démontrer «(…) l'existence d'une pratique commerciale déloyale, répétitive, sinon systématique». [The Court underlines]

[28] Thus at this stage, allegations which are susceptible of helping a Court to weigh defendant's testimony are deemed relevant. The defendant also argues against a second type of allegations relating to other proceedings and investigations which targeted him. The defendant believes those allegations have no logical relevance to the principal allegations of the proposed class action (i.e.: a scheme to inflate the price of the shares) and are incomplete, speculative or outdated. As stated above, relevance at the authorization stage must be construed as a broad concept and in the eyes of the Court, must remain at this juncture of the proceedings. The allegations make reference to the defendant in the context of his role within Amaya.

[29] The last type of allegations are characterized by defendant as an opinion by counsel or plaintiff (paragraphs 38.2 and 49.1). These relate to an assertion that a financial institution would likely not have agreed to finance the defendant's acquisition of shares in light of defendant's situation or of the allegations against him. Obviously, these facts remain to be established but the Court can appreciate that such a fact would be relevant to the allegations that defendant never had the intention of pursuing the acquisitions of the shares. As stated in the decision of the Court of appeal in *Monde Forestier*[11], it would be imprudent for the Court to carve into the proceedings at this stage:

> 28 Par ailleurs, la séquence des faits allégués, la plainte au Conseil de presse et l'absence de collaboration des intimés lors de l'étude de la plainte font partie du contexte factuel et sont de nature à soutenir la demande de dommages exemplaires de l'appelante. Un découpage très pointu des allégations à ce stade des procédures paraît imprudent. Le juge du fond sera mieux placé pour apprécier la pertinence de ces faits. [The Court underlines]

[30] For these reasons the motion to strike will be dismissed.

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[11] See *Monde Forestier, supra*, note 8, par. 28.

THE MOTION TO PRODUCE RELEVANT EVIDENCE

[31] Defendant is asking to file documents which relate to other proceedings and investigations as well as documents to complete the exhibits already filed by plaintiff. The parties agree the transcript of plaintiff's examination under article 574 *C.c.p*. should be part of the Court record[12].

[32] The filing of evidence, in a Class action authorization under the *C.c.p*., is subject to article 574 *C.c.p*.:

> Art. 574 Prior authorization of the court is required for a person to institute a class action.
>
> The application for authorization must state the facts on which it is based and the nature of the class action, and describe the class on whose behalf the person intends to act. It must be served on the person against whom the person intends to institute the class action, with at least 30 days' notice of the presentation date.
>
> An application for authorization may only be contested orally, and the court may allow relevant evidence to be submitted.

[33] In *Catucci v. Valeant*, Justice Chatelain summarized as follow the admissibility of additional evidence[13]:

> 21 Article 574 *CCP* gives the Court broad discretion to allow relevant evidence at the authorization stage. The applicable principles which guide the Court in the exercise of this discretion are properly set out by Justice Gascon, then of this Court, in *Option Consommateurs c. Banque Amex du Canada*:[4]
>
> [20] Cela dit, au chapitre du mérite maintenant, le Tribunal retient de la jurisprudence pertinente les sept (7) propositions suivantes comme devant servir de guide dans l'analyse des requêtes formulées par les Banques:
>
> 1) puisque, dans le cadre du mécanisme de filtrage et de vérification qui caractérise la requête en autorisation, le juge doit, si les allégations de faits paraissent donner ouverture au droit réclamé, accueillir la requête et autoriser le recours, il n'y aura pas, dans tous les cas, la nécessité d'une preuve;
>
> 2) en vertu du nouvel article 1002 C.p.c., le retrait de l'obligation d'un affidavit et la limitation des interrogatoires à ceux qui sont autorisés assouplissent et accélèrent le processus sans pour cela stériliser le rôle du juge, car la loi lui reconnaît la discrétion d'autoriser une preuve pertinente et appropriée dans le cadre du processus d'autorisation;
>
> 3) c'est en utilisant sa discrétion, qu'il doit bien sûr exercer judiciairement, que le

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12 Exhibit D-12.

13 *Catucci c. Valeant Pharmaceuticals International Inc.,* EYB 2016-273367, 2016 QCCS 5803.

> juge doit apprécier s'il est approprié ou utile d'accorder, dans les circonstances, le droit de présenter une preuve ou de tenir un interrogatoire. Idéalement et en principe, cette preuve et ces interrogatoires se font à l'audience sur la requête en autorisation et non hors cour;
>
> 4) pour apprécier s'il est approprié ou utile d'accorder la demande faite, le juge doit s'assurer que la preuve recherchée ou l'interrogatoire demandé permettent de vérifier si les critères de l'article 1003 C.p.c. sont remplis;
>
> 5) dans l'évaluation du caractère approprié de cette preuve, le juge doit agir en accord avec les règles de la conduite raisonnable et de la proportionnalité posées aux articles 4.1 et 4.2 C.p.c., de même qu'en accord avec la règle de la pertinence eu égard aux critères de l'article 1003 C.p.c.;
>
> 6) le juge doit faire preuve de prudence et ne pas autoriser des moyens de preuve pertinents au mérite puisque, à l'étape de l'autorisation du recours, il doit tenir les allégations de la requête pour avérées sans en vérifier la véracité, ce qui relève du fond. À cette étape de l'autorisation, le fardeau en est un de démonstration et non de preuve;
>
> 7) Le fardeau de démontrer le caractère approprié ou utile de la preuve recherchée repose sur les intimés. Aussi, il leur appartient de préciser exactement la teneur et l'objet recherchés par la preuve qu'ils revendiquent et les interrogatoires qu'ils désirent, en reliant leurs demandes aux objectifs de caractère approprié, de pertinence et de prudence déjà décrits.
>
> L'objectif recherché n'est pas de permettre des interrogatoires ou une preuve tous azimuts et sans encadrement, mais plutôt d'autoriser uniquement une preuve et/ou des interrogatoires limités sur des sujets précis bien circonscrits.

[34] The Court must evaluate the necessity of the evidence to be filed in accordance with the limited burden of proof placed upon the plaintiff under an authorization. Here, the defendant must convince the evidence is useful and will allow the Court to determine whether the criteria to authorize the Class action under the Code of civil procedure are met. For example, evidence may be allowed if it serves to contradict allegations which are false, inaccurate or implausible[14]. The evidence must not be seen as allowing an analysis of the merits of the case but only to assist in the authorization process.

[35] In *Infineon*, the Supreme Court defined the threshold of the Class action under the Code of civil procedure as follow[15]:

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[14] *Allstate du Canada, compagnie d'assurances* c. *Agostino*, EYB 2012-205044, 2012 QCCA 678, par. 35 and 36. See also *Benizri* c. *Canada Post Corporation*, 2016 QCCS 454, par.17.

[15] *Infineon Technologies AG* c. *Option consommateurs,* EYB 2013-228582, [2013] 3 R.C.S. 600, 2013 CSC 59.

> 67 At the authorization stage, the facts alleged in the applicant's motion are assumed to be true. The applicant's burden at this stage is to establish an arguable case, although the factual allegations cannot be [TRANSLATION] "vague, general [or] imprecise" (see *Harmegnies v. Toyota Canada inc.*2008 QCCA 380CanLII, at para. 44).
>
> 68 Any review of the merits of the case should properly be left for the trial, at which time the appropriate procedures can be followed to adduce evidence and weigh it on the standard of the balance of probabilities.

[36] In the decision of *Theratechnologies,* the Supreme Court examined the burden under article 225.4 of the Québec securities act and reflected it is a more compelling burden than simply showing a good colour of right [16] :

> 35 Given this history, I agree with the Court of Appeal and Motions Judge that the reasonable possibility of success required under s. 225.4 sets out a different and higher standard than the general threshold for the authorization of a class action under art. 1003 of the *C.C.P..* Under art. 1003, the court seeks only to identify whether the facts alleged seem to justify the conclusions sought that is, whether the applicant has established a good colour of right: *Infineon Technologies AG v. Option consommateurs*[2013] 3 S.C.R. 600, at para. 62; *Guimond v. Quebec (Attorney General)*[1996] 3 S.C.R. 347, at paras. 5 and 9-10; *Marcotte v. Longueuil (City)*[2009] 3 S.C.R. 65, at para. 94. As this Court pointed out in *Infineon Technologies*, the low threshold for authorizing a class action under art. 1003 of the *C.C.P.* reflects the twin objectives of deterrence and compensation that animate the class action system: para. 125. [The Court underlines]

[37] The defendant submits they are no restrictions to file evidence under the QSA because, as underlined by Justice Chatelain in *Catucci c. Valeant Pharmaceuticals International inc*., the Québec act, contrary for example to the equivalent *Ontario Securities Act*, does not deal with the evidence which may be submitted at the authorization stage[17]. Chatelain J. wrote :

> 160 In the instant case, the Applicants filed 218 exhibits and six expert reports. The Defendants filed two responding expert reports. Most of the experts were cross-examined out of court and the transcripts of their examination were also filed, with additional exhibits. In addition, under the *CCP* regime for authorizing a class action, the Court authorized the Defendants to examine the Applicants out of court and the Underwriters were authorized to file four exhibits.
>
> 161 The material filed in this case exceeds 12,000 pages.
>
> 162 The Court doubts that this is what the legislator had in mind when he

[16] See *Theratechnologies*, supra, note 6, par. 35.
[17] 2017 QCCS 3870, EYB 2017-283884, see par. 158 to 164.

> established the screening mechanism in the *QSA*.
>
> 163 Simply adopting the model applicable in Ontario without further reflection as to the particularities of Quebec law seems at odds with other legislative choices made in Quebec, namely with respect to the differences as to the extent of evidence which can be filed for the purposes of authorizing (in Quebec) or certifying (in Ontario) a class action.
>
> 164 However, that being said, the Court was left here with little alternatives in that respect. This is only the second case in Quebec to proceed on a motion for authorization under the *QSA* (the first being *Theratechnologies*) and all the parties agreed and proceeded assuming that they were entitled to file and rely on extensive evidence in support of the motion under the *QSA*.
>
> 165 The Court therefore undertook a reasoned consideration of all the evidence proffered by all parties to determine whether the proposed action has some merit, in keeping, however, with the nature and the goal of the screening mechanism at issue. [The Court underlines]

[38] In *Amaya*, the Court of Appeal ruled that a defendant, facing a class action authorization under art. 225. 4 of the QSA*,* does not have a procedural duty to assist the plaintiff in document production as it would negate its right to protect against strike suits[18]. The Court also considered the weighing of the evidence filed. It wrote:

> 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.
>
> (…)
>
> 109 I note as well the motion judge's concern that, without document disclosure, plaintiffs will be unfairly placed when seeking to adduce "credible evidence" required of them in the effort to meet the standard of the screening mechanism. It

[18] *Supra*, note 3, paras. 105, 109.

> is true, as Abella, J. wrote, that summary adjudication pursuant to section 225.4 involves a "reasoned consideration of the evidence".But this does not, in itself, justify forcing the defendant issuer to disclose documents. In keeping with *Theratechnologies*, a motion judge should weigh the evidence proffered by the plaintiff and, if the defendant has chosen to bring evidence as well, that too should be scrutinized in the summary proceedings envisaged by the legislature. Indeed in *Mask v. Silvercorp*, decided after both *Theratechnologies*and *Green*, Strathy, C.J.O. decided that the "reasonable possibility" leg of the leave test requires scrutiny of merits of the action "based on all the evidence proffered by the parties». That said, the injunction that the evidence from both sides be weighed at this stage, and the burden that a plaintiff faces to bring credible evidence in support of his or her request for leave, does not in itself justify document discovery. [The Court underlines]

[39] In *Gauthier v. Bombardier*[19], Tremblay J. had to deal with a request by the defendant to file affidavits and supporting documents to which the plaintiff objected. Having considered the application of article 574 *C.c.p*., the Court recognized the QSA is silent as to the filing of evidence by the defendant and that consequently no leave was required. The documents were in any event allowed into the Court record after consideration of the criteria under the Code of civil procedure. The Court wrote:

> 32 Le Tribunal est d'avis que ces informations sont utiles et nécessaires en vue de l'audition sur autorisation pour l'analyse du critère prévu à l'article 575 (2) C.p.c. en ce qui concerne la faute reprochée aux défendeurs.
>
> 33 Bien que les défendeurs aient formulé leur demande en vertu de l'article 574 C.p.c., le Tribunal ne peut faire abstraction du fait que ceux-ci entendent déposer cette même preuve en vue de l'analyse des critères d'autorisation prévus à l'article 225.4 LVMQ et aux autres dispositions similaires dans les lois canadiennes en matière de valeurs mobilières.
>
> 34 La preuve sollicitée n'est pas excessive et n'empêchera pas le Tribunal d'exercer une analyse raisonnée de celle-ci en vertu de l'article 225.4 LVMQ, sans transformer le stade de l'autorisation en un mini-procès.[The Court underlines]

[40] Recently, in *Graaf* c. *SNC-Lavalin Group Inc*[20]*.,* Morrison J. declined a request by the defendant to proceed with examinations at the authorization stage, being of the view that such an exercise would transform the hearing into a mini-trial. Reflecting on the *Amaya* ruling, he wrote:

> 29 Cela va à l'encontre du prétendu droit absolu, plaidé par SNC, de contre-interroger les experts de la partie adverse et d'interroger n'importe quels autres témoins, notamment ses propres experts, avant ou lors de l'audition en

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19 *Gauthier* c. *Bombardier inc.,* EYB 2019-324397, 2019 QCCS 4555.

20 *Graaf* c. *SNC-Lavalin Group Inc.,* EYB 2020-351421, 2020 QCCS 1232.

> autorisation. De l'avis du Tribunal, à ce stade, le prétendu droit absolu aux interrogatoires et contre-interrogatoires des experts est aussi incompatible avec l'objectif législatif de l'article 225.4.
>
> 30 Il est du rôle du juge responsable de l'autorisation de s'assurer non seulement des droits des parties, mais également du respect par ces dernières du cadre législatif pertinent et du principe de proportionnalité, le tout par l'application juste, simple, proportionnée et économique de la procédure, et généralement de voir à la bonne administration de la justice.
>
> 31 Un exemple de ce qui pourrait survenir lorsque le juge est gardé hors du processus décisionnel quant à la présentation de la preuve au stade de l'autorisation se trouve dans l'affaire *Catucci* c. *Valeant Pharmaceuticals International Inc*.*[13]. Les parties, sans avoir obtenu l'autorisation de la juge Chatelain, ont, sans aucune objection de part et d'autre, déposé au stade de l'autorisation huit (8) rapports d'expertise, plus de 200 pièces, pour un total de plus de 12000 pages. La juge n'a eu, par la suite, d'autre de choix que de faire face au fait accompli crée par les parties, ce qu'elle a déploré comme ne reflétant vraisemblablement pas l'intention du législateur.
>
> 32 Une telle situation déplorable démontre les risques liés à l'approche permissive plaidée par SNC quant à la preuve à être déposée au stade de l'autorisation sous la LVM. Il faut porter attention de ne pas permettre qu'il y ait dégradation du processus en direction d'une pente glissante vers un miniprocès ou même vers le fond. Le système judiciaire et la magistrature qui est responsable de voir à la bonne administration de la justice, ne devraient pas être pris en otage par le dépôt sans limites de la preuve dans un simple processus de filtrage. [The Court underlines]

[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. The Court will now refer to the eleven documents which the defendant wishes to file as they are described in the defendant's motion[21]:

> 1- Judgment rendered by Justice Salvatore Mascia on June 6, 2018 ordering the stay of the penal charges laid by the AMF before the Court of Quebec against, among others, the Defendant, in connection with the allegations found at paragraph 13.3 i) of the ReAmended Motion (Exhibit D-1).
>
> 2- Two letters from the AMF confirming the closing of the files relating to the "Cordon" and "Bronze" investigations, dated respectively September 13, 2016 and June 6, 2019, as well as two articles published by La Presse, dated respectively July 6, 2018 and June 7, 2019, in connection with the allegations

[21] Motion to strike allegations and produce relevant evidence, August, 23rd, 2019.

found at paragraph 13.3 ii) of the ReAmended Motion, filed *en liasse* in support hereof as Exhibit D-2.

3- Court docket and list of parties in the class action file *Derome v. Amaya Inc., David Baazov et al.* (the "Derome file") showing that the attorney representing the Plaintiff is also the attorney in the Derome file, in connection with the allegations found at paragraph 13.3 iii) of the Re-Amended Motion, filed *en liasse* in support hereof as Exhibit D-3.

4- Decision rendered by the TMF dated June 7, 2019 confirming the discontinuance by the AMF of its application seeking freeze and cease trade orders before the TMF against, among others, the Defendant, as well as the lifting of any freeze or cease trade order, in connection with the allegations found at paragraph 13.3 iv) of the ReAmended Motion, filed in support hereof as Exhibit D-4.

5- *Final Judgment and Order of Dismissal with Prejudice* rendered by Justice Joseph H. Rodriguez of the United States District Court of New Jersey dated December 21, 2018 confirming the settlement agreement without admission of liability entered into between the class members and the defendants in file no. 16-CV-01884-JHR-JS, including among others the Defendant and Amaya, in connection with the allegations found at paragraph -13.3 v) of the Re-Amended Motion, filed in support hereof as Exhibit D-5.

6- *Order for Dismissal* of the criminal complaint filed against G. Steven Pigeon by the United States Attorney for the Western District of New York, leave for the filing of which was granted by Justice Michael J. Roemer of the United States District Court for the Western District of New York dated October 6, 2017, in connection with the allegations found at paragraph 13.3 vi) of the Re-Amended Motion, filed in support hereof as Exhibit D-6.

7- Letter from FINRA dated February 24, 2015 confirming the conclusion of its review of the trading in shares surrounding the June 12, 2014 announcement of the transaction between Amaya and Olford Group, in connection with the allegations found at paragraph 13.3 vii) of the Re-Amended Motion, filed in support hereof as Exhibit D-7.

8- *Joint Stipulation for Entry of Final Order of Voluntary Dismissal with Prejudice* dated December 3, 2018 and *Final Order of Dismissal with Prejudice* rendered by Justice Martin J. Bidwill of the Seventeenth Judicial Circuit Court of Florida dated December 6, 2018 in the matter *Van Kessel v. The Stars Group Inc.,* putting an end to this litigation, in connection with the allegations found at paragraph 13.3 viii) of the Re-Amended Motion (Exhibit D-8).

9- *Filing Sheet, Case Memorandum, Material Procedural History and List of Issues* filed with the Dubai International Financial Centre confirming that the claim by KBC is contested by all defendants, including the Defendant, in connection with the allegations found at paragraph 13.3 ix) of the Re-Amended

> Motion, filed *en liasse* in support hereof as Exhibit D-9.
>
> 10- In support of the Re-Amended Motion, the Plaintiff filed trading data on common shares of Amaya for the period from February 1, 2016 to November 25, 2016 (Exhibit P-30), but not for the subsequent period from November 25, 2016 to March 31, 2017, which should be part of the evidence and is filed in support hereof as Exhibit D-10.
>
> 11- The Plaintiff also alleges that the Defendant would have *"never acquired all of Amaya's Common Shares further to its phantom offer",* as appears from paragraph 53 of the Re-Amended Motion. In support of the Re-Amended Motion, including the above allegation, the Plaintiff refers to forms filed by the Defendant, as appears from Exhibits P-2, P-3, P-27, P-28 and P-29, but does not file Form 62-103F1 filed by the Defendant on December 20, 2016 during the time period relevant to the allegations, which should also be part of the evidence and is filed in support hereof as Exhibit D-11.

[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. For example, several of the exhibits explain how an investigation, or proceeding, as alleged by plaintiff, came to an end. Lastly, some of the exhibits refer to events which occurred during the proposed time frame of the class action (February 1st, 2016 to November 21st, 2016) or, at the least, refer to events which are alleged by plaintiff as being relevant to the general context of the Class action. As such, all the exhibits are contemporaneous to the facts alleged.

[43] The Court will therefore allow the above mentioned exhibits to be part of the record.

[44] The situation is different concerning exhibit D-3 which serves no purpose and does not complete the record. It is not relevant to the debate to know who the attorneys of record were in the class action file *Derome v. Amaya Inc., David Baazov et al.*

[45] Plaintiff filed several Early Warning Reports (form 62-103F1) which relate to the proposed acquisition of Amaya shares or its disposal by defendant at periods running from February 2016 to March 2017. One of the reports is dated March 7th, 2017 and is deemed to amend an earlier report of December 20th, 2016[22]. Defendant aims to produce this earlier report (exhibit D-11). Surely, this document is relevant and completes the plaintiff's exhibits, it will be allowed.

[46] The defendant also wishes to file Amaya's trading data for the period running from November 26th, 2016 to March 31st, 2017 (exhibit D-10). Plaintiff filed historical

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[22] Exhibit P-28.

data showing the number of shares traded during the proposed Class period (February 1st, 2016 to November 21st, 2016). The allegations concerning the number of shares traded are made to justify the criteria under article 575 (3) *C.c.p*,: *the composition of the class makes it difficult to apply the rules of mandate or consolidation of proceedings*. The relevant paragraphs read:

> 94. During the Class Period, a total of 93,140,300 shares were traded on the TSX and 40,163,300 on the NASDAQ, the whole as appears from Yahoo! Finance's Historical Data from February 1 to November 21,2016, communicated herewith as Exhibit P-30;
>
> 95. During the period between November 22 and November 25, 2016, a total of 3,534,600 shares were traded on the TSX and 1,675,300 on the NASDAQ, as appears from Exhibit P-30 *en liasse*;
>
> 96. There are thousands of investors that could be members of the putative Ciass and are likely located throughout the world such that it would be difficult or impracticable to apply the rules for mandates to take part in judicial proceedings;

[47] The exhibit is not relevant to the appreciation of the criteria under article 575 (3) *C.c.p*. and serves no purpose in analysing the burden of the plaintiff in showing compliance with the conditions of a Class action. It will not be filed.

[48] In conclusion, the Court allows the filing of exhibits D-1, D-2, D-4, D-5, D-6, D-7, D-8, D-9 and D-11.

CRITERIA FOR LEAVE UNDER THE QSA

[49] Article 225.4 of the QSA reads:

> Art. 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 article 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.

[50] In *Theratechnologies,* The Supreme Court recognized the burden of the plaintiff is twofold: the action must be shown to have been brought in good faith and the plaintiff must show a reasonable possibility that it will be resolved in its favour. Having analysed

the history and objectives of the QSA, the Court offered the following explanation on the second criteria[23]:

> 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 mini-trial. 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. [The Court underlines]

[51] The Ontario legislation equivalent to the QSA also contains the same criteria. The notion of good faith was referred to by Justice Côté in the Supreme Court decision of *Banque Canadienne Impériale de Commerce* v. *Green* as follow[24]:

> 26 In his exhaustive ruling, Strathy J. (as he then was) considered the requirements for granting leave under s. 138.8 *OSA*: (1) that the action is being brought in good faith; and (2) that there is a reasonable possibility of success. Good faith, he held, requires an honest and reasonable belief that the claim has merit, and a genuine intent and capacity to pursue it. He found that the plaintiffs had met this requirement and that this had not been seriously challenged by the defendants. As to the reasonable possibility of success requirement, Strathy J. stated that it is a relatively low threshold (para. 373) and that the question to ask is whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success (para. 374). Had he applied this standard, Strathy J. would have granted the leave motion, but he found that he was bound by *Timminco*, as he saw no way to distinguish it from the case before him. [The Court underlines]

[52] In the matter of *Cappelli* v. *Nobilis Health Corp.,* Justice Perell of the Ontario Superior Court defined good faith[25]:

> [132] In the leave test, “good faith” has been interpreted to mean that the plaintiff has brought his or her action in the honest belief that he or she has an

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23 See *Theratechnologies*, supra, note 6, par. 39.
24 EYB 2015-259361, [2015] 3 R.C.S. 801, 2015 CSC 60.
25 2019 ONSC 2266 (CanLII).

> arguable claim, for reasons that are consistent with the purpose behind the statutory remedy, not for an oblique or collateral purpose, and with the genuine intention and capacity to prosecute the claim if leave is granted.

ANALYSIS OF GOOD FAITH

[53] The defendant argues that plaintiff is not in good faith. The Court disagrees. A review of the transcript of the examination on discovery of the plaintiff shows he understands the basic legal tenets behind his claim and is genuinely interested in pursuing it[26]. While he does admit to not fully understanding the legal issues or having direct knowledge of proceedings and investigations concerning Mr. Baazov, he bought in good faith the shares and relied on a newspaper article in La Presse[27], thinking he could perhaps earn a few dollars on the share price before selling. Thereafter, his understanding is that the proposed acquisition by the defendant could not proceed as KBC, as per various news outlet, was not involved in the financing contrary to what had been reported[28]. There is no indication the proposed lawsuit is taken for any other purpose than obtaining compensation for what he believes, for himself and others, is a scheme by defendant to manipulate the price of Amaya shares. The fact that plaintiff relied on his attorney to obtain further information or opposed the filing of other exhibits does not indicate he is acting in bad faith.

[54] Also good faith is always presumed, unless the law expressly requires that it be proved[29].

[55] In the Court's understanding, meeting the good faith criteria does not entail that a plaintiff would have a perfect and direct knowledge of the facts and legal principles behind a secondary market claim. If such was the case, no action could reasonably be brought. This would be contrary to the objectives of the QSA which is to reduce the burden of proof placed upon the plaintiff but also avoid unmeritorious claims. In *Theratechnologies,* the Supreme Court explained the history behind the legislation[30]:

> 30 The Canadian Securities Administrators, an umbrella organization of Canada's provincial and territorial securities regulators, adopted most of the Committee's recommendations and began developing proposals to implement them across Canada: Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of Material Fact and Material Change, CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383. Despite the fact that the Allen Committee had not recommended it, and in order to discourage the kind of strike suits that had become common in the United States under more investor-friendly regimes, the Canadian Securities Administrators recommended that in addition to reducing the burden of proof on

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26 Exhibit D-12.
27 Exhibit P-38.
28 Supra, note 26, pages 21 to 45.
29 Article 2805 C.c.Q.
30 See *Theratechnologies*, supra, note 6, par. 30 to 34.

> investors, the new liability regime should include a screening mechanism to ensure that only claims with a reasonable chance of success would be brought: This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit. [Emphasis added; *ibid.*, at p. 7390].
>
> (…)
>
> 32 Quebec implemented the recommendations of the Canadian Securities Administrators through Bill 19, *An Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15, which received assent on November 9, 2007. When Bill 19 was before the legislature, Monique Jérôme-Forget, the Minister of Finance at the time, said:
>
> [TRANSLATION] The recourse in Bill 19 is highly harmonized with that in place in Ontario, which is recourse that strongly inspired the other provinces and territories. Only the necessary adjustments were made to integration into Québec legislative corpus, including the Securities Act, into which it will be incorporated.
>
> 33 Under this regime, when a security is acquired or transferred at the time of a false declaration or omission of information that should have been disclosed, the fluctuation in the value of the security is presumed to be attributable to that fault. Investors were thereby released from the heavy burden of demonstrating that the variation in the market price of the security was linked to the misinformation or omission, and from demonstrating that they personally relied on that information or omission in buying or transferring the security.
>
> 34 The scheme also establishes an authorization mechanism to permit only actions in good faith with a reasonable possibility of success. As the Court of Appeal noted, Quebec's new regime therefore reflected an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations.[The Court underlines]

[56] In short, the Court is satisfied the plaintiff is acting in good faith in bringing forward the authorization.

ANALYSIS OF REASONABLE POSSIBILITY THAT THE ACTION WILL BE RESOLVED IN FAVOR OF PLAINTIFF

[57] Courts have stated the authorization judge must undertake a *reasoned consideration of the evidence* in order to decide whether the criteria is met. In that

sense, the Court must decide whether plaintiff offers a plausible analysis of the applicable legislation and credible evidence[31].

[58] The authorization is framed within two events, the February 1st, 2016 issuance of an Early warning report by the defendant and the corrective document of November 22nd, 2016 (The Globe and Mail article), which indicated KBC was not part of the financing.

[59] The defendant contests that the authorization can reasonably relate to the first document of February 1st, 2016 and argues that should the authorization be given, the action be framed within the November 14th, 2016 Disclosure under the Early Warning Report and the corrective document of November 22nd, 2016 (The Globe and Mail article).

[60] It is useful for the present analysis to quote from the authorization proceeding in regards to the first and second impugned documents:

> 55.1 When the Defendant filed the first Impugned Document on February 1, 2016, he was a member of Amaya's board of directors and, therefore, subject to the QSA;
>
> 55.2 Art. 225.8(1) of the QSA states that “a person that acquires or disposes of an issuers security during the period between 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 [...] 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 to the release of the document";
>
> 55.3 The Defendant's misrepresentations in the First Impugned Document fall within the scope of art. 225.8(1) of the QSA since at the time when these misrepresentations were made, the Defendant was a director of Amaya;
>
> 55.4 The filing of the First Impugned Document therefore gives rise to a secondary market claim under art. 225.8(1) of the QSA;
>
> 55.5 When the Defendant filed the Second Impugned Document on November 14, 2016, he was no longer a member of Amaya's board of directors since he resigned from that post effective August 11, 2016. The Defendant did however own more than 10% of Amaya’s issued and outstanding Common Shares as a result of which he qualified as an insider and in turn, as an influential person under the QSA;
>
> 56. Under art. 225.3 of the QSA, an influential person includes an insider who

[31] See *Catucci c. Valeant Pharmaceuticals International Inc., S*upra, note 17, par. 156 and *Theratechnologies*, *Supra*, note 6, para. 38, 39.

is not a director or an officer of the issuer;

57. Art. 89 of the QSA defines an insider as "a person that exercises control over more than 10% of the voting rights attached to all outstanding securities of an issuer". Since as at the date of filing of the Second Impugned Document the Defendant exercised control over more than 10% of Amaya's issued and outstanding Common Shares and was no longer a director or officer of Amaya, he was considered an insider and as such, an influential person under art. 225.3 of the QSA;

57.1 Art. 225.10(4) of the QSA states that "a person that acquires or disposes of an Issuer's security during the period between when an influential person [...] released a document [...] relating to the issuer containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against [...] the influential person

58. The Defendant's misrepresentations made in the Second impugned Document fall within art. 225.10(4) of the QSA since, at the time when these misrepresentations were made, the Defendant was an Influential person;

58.1 The filing of the Second Impugned Document therefore gives rise to a secondary market claim under art. 225.10(4) of the QSA;

59. (...)

60. The Impugned Documents prepared and signed by the Defendant contained misrepresentations relating to the issuer, Amaya, which misled investors and led them to believe that the Defendant intended to present viable acquisition offers;

61. As a result of those misrepresentations; made in furtherance of the Defendant's scheme to increase the price of Amaya's shares, the Plaintiff asserts a claim in virtue of art. 225.8(1) of the QSA and a claim in virtue of art. 225.10(4) of the QSA against the Defendant on behalf of all Class Members;

62. The Defendant knew that at the time of its releases the Impugned Documents contained misrepresentations;

63. The monetary damages suffered by the Plaintiff and Class Members are a direct result of the Defendant's intentional market manipulation scheme to artificially inflate Amaya's share price by releasing documents containing misrepresentations about a phantom offer to acquire all of Amaya's shares, i.e. a going private transaction;

B. Offences Under Title,VII, Chapter II of the QSA

63.1 Under art. 195(2) of the QSA, it is an offence to influence or attempt to influence the market price of securities by means of unfair, improper or fraudulent practices;

63.2 As particularized herein, the Defendant published the Impugned Documents which contained misrepresentations as part of an intentional scheme to increase the value of the Defendant's stake in Amaya

63.3 The Defendant committed a fault under art. 195(2) of the QSA, thus breaching his obligations towards the Plaintiff and Class Members;

64. Additionally, art. 197(5) of the QSA states that a person is "guilty of an offence who in any manner not specified in art. 196 makes a misrepresentation in any document forwarded or record kept by any person pursuant to [the QSA]";

65. The article further defines a "misrepresentation" as "any misleading information or a fact that is likely to affect the decision of a reasonable investor as well as any pure and simple omission of such a fact";

66. Pursuant to art.112 of the QSA, a person making a take-over bid shall conduct the bid in accordance with the conditions determined by regulation;

67. Regulation 62-103 defines "early warning requirements" as the requirements set out in section 5,2 of *Regulation 62-104 Respecting Take-Over bids and Issuer Bids ("Regulation 62-104"*) which states that:

(1) An acquiror who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class, must

(a) promptly, and, in any event, no later than the opening of trading on the business day following the acquisition, issue and file a news release containing the information required by section 3.1 of Regulation 62-103 respecting The Early Warning System and Related Take-Over Bid and Insider Reporting Issues (chapter V-1.1, r. 34), and

(b) promptly, and, in any event, no later than 2 business days from the date of the acquisition, file a report containing the information required by section 3.1 of Regulation 62-103 respecting The Early Warning System and Related Take-Over Bid and Insider Reporting issues.

[our emphasis.]

68. Section 3.1 of Regulation 62-103 states that the news release and report (...) that must be issued and filed under the early warning must contain the information required by Form 62-103F1, namely the identity of the acquiror and all joint actors, a description of the agreements, arrangements, commitments or understandings betweenthe acquiror and the joint actors and a certification that the information in the form is true and complete in every respect;

69. The impugned Documents are governed by art. 197(5) of the QSA since

> the Defendant was required to file them pursuant to Regulations 62-103 and 62-104 as well as art.112 of the QSA;
>
> 70. By filing the Impugned Documents which the Defendant knew to have contained misrepresentations, (...) he committed a fault under art. 197(5) of the QSA which caused the Plaintiff and Class Members damages;
>
> 71. At all relevant times during the Class Period, Amaya's principal establishment was located in Quebec arid it carries on business in Quebec, as appears from Exhibit P-10;
>
> 72, At all relevant times during the Class Period, Amaya was a reporting issuer in Quebec under art. 68 QSA;
>
> 73. At all relevant times during the Class Period, the Defendant was domiciled in Quebec, his actions related to a corporation located in Quebec and his breaches of applicable laws and regulations were committed in Quebec;
>
> 74. The Plaintiff purchased AYA shares as a direct result of his awareness of the (…) Acquisition Proposal; and his reliance and belief that (...) the Defendant presented the Acquisition Proposal in good faith and that the information contained therein was truthful and accurate;

[61] The plaintiff suggests that although there is no direct evidence that the first impugned document misrepresents reality, the Court may under article 225 (4) QSA, draw a reasonable inference that Mr. Baazov wanted to influence the stock market price.

[62] At the time of the first impugned document defendant was a member of Amaya's board of directors. Article 228.8(1) QSA reads:

> Art. 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;

[63] The QSA defines a misrepresentation under article 5 as follow:

> Art. 5: In this Act, unless the context indicates otherwise,
>
> "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;
>
> "misrepresentation" means any misleading information on a material fact as well

as any pure and simple omission of a material fact;

[64] Plaintiff's theory of the case is that the defendant, even at the time the first impugned document was released, had no intention of going through with the acquisitions of the shares and that the announcement had an effect on the market. Objectively, the available evidence does show that the various announcements over the class period influenced the course of the shares. This is established by the expert's report filed by plaintiff, i.e.: the conclusions of Craig J. McCann, dated May 31st, 2018 state[32]:

> 13. Based upon my review of documents and my experience as an expert in securities litigation damages calculations, I conclude that:
>
> a) Mr. Baazov's announcement on February 1, 2016 that he intended to submit a proposal to acquire all Amaya's outstanding shares at C$21 per share ("First Impugned Document") had an economically and statistically significant positive impact on the share price of Amaya's common equity. The information in the announcement affected investors' decisions to purchase shares of Amaya's common stock.
>
> b) Mr. Baazov's announcement on November 14, 2016 that he had submitted a proposal to acquire all Amaya's outstanding shares at C$24 per share, and that he had four equity investors committed to funding US$3.65 billion of the cost ("Second Impugned Document") had a statistically significant positive impact on the share price of Amaya's common equity. The information in the announcement affected investors' decisions to purchase shares of Amaya's common stock.
>
> c) The revelations on November 22, 2016 that KBC Aldini Capital had not agreed to fund the acquisition and Ferdyne Advisory LLC was no longer registered as a company (the "Corrective Disclosure") had a statistically significant negative impact on the share price of Amaya's common stock.

[65] As indicated, the plaintiff's alleges in his motion an intentional act by the defendant in releasing the first document in order to manipulate the market and that the latter never had the intention of going forward with his acquisition nor did he have the requisite financial capacity to do so[33].

[66] The Early Warning Report of February 1st, 2016 contains the following information[34]:

> On January 31, 2016, Mr. Baazov delivered a notice to the Lead Independent Director of Amaya's Board of Directors (the "**Notice**"), stating Mr. Baazov's present intention to make an all-cash proposal to acquire Amaya. As set forth in the Notice, Mr. Baazov, currently estimates his proposed offer to be CDN$21 per

[32] Exhibit P-37.
[33] Re-amended motion of September, 10th, 2018, see paras. 26 to 29, 55.1 to 55.4, and 60, 61.
[34] Exhibit P-2.

> Common Share. Also, as set forth in the Notice, Mr. Baazov recently began preliminary discussions with a small number of potential investors; and Mr. Baazov's present intention, subject to certain contingencies, is to submit a formal proposal on or about the end of February.
>
> On February 1, 2016, Mr. Baazov issued a news release (the "**News Release**"), announcing his intention to acquire Amaya at a purchase price presently estimated at CDN$21.00 per Common Share. Currently, the particular form and structure of a potential transaction have not been determined and, other than as set out in the News Release, no formal discussions have commenced between Mr. Baazov and Amaya with respect to a potential transaction.

[67] The news release attached to the Report states:

> Montreal, Quebec, February 1, 2016 **-**David Baazov, Chairman and Chief Executive Officer of Amaya Inc. (NASDAQ: AYA; TSX: AYA), today announced that he, together with a group of investors with whom he is in discussions, intends to make an all-cash proposal to acquire Amaya at a purchase price presently estimated at CDN$21.00 per common share, representing a 40% premium to Friday's closing price on the Toronto Stock Exchange.
>
> The particular form and structure of the transaction have not been determined, and no discussions have commenced between Mr. Baazov and Amaya with respect to any particular transaction. There is no certainty that the proposed transaction will proceed or be consummated.

[68] The update to the Early Warning Report came in the form of the Required Disclosure under the Early Warning Requirements of November 14th, 2016[35]. Here is an extract:

> 2.2 State the date of the transaction or other occurrence that triggered the requirement to file this report and briefly describe the transaction or other occurrence.
>
> On November 14, 2016, the Acquiror delivered to Amaya's Chairman of the Board of Directors a proposal on behalf of BidCo (as defined below), not subject to any due diligence or financing conditions (the "Proposal"), to acquire 100% of the common shares of Amaya for CAD$24 per share on the terms and subject to the conditions set forth in the Proposal (the "Proposed Transaction"). Additionally, as set forth in the Proposal, BidCo is prepared to provide a US$200.0 million deposit (the "Deposit") into escrow upon execution of a definitive agreement in respect of the Proposed Transaction; and, in the event Amaya's US$400.0 million deferred payment (the "Deferred Payment") obligation to the previous owners of Oldford Group Limited becomes due (the "Deferred Payment Date") prior to the closing of the Proposed Transaction, BidCo will cause the Deposit to be released from escrow five days prior to the Deferred Payment Date and converted into a one-year structurally subordinated debt obligation to fund the Deferred Payment,

[35] Exhibit P-3.

> such amount to be convertible into equity following the closing of the Proposed Transaction.
>
> On November 14, 2016, the Acquiror issued a news release (the "News Release") announcing the Proposal.
>
> 2.3 State the names of any joint actors.
>
> Under applicable Canadian securities laws, the Acquiror may be deemed to be acting jointly or in concert with each of Head and Shoulders Global Investment Fund SPC - HS Special Event Segregated Portfolio, Goldenway Capital SPC-Special Event SP, Ferdyne Advisory Inc. and KBC Aldini Capital Limited (collectively, the "Equity Financing Sources").

[69] It is plaintiff's contention that the Globe and Mail article, dated November 22nd, 2016, which reported that KBC was not involved in the financing structure, constitutes a corrective disclosure[36]. The QSA does not define what a public correction under article 225.8 is, but it may come in multiple forms, as for example, a newspaper article[37].

[70] On November 23rd, 2016, the defendant issued a news release concerning the involvement of KBC[38]. It reads in part:

> Montreal, Quebec, November 23, 2016 - David Baazov today confirmed that he has been advised by representatives of KBC Aldini Capital Limited ("KBC") that the equity commitment letter purported to be delivered to Mr. Baazov on behalf of KBC was delivered without KBC's knowledge or consent and that KBC has not committed to provide financing for the proposed acquisition of Amaya. Mr. Baazov intends to obtain replacement financing and still currently intends to acquire Amaya on the terms previously disclosed by him on November 14, 2016.

[71] While the plaintiff labels the news release as an admission by the defendant, the Court agrees it only represents an acknowledgement of KBC's position towards the fact that KBC denies knowledge or consent to the commitment letter. Nevertheless, it remains that the Required Disclosure document of November 14th, 2016 is not accurate and true.

[72] The evidence confirms KBC issued legal proceedings against various parties, including defendant, which are still pending and contested before the Dubai courts and, among others, contain allegations of knowledge by the defendant that the early warning report was untrue[39].

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36 Exhibit P-1.
37 *Mask* v. *Silvercorp Metals Inc*., 2015 ONSC 5348, para. 30.
38 Exhibit P-24.
39 Exhibit P-31 and D-9.

[73] The Court is satisfied that the alleged misrepresentations, at this stage, deal with material facts. In *Sharbern*, the Supreme Court defined materiality[40]:

> The materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision;
>
> ▪ A fact may be considered material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price;
>
> ▪ Materiality is determined objectively from the perspective of a reasonable investor … the subjective views of the issuer do not come into play when assessing materiality;
>
> ▪ Because disclosure is a matter of legal obligation, the business judgment rule should not be used to qualify or undermine the duty of disclosure.

[74] The Court also notes that by the time the second impugned document was issued, November 14th, 2016, the defendant was no longer a director of Amaya[41]. However, he still held more than 10 % of Amaya's shares[42], which as per plaintiff, qualifies him as an influential person within the meaning of article 225.10 (4) of the QSA:

> Art. 225.10: A person that acquires or disposes of an issuer's security during the period between the time when an influential person or a mandatary or other representative of the influential person released a document or made a public oral statement relating to the issuer and containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against
>
> (…)
>
> (4) the influential person and each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

[75] Indeed, article 225.3 QSA defines an *influential person* as: 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, and article 89 QSA states: *Insider* means (3) a person that exercises control over more than 10 % of the voting rights attached to all outstanding voting securities of an issuer other than

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40 *Sharbern Holding Inc.* v. *Vancouver Airport Centre Ltd*, 2011 SCC 23, par. 58 and 61. See Justice Belobaba's summary of the materiality concept in *Wong* v. *Pretium Resources*, 2017 ONSC 3361, para.30.

41 Exhibit P-11.

42 See sections 3.4 and 3.5 of Exhibit P-3.

securities underwritten in the course of a distribution.

[76] The defendant contests the interpretation given to the QSA by the plaintiff on several grounds. Firstly, in regards to the first document, it is underlined that article 225.8 QSA does not apply as the Early Warning report was not issued by Amaya. The Court disagrees as the defendant, being a director of Amaya, may be seen as a representative of Amaya. Article 225.8 QSA states:

> Art. 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

[77] The defendant, as the offeror in the document, is described as the Chairman and Chief Executive Officer of Amaya, as well as being an important shareholder[43]. A plausible analysis of the QSA and the available documents do support the notion that defendant can be seen as a mandatary or other representative of Amaya at the time of the issuance of the document. Professor Stéphane Rousseau proffers the following analysis of article 225.8 QSA when it refers to mandatary or representative[44]:

> 44. Mandataire - Dans cette perspective, la notion de représentant englobe la notion de mandataire à laquelle réfère le nouveau recours. Les administrateurs et dirigeants étant expressément qualifiés de mandataires de leur société par la Loi, ils se trouvent par conséquent visés par les notions de mandataire et de représentant qui figurent dans le recours1. Ainsi, les actes posés par les membres de la direction d'un émetteur ou d'une personne influente dans le cadre de leurs fonctions ont pour conséquence d'engager la responsabilité de leur mandant2. Ce résultat est conforme aux règles générales régissant la responsabilité civile des mandataires et mandants.
>
> 1. Voir l'article 119 de la Loi sur les sociétés par actions, RLRQ, c. S-31.1 et les articles 312,
>
> 321,2132 et 2137 C.c.Q.
>
> 2. La détermination de l'étendue des fonctions des administrateurs et des dirigeants pourra devenir cruciale pour déterminer si ces derniers agissent effectivement à titre de représentants de l'émetteur ou de la personne influente. Tout de même, cet exercice sera facilité par le régime du mandat apparent en vertu duquel l'excès ou le défaut de pouvoir d'un administrateur ou d'un dirigeant pourrait entraîner néanmoins la responsabilité de l'émetteur ou de la personne influente.

[43] Exhibit P-3, section 3.

[44] Rousseau, Stéphane, *Régimes de responsabilité civile : divulgation sur les marchés primaire et secondaire,* JurisClasseur Québec, Collection droit des affaires, LexisNexis, July 2019.

> : 3. Art. 2164 C.c.Q.
>
> 45. Autre représentant - En plus d'englober la notion de mandataire qui figure dans le recours, la notion de représentant s'étend également à la représentation en l'absence de mandat : « Dans la représentation sans mandat, le "mandant" n'a pas donné au "mandataire* le pouvoir de le représenter, originellement, ni expressément, ni implicitement »*. La représentation sans mandat existe lorsqu'il y a apparence de mandat dans les circonstances, comme le prévoit l'article 2163 C.c.Q. :
>
> Celui qui a laissé croire qu'une personne était son mandataire est tenu, comme s'il y : avait eu mandat, envers le tiers qui a contracté de bonne foi avec celle-ci, à moins qu'il .n'ait pris des mesures appropriées pour prévenir l'erreur dans des circonstances qui la rendaient prévisible.'
>
> Dans ce cas, « [c]e qui importe c'est la bonne foi du tiers, sa croyance légitime lui permettant de se fier à l'apparence ».
>
> Cette seconde dimension de la notion de représentant rejoint 1 'apparent authority de la common law. Elle entraîne que l'application du recours peut être déclenchée par les actes de personnes qui font partie de l'organisation de l'émetteur ou de la personne influente sans pour autant que celles-ci aient le pouvoir de divulguer des documents ou de formuler des déclarations publiques. [The Court underlines]

[78] It follows that there is a reasonable possibility that the defendant, when he issued the first document, acted as a mandatary or representative of Amaya and therefore article 225.8 QSA may be applied. Furthermore, the argument under 225.10(4) QSA that the defendant was an influential person still stands.

[79] Defendant argues, in any event, that there is no misrepresentations to be found in the first impugned document. The document refers only to a potential transaction and there is no evidence to support the notion that defendant had no intention of going ahead with the proposed transaction.

[80] Furthermore, as per the defendant there is no evidence that his credibility should be put into doubt. For example, the investigations and other proceedings referred to by plaintiff have all come to an end (except the Dubai proceedings taken by KBC). However, in the eyes of the Court, this does not mean that all evidence relating to these investigations and or proceedings becomes irrelevant. The proceedings taken by KBC point to a forgery[45].

[81] On the other hand, it is clear the second impugned document is inaccurate, and potentially false. It is directly tied to the first document and aims to update it. A party is not bound to adduce direct evidence of a fact and an inference may be draw from

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[45] Exhibit P-31, see paras. 27 to 33, 49 to 56 and 93.

circumstantial evidence. In *Hinse*, the Supreme Court defined evidence based on presumptions[46] :

> [71] In this case, there is no direct evidence regarding the quality of the Minister's review. The appellant's argument was based on proof by presumption of fact, and the trial judge relied on this argument to conclude that the Minister had not conducted a meaningful review. Article 2846 *C.C.Q.* provides that "[a] presumption is an inference drawn by the law or the court from a known fact to an unknown fact." Regarding presumptions of fact, art. 2849 *C.C.Q.* provides that courts may, at their discretion, take such presumptions into account, but only if they are "serious, precise and concordant". These modifiers can be defined as follows:
>
> [translation] Presumptions are serious when the connection between the known fact and the unknown fact is such that the existence of one establishes the existence of the other in a clear and obvious manner. . . .
>
> Presumptions are precise when the conclusions that flow from the known fact tend to establish the contested unknown fact in a direct and specific manner. If it were also possible to draw different and even contrary results, to infer the existence of various and contradictory facts, the presumptions would not be precise in nature and would give rise only to doubt and uncertainty.
>
> Finally, they are concordant, whether or not they each spring from a common or different source, when they tend[, as a whole and in how they accord with one another,] to establish the fact to be proven. . . . If, on the contrary, they contradict each other . . . and cancel each other out, they are no longer concordant, and create only doubt in the magistrate's mind. [Emphasis added.]
>
> (M. L. Larombière, *Théorie et pratique des obligations* (new ed. 1885), vol. 7, at p. 216, reproduced in *Barrette v. Union canadienne, compagnie d'assurances*, 2013 QCCA 1687, [2013] R.J.Q. 1577, at para. 33; *France Animation s.a. v. Robinson*, 2011 QCCA 1361, at para. 120 (CanLII), quoting *Longpré v. Thériault*, [1979] C.A. 258, at p. 262.)
>
> [72] Thus, [translation] "[a] presumption of fact cannot be deduced from a pure hypothesis, from speculation, from vague suspicions or from mere conjecture": Royer and Lavallée, at No. 842, citing *Crispino v. General Accident Insurance Company*, 2007 QCCA 1293, [2007] R.R.A. 847. An unknown fact will not be proven if the known facts cause another fact that is inconsistent with the fact the plaintiff wants to prove to be more or less likely, or if they do not reasonably rule out another possible cause of the damage he or she suffered: see, e.g., *Crispino.* However, it is not necessary to rule out every other possibility: Royer and Lavallée, at No. 842; see also *St-Yves v. Laurentienne générale, compagnie d'assurance inc.*, 1997 CanLII 10732 (Que. C.A.).

[82] The Court is mindful that it must not look into the allegations and available

[46] *Hinse* v. *Canada (Attorney General),* 2015 SCC 35 (CanLII), [2015] 2 SCR 621.

evidence to form a judgment as to whether or not under a balance of probabilities there is a conclusion to be drawn. At this juncture, the Court is of the view the case presented by plaintiff allows a reasonable conclusion that the first and second documents are closely intertwined and must be looked at together. Thus, the fact that KBC was not part of the financing and did not authorize the letter of commitment points logically to a scheme to influence the price of the shares. Furthermore, the possible argument that defendant did not know that the commitment letter was false has no bearing at this stage. The second document contains an affirmation that the statements contained in the document are true and accurate. The document was issued as a follow up to the first one and as prescribed under regulation[47]. As such, it is likely the second document would be seen as a core document under article 225.3 QSA but this issue remains for the merits of the case[48].

[83] The burden of showing reasonable possibility of success is met.

[84] The defendant also argues there was no corrective disclosure in regards to the first document : the Globe and Mail article only revealed that KBC had no involvement in the financing[49].

[85] More specifically, the defendant presents the argument that without a corrective disclosure to the first document there can be no statutory claim in relation to its publication whether it be under article 225.8 or 225.10 QSA. It relies *inter alia* on the Ontario Superior Court decisions of *Mask* v. *Silvercorp Metals Inc*.[50] and *Swisscanto Fondsleitung AG* v. *Blackberry Ltd*.[51] which state that there must be a public correction which a) provides fair notice with sufficient precision to the defendant and b) reveals to the market the alleged misrepresentation. In *Cappelli* v. *Nobilis Health Corp*.[52], justice Perell summarized the requirement as follow :

> [138] To plead the statutory cause of action for misrepresentation in the secondary market, the plaintiff should identify and articulate the falsity of the representation and link the misrepresentation to a corrective disclosure so with sufficient clarity and precision so as to give the other party fair notice of the case they are required to meet and to enable the court.

[86] Here, the defendant is of the view that the Globe and Mail article, labelled by the plaintiff as the corrective disclosure, makes no link or connection to the first document. Neither does it identify a misrepresentation in relation to its contents.

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47 Exhibit P-3, Form 62-103 F1 Required Disclosure under the Early Warning Requirements, is mandated by article 5.2 of the Regulation 62-104 respecting Take-Over Bids and Issuer Bids (V-1.1, r. 35).

48 See *Abdula* v. *Canadian Solar*, 2014 ONSC 5167, paras. 45 and 46. See also *Goldman, Sachs & Co. c. Catucci*, 2017 QCCA 1890, paras 34 to 44.

49 Exhibit P-1.

50 *Supra*, note 37, paras. 22-23.

51 2015 ONSC 6434, para. 65.

52 *Supra* note 25, para. 138.

[87] Article 225.16 is of interest. It reads :

> Art. 225.16 : The court seized of the action may decide that multiple misrepresentations having common subject matter or content may be treated as a single misrepresentation or that multiple instances of failure to make timely disclosure concerning common subject matter may be treated as a single failure to make timely disclosure.

[88] The Court is of the view there is really only one misrepresentation in the present matter, i.e.: a proposal by defendant to acquire the shares of Amaya. The misrepresentations in the first and second document were corrected by a single corrective disclosure. This is enough to give fair warning to the defendant that his plan to acquire Amaya shares was put into doubt and it also revealed to the market a serious issue regarding the acquisition proposal.

[89] In closing, under the authorization test of the QSA the Court is satisfied the plaintiff has brought the action in good faith and there is a reasonable possibility that he will succeed at trial.

CRITERIA FOR LEAVE UNDER ARTICLE 575 C.c.p.

[90] The plaintiff must demonstrate he meets the four conditions set out under article 575 C.c.p. :

> Art. 575 : The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
>
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[91] It is recognized that the authorization judge must verify that all four criteria under article 575 C.p.c. are met and a failure to demonstrate one criteria is enough to warrant a dismissal of the authorization. However, the analysis must take the allegations under the proceeding as being proven and only consider the burden as being one of showing an arguable case. The analysis is a screening operation where only untenable claims should be stopped.

[92] The screening operation is based upon a liberal interpretation of article 575

C.c.p. The authorization is not an exceptional recourse but rather a way for victims of reprehensible acts to gain access to justice. In *Oratoire Saint-Joseph*, the Supreme Court outlined those principles[53]:

> 7 At the authorization stage, the court plays a "screening" role: *Infineon Technologies AG v. Option consommateurs*2013 SCC 59[2013] 3 S.C.R. 600, at paras. 59 and 65; *Vivendi*, at para. 37. It must simply ensure that the applicant meets the conditions of art. 575 *C.C.P.* If the conditions are met, the class action must be authorized. The Superior Court will consider the merits of the case later. This means that, in determining whether the conditions of art. 575 *C.C.P.* are met at the authorization stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted: *Infineon*, at para. 68; *Vivendi*, at para. 37; *Marcotte v. Longueuil (City)*2009 SCC 43[2009] 3 S.C.R. 65, at para. 22.
>
> 8 The Court has given "a broad interpretation and application to the requirements for authorization [of the institution of a class action], and 'the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation": *Bank of Montreal v. Marcotte*2014 SCC 55[2014] 2 S.C.R. 725, at para. 43, quoting *Infineon*, at para. 60; see also *Marcotte v. Longueuil (City)*, at para. 22. In other words, the class action is *not* an [TRANSLATION] "exceptional remedy" that must be interpreted narrowly: *Tremaine v. A.H. Robins Canada inc.*[1990] R.D.J. 500Que. C.A.; see also *Comité d'environnement de La Baie inc. v. Société d'électrolyse et de chimie Alcan Ltée*[1990] R.J.Q. 655C.A.. On the contrary, it is [TRANSLATION] "an ordinary remedy whose purpose is to foster social justice": *Harmegnies v. Toyota Canada inc.*2008 QCCA 380, at para. 29; see also *Bisaillon v. Concordia University*2006 SCC 19[2006] 1 S.C.R. 666, at para. 16; *Pharmascience inc. v. Option consommateurs*2005 QCCA 437, at para. 20; *Trottier v. Canadian Malartic Mine*2018 QCCA 1075, at paras. 35-36. (…)

[93] In this instance, defendant does not contest the conditions found under 575(1) and 575(3). The ability of Mr. Gauthier to represent the Class is put into doubt as well as the condition of sufficiency of the alleged facts. Defendant is also asking the Court to modify the scope of the proposed class and attacks the claim for punitive damages. Lastly, the parties disagree on how judicial costs should be awarded at this time.

[94] The Court is satisfied the plaintiff does meet the conditions of 575(1) and 575(3), that is the claims of the members raise similar issues of law or fact and, the composition of the class makes it difficult to apply the rules for mandates. Indeed, the motion is sufficiently detailled to support the argument that the claims of the members are similar and that the composition of the class is appropriate[54]. The situation of potential members is sensibly the same and it is practical, in view of the number of potential

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[53] *Supra*, note 5, para. 7 and 8.

[54] Re-amended motion of September, 10, 2018, paras. 90 to 96.

claimants, to consider the Class action as being the recourse of choice.

THE SUITABILITY OF PLAINTIFF AS REPRESENTATIVE

[95] Essentially, the defendant is of the view that Mr. Gauthier is not an appropriate reprsentative as he lacks the most basic understanding of the action and relied on his counsel without assuring himself of the accuracy of the allegations put forth.

[96] The Court disagrees and has already commented on Mr. Gauthier's involvement in the proposed suit under the argument that he was not in good faith in bringing forth a recourse under the QSA. As already indicated, the Court ruled that plaintiff had sufficient knowledge of the suit and was in good faith. This being said, a few additional comments are in order.

[97] The threshold to satisfy the condition of a representative is low. In *Infineon*, the Supreme Court confirmed this interpretation [55]:

> [149] Article 1003(*d*) of the *C.C.P.* provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [translation] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(*d*), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly. [The Court underlines]

[98] In *Sibiga*[56], Justice Kasirer adopted the same reasoning, i.e. : that the representative condition is a minimalist concept :

> 109 To my mind, this reading of article 1003(d) makes particular sense in respect of a consumer class action. Mindful of the vocation of the class action as a tool for access to justice, Professor Lafond has written that too stringent a measure of representative competence would defeat the purpose of consumer class actions. After reviewing the law on this point, my colleague Bélanger, J.A. observed in *Lévesque v. Vidéotron, s.e.n.c.*, a consumer class action, that article 1003(d) does not impose an onerous burden to show the adequate character of representation: "[c]e faisant, la Cour suprême envoie un message plutôt clair quant au niveau de compétence requis pour être nommé représentant. Le critère est devenu minimaliste". In *Jasmin v. Société des alcools du Québec*, another consumer action, Dufresne, J.A. alluded to the *Infineon* standard and warned against evaluations of the adequacy of representation that are too onerous or too

[55] *Supra* note 15, para. 149.
[56] *Sibiga c. Fido Solutions inc.*, EYB 2016-268978, 2016 QCCA 1299.

harsh, echoing an idea also spoken to by legal scholars.

> 110 In keeping with the "liberal approach" to the interpretation of article 1003(d), especially suited with the consumer class action, it suffices here that the appellant understand, as she has alleged, that she was billed a disproportionate amount for roaming because of the unfair difference between the amount charged and the real cost of the service to the respondent Fido. She must know that, like herself, others in the class, whether roaming in the U.S. or elsewhere, were also disproportionately billed, either with her own service provider or others who offer like services to Quebecers. She of course must see that her claim raises common questions with others in the class and that she is prepared to represent their interest and her own going forward.[The Court underlines]

[99] Justice Kasirer specifically dealt with arguments which are quite similar to what the defendant is raising: the proceedings are counsel driven and the plaintiff has insufficient knowledge of the case. He dismissed both arguments and concluded as follow :

> 103 A lawyer-initiated consumer class action is not inherently incompatible with an acceptable solicitor-client relationship, nor does it mean that the client has "no control" over counsel. Article 1049 C.C.P. requires that a lawyer act for the representative. In our case, the appellant retains the authority to walk away from the class action, with permission of the court, and the lawyers cannot unilaterally "dismiss" the client as representative of the class. The judge was wrong to suggest that the fact that the lawyers chose their client here means that the appellant is an inadequate representative. (…)
>
> 108 It is best to recognize, as does the appellant herself in written argument, that she may not have a perfect sense of the intricacies of the class action. This is not, however, what the law requires. As one author observed, Quebec rules are less strict in this regard that certain other jurisdictions: not only does the petitioner not have to be typical of other class members, but courts have held that he or she "need not be perfect, ideal or even particularly assiduous". A representative need not single-handedly master the finery of the proceedings and exhibits filed in support of a class action. [The Court underlines]

[100] Here, as his discovery shows, Mr. Gauthier relied for certain aspects on his attorney but he also understands the basic concept behind his claim : he bought shares in November 2016 upon seeing news of the proposed acquisition only to realize a few days later that the financing was not available and that its legitimacy was being put into doubt. He has the will and interest to pursue the claim for himself and others in his situation.

[101] The Court concludes Mr. Gauthier is an appropriate representative for the purpose of a class action.

THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT

[102] Before dwelling further on this aspect, a preliminary comment is in order. The standard to pursue an authorization under the QSA is heavier than the standard under 575 C.c.p., which in some instances has been described as a speed bump. Here, the Court has concluded the plaintiff met the burden of good faith and reasonable possibility of success under the QSA. Justice Chatelain in *Valeant*, faced with a similar issue, made the following comments to which the Court adheres [57]:

> 252 In support of their motion for authorization to bring as a class action the Division II Claim, the Applicants essentially restate all of their arguments relating to their request for authorization to bring an action for damages under Division II of the *QSA*.
>
> 253 The Applicants argue that insofar as the Court authorizes them to bring a Division II Claim, they also necessarily satisfy the good colour of right criteria for leave to bring that claim as a class action.
>
> 254 The Court agrees. The burden under section 225.4 *QSA* is heavier than the one applicable under Article 575(2) *CCP*. Therefore, satisfaction of the former necessarily entails satisfaction of the latter.

[103] The defendant does not dispute this principle.

[104] Under the proposed class action, plaintiff alleges various legal means to support his claim and that of members. The first is under a secondary market claim stemming from article 225.4 QSA, as already reviewed by the Court. The second is in regards to alleged offenses under articles 195.2 and 197(5) QSA and the third under article 1457 C.c.Q. In the circumstances, Court will not go further in the analysis of the recourse under 225.4 QSA and agrees the plaintiff meets his burden of showing a good colour of right.

[105] In the analysis of the conditions under article 575 C.c.p., the motion judge must avoid weighing whether the proposed Class action will be sucessful. It is under that perspective that the screening must be exerciced: only the recourse which is clearly ill-founded should be excluded. In *Oratoire St-Joseph,* the Supreme Court reiterates that the condition of 575(2) is not strict and does not require a demonstration of a sufficent basis in fact :

> [58] The applicant's burden at the authorization stage is simply to establish an "arguable case" in light of the facts and the applicable law. This is a "low threshold"(…). The applicant need establish only a mere "possibility" of succeeding on the merits, as *not even* a "realistic" or "reasonable" possibility is required(…).The legal threshold requirement under art. 575(2) *C.C.P.* is a simple burden of "demonstration" that the proposed "legal syllogism" is tenable(…) As I pointed out above, it is in principle not appropriate at the authorization stage for the court to make any determination as to the merits in law of the conclusions in

[57] *Supra* note 17, paras. 252 to 254.

> light of the facts being alleged. It is enough that the application not be "frivolous" or "clearly wrong" in law, or in other words, the applicant must establish "a good colour of right (…). As for the evidentiary threshold requirement under art. 575(2) *C.C.P.*, it is more helpful to define it on the basis of what it is *not*. First, the applicant is *not* required to establish an arguable case in accordance with the civil standard of proof on a balance of probabilities, as the evidentiary threshold for establishing an arguable case falls "comfortably below" that standard (…) Second, he or she is *not*, unlike an applicant elsewhere in Canada, required to show that the claim has a "sufficient basis in fact"(…)
>
> [59] Furthermore, at the authorization stage, the facts alleged in the application are assumed to be true, so long as the allegations of fact are sufficiently precise(…). Where allegations of fact are "vague", "general" or "imprecise", they are necessarily more akin to opinion or speculation, and it may therefore be difficult to assume them to be true, in which case they must absolutely "be accompanied by some evidence to form an arguable case. It is in fact strongly suggested in *Infineon*, at para. 134 (if not explicitly, then at least implicitly), that "bare allegations", although "insufficient to meet the threshold requirement of an arguable case" (emphasis added), can be *supplemented* by "some evidence" that — "limited though it may be" — must accompany the application in order "to form an arguable case". [References omitted and underlining by the Court]

[106] The other articles of the QSA to which the plaintiff makes reference are found within Title VII of the Act, prohibition and penalties, Chapter II, offences. The articles read :

> Art. 195.2 : Influencing or attempting to influence the market price or the value of securities by means of unfair, improper or fraudulent practices is an offence.
>
> Art. 197(5) : Every person is guilty of an offence who in any manner not specified in section 196 makes a misrepresentation
>
> (5) in any document forwarded or record kept by any person pursuant to this Act.
>
> For the purposes of this section, a misrepresentation is any misleading information on a fact that is likely to affect the decision of a reasonable investor as well as any pure and simple omission of such a fact.

[107] The defendant believes these articles may not serve as a basis for a civil recourse since only the Autorité des marchés financiers may bring forward penal proceedings (art. 210 QSA) or the Financial Markets Administrative Tribunal in the case of an administrative penalty (art. 273.1 QSA). The Court disagrees: a judge may find that an administrative or penal offence constitutes a civil fault. This is what the plaintiff alleges in his motion[58]. Since the Court has concluded in its analysis of the recourse under 225.4 QSA that both impugned documents contained a misrepresentation, the

[58] Re-amended motion of September 10, 2019, paras.63.1 to 74.

facts appear to justify the conclusions sought.

[108] The Court will now turn to the allegations under 1457 C.c.Q. The plaintiff alleges the defendant breached his general duty of diligence owed to Class members by publishing and disseminating false and misleading information in the impugned documents[59].

[109] The argument presented against the allegations is that the first impugned document contains no misrepresentation. The Court has already ruled that it did and that both documents must be interpreted together. The Court accepts there is an inference to be drawn that defendant never intended to come through with his acquisition proposal and that the financing was not available.

[110] The Court concludes the plaintiff meets the burden under article 575(2).

CLAIM FOR PUNITIVE DAMAGES

[111] The allegations made by plaintiff on this subject rely on article 44 of the Charter of human rights and freedoms[60] and read as follow:

> Punitive Damages
>
> 84.4 The Representative Plaintiff and Class Members advance a claim for punitive damages based on the Defendant's unlawful and Intentional violation of their right to information provided for under art. 44 of the Charter of Human Rights and Freedoms, CQLR c C-12 {Charter};
>
> 84.5 The Defendant intentionally violated his statutory obligations of timely and accurate disclosure of information under the QSA with the intention to manipulate Amaya's Common Share price in order to increase his personal wealth, which he was successful in doing and realizing financial gains measured in the tens-of-millions;
>
> 84.6 In 2017, it was revealed that although Amaya's filings prepared contemporaneously to its initial public offering indicated that the Defendant owned 24,525,599 shares of AYA, the Defendant secretly owned additional AYA shares a result of nominee agreements with 2748134 Canada Inc. ("Hypertec") and Yosef Ifergan, as appears from paras. 147-168 of Xavier Saint-Pierre's affidavit filed in court file no. 500-26-103321-174, communicated herewith as Exhibit P-36;
>
> 84.7 This material fact was never declared in Amaya's core and non-core documents;
>
> 84.8 At all relevant times during the Class Period, the Defendant was an

[59] *Ibid*, paras 75 to 84.3.

[60] CQLR c. C-12, art 44: Every person has a right to information to the extent provided by law.

> insider pursuant to art. 89 of the QSA. Baazov was therefore required to file insider reports disclosing any control he exercised over Amaya's securities pursuant to art. 89.3 of the QSA;
>
> 84.9 By intentionally omitting to disclose the additional AYA shares he secretly owned as a result of his nominee agreement with Hypertec and Yosef ifergan, the Defendant violated art. 89.3 of the QSA;
>
> 84.10 The Defendant also intentionally violated his general duty to provide full and fair disclosure to investors which was incumbent upon him in virtue of art. 1457 CCQ;
>
> 84.11 All of the facts alleged herein demonstrate the Defendant's clear intent to cause the consequences of his wrongdoing, namely to influence the value of Amaya's securities by means of unfair, improper and fraudulent practices in order to increase the value of the Defendant's stake in Amaya and his personal wealth;
>
> 84.12 The Defendant's unlawful and intentional interference with his obligations to provide timely and accurate disclosure under the QSA and CCQ constitutes a breach of art. 44 of the Charter thus giving rise to an award for punitive damages;

[112] Plaintiff argues that at all relevant times defendant was an insider under the definition of the QSA and was bound by a duty of information under article 89.3. In violation of his duty of disclosure and as per the available evidence, defendant failed to properly reveal the number of shares he owned and failed in his general duty of disclosure under the Civil code of Québec. Under the burden of simply showing a colour of right, the Court should allow the claim for punitive damages to go forward.

[113] The defendant’s argument against the claim for punitive damages is twofold: firstly, the right to information under article 44 of the Charter has to be provided by a specific statute, which is not the case here, and secondly, there is no factual basis for a punitive damage claim as it does not relate to the cause of action (impugned documents and misrepresentation as to acquisition of shares).

[114] The Court agrees with the defendant on its first argument. Article 89.3 reads :

> Art. 89.3 : An insider of a reporting issuer other than a mutual fund shall, in accordance with the conditions determined by regulation, file a report disclosing, in particular, any control exercised by the insider over the reporting issuer’s securities, any interest in, or right or obligation associated with, a related financial instrument of the issuer’s securities and make other disclosure prescribed by regulation.

[115] As pointed out by defendant the scope of article 44 of the Charter is limited. In *Globe and Mail* v. *Canada*, the Supreme Court wrote [61]:

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[61] *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41.

> [34] But the Globe and Mail also suggests that another provision of the *Quebec Charter* is relevant to the analysis. It argues that unlike the *Canadian Charter*, s. 44 of the *Quebec Charter* expressly protects access to information: "Every person has a right to information to the extent provided by law." However, s. 44 does not confer a fundamental right. Rather, it belongs to a class of social and economic rights, the scope of which is defined by the law itself (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429). This right is limited to the extent that access to information is already provided for by law. Section 44 does not broaden the scope of the right, and cannot be the source of a quasi-constitutional right to the protection of journalists' sources. While the s. 44 right can also inform the protection of the confidential relationship between journalists and their sources, it cannot constitute the basis for recognizing that privilege. [The Court underlines]

[116] In *Chandler*[62], Justice Chatelain did not allow a claim for punitive damages under an authorization which was based on article 44 of the Charter and article 74 QSA[63]. It was being alleged the defendant had breached its duty of information under the QSA and its general duty of information under the Civil code of Québec. She wrote :

> 87 Mr. Chandler acknowledges that the right which is protected under Section 44 of the *Charter* is a right to information as "provided by law". In order to fit into that mould, Mr. Chandler claims that his right to information provided by law which was violated is his right to have VW provide full and fair disclosure pursuant to the general principles of civil liability under Article 1457 *CCQ* as well as his statutory right to have VW accurately disclose information under Section 74 of the *Securities Act.*
>
> 88 The Court cannot accept these arguments.
>
> 89 Firstly, as appears from the wording of Section 44 of the *Charter* and as confirmed by the parliamentary debate surrounding its adoption, the legislator did not provide an absolute right to information. Although the *Charter* must receive a broad and liberal interpretation, Section 44 of the *Charter* only guarantees the right to information when that right is provided for in a specific statute. That is the meaning of the words "to the extent provided by law» or, in French "*dans la mesure prévue par la loi*". According to the Court, it is not possible to invoke that the general principles of civil liability under Article 1457 *CCQ* afford a right to information within the meaning of Section 44 of the *Charter*. Rather, to claim an infringement to Section 44 of the *Charter*, a claimant must identify a specific statutory provision providing a right to information.

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62 *Chandler* c. *Volkswagen Aktiengestllchaft,* EYB 2018-294785, 2018 QCCS 2270. Motion to appeal dismissed, *Volkswagen* v. *Chandler*, 2018 QCCA 1347.

63 Art. 74 : An issuer that is not a reporting issuer shall provide any disclosure prescribed by regulation in accordance with the conditions determined by regulation.

> 90 Secondly, with respect to the alleged violation to Section 74 of the *Securities Act*, Mr. Chandler cannot ask the Court to read into the Motion for Authorization a completely different cause of action which is simply not there. The Motion for Authorization does not allege any breach of any reporting obligations under the *Securities Act* and the proposed cause of action in the Motion for Authorization is not related to any alleged breach under the *Securities Act*. Mr. Chandler's reliance on Section 74 of the *Securities Act* appears to be an afterthought only designed to build a tentative foundation for a claim in punitive damages which is non-existent.
>
> 91 In light of the above conclusions, it is not necessary to determine whether VW, although it is admittedly not a reporting issuer under the *Securities Act*, nevertheless has obligations under the *Securities Act*.
>
> 92 The Court is aware that at the authorization stage, the Motion for Authorization must be read broadly and that the petitioner's burden to demonstrate a *prima facie* or arguable case is low. However, even read as broadly as possible, the allegations of the Motion for Authorization do not appear to justify the conclusions sought in relation to the claim for punitive damages. Any question relating to that cause of action will thus not be authorized.

[117] The Court sees no reason to deviate from Justice Chatelain's reasons. The claim for punitive damages will not be allowed to go forward.

SCOPE OF THE CLASS

[118] Plaintiff asks to bring the Class action on behalf of the following Class members :

a) Class" and "Class Members" are comprised of the following, other than Excluded Persons:

   All persons and entities who purchased Amaya Inc. securities during the Class Period and held all or some of those securities until after the Corrective Disclosure;

b) "Class Period" means the period from February 1, 2016 to November 21, 2016, inclusively;

[119] On July 8th, 2020 Justice Courchesne rendered a judgment in *Derome v. Stars Group* which approved a settlement agreement[64]. On January 21st, 2020, the plaintiff Derome had been authorized by judgment to bring for settlement purposes a civil liability and securities class action[65]. The Class was defined as :

> i) "**Primary Market Sub-Class**": all persons and entities, wherever they may reside or may be domiciled, other than Excluded Persons, who, during the Class Period, purchased TSGI's securities in an Offering and held all or some of

[64] 2020 QCCS 2316.
[65] 2020 QCCS 1089.

> those securities until at least March 23, 2016;
>
> ii) "**Secondary Market Sub-Class**": all persons and entities, wherever they may reside or may be domiciled, other than Excluded Persons, who, during the Class Period, purchased TSGI's securities in the secondary market and held all or some of those securities until at least March 23, 2016, and who:
>
> - are residents in Canada or were residents in Canada at the time of such acquisitions regardless of the location of the exchange on which they acquired TSGI's securities; or
>
> - acquired TSGI's securities in the secondary market in Canada or elsewhere, other than in the United States;

[120] The defendant is weary an overlap of the Class members in the Derome case and the present case may occur[66]. Indeed, in the present matter, persons and entities who purchased Amaya securities during the period from February 1st, 2016 to March 22nd, 2016 may potentially be covered by both proposed class actions assuming they held all or some of those securities until after the Globe & Mail's article was published on November 22nd, 2016[67].

[121] Plaintiff's view is that should such an overlap occur, the cause of action and damages are not the same under the Class actions. The issue may become relevant only when, and if, damages are calculated.Therefore at the moment, the Court does not see the necessity of limiting the scope of the Class as described by Plaintiff.

COSTS

[122] The plaintiff in his conclusions requests the Court to award costs including experts' fees and costs of publication of notices. The defendant relies on recent caselaw to argue that costs of experts, as well as other publication costs, should be borne by the plaintiff until an adjudication on the merits.

[123] The Court agrees that costs will follow suit. There is no reason at this point for defendant to assume immediately payment of the expert's fees and it is quite likely the defence will wish to present its own expertise. As for publication costs, the Court follows the reasoning of our colleague Provencher in *A.* v. *Frères du Sacré-Cœur* [68]:

> 29 En d'autres mots, il n'est pas anormal qu'un demandeur dans une instance judiciaire quelle qu'elle soit encourt des frais pour faire valoir ses droits. Aussi, le véhicule procédural qu'est celui de l'action collective n'emporte pas pour autant

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66 The Class period in the Derome case is defined as the period from March 31st, 2014 to March 22nd, 2016.

67 Exhibit P-1.

68 *A*. c. *Frères du Sacré-Coeur,* EYB 2018-293343, 2018 QCCS 1607. See also *A.B*. v. *Clercs de Saint-Viateur*, 2019 QCCS 1521, paras. 32 to 43.

> l'obligation pour un défendeur de supporter les frais d'un demandeur pour l'exercice d'un tel recours.
>
> 30 Le Tribunal souligne que la publication de l'avis l'est au bénéfice des membres et non à celui des défenderesses, que ces dernières doivent déployer à leurs frais leurs moyens de défense et, le cas échéant, faire face à une condamnation pécuniaire possiblement importante.
>
> 31 Au risque de nous répéter, le Tribunal croit que les fins de la justice dans les présentes circonstances requièrent que les frais de publication soient assumés par les défenderesses que si elles échouent dans leurs moyens de défense, ce qui sera connu qu'au terme de l'instruction.
>
> 32 D'ailleurs, le Tribunal ne fait pas cavalier seul à cet égard puisque la Cour supérieure dans des affaires similaires à la nôtre a autorisé des actions collectives toutes «*frais à suivre le sort du litige*» incluant les frais de publication de l'avis.
>
> 33 Récemment, la Cour d'appel dans l'affaire *J.J.* accueillait l'appel de l'appelant (le requérant devant la Cour supérieure) et permettait l'exercice d'une action collective contre L'Oratoire St-Joseph du Mont Royal et La Province canadienne de la congrégation de Ste-Croix quant à des faits et circonstances s'apparentant aux nôtres «*avec frais de justice à suivre le sort de l'action collective au fond*».
>
> 34 Cela dit, le demandeur et les membres du groupe pourront récupérer ces frais, s'ils ont gain de cause tout comme ceux de publication de l'avis qui fera suite au jugement, le cas échéant, comme le prescrit l'article 598(1) C.p.c. (…)

CONCLUSIONS

[124] In conclusion, the Court rules that plantiff has met his burden of proof under the QSA and article 575 C.c.p. The Class action will be pursued against the defendant but without punitive damages.

[125] The issue of the content of the notice to Class members and how it is published will be dealt with at a subsequent hearing.

[126] **FOR THESE REASONS, THE COURT** :

[127] **GRANTS** the re-amended motion for authorization of a class action and for authorization to bring an action pursuant to article 225.4 of the *Québec securities act;*

[128] **DESIGNATES** the plaintiff Denis Gauthier as representative of the Class described hereunder;

[129] **AUTHORIZES** the Class described as follow:

"Class" and "Class Members" are comprised of the following, other than Excluded Persons:

> All persons and entities who purchased Amaya Inc. securities during the Class Period and held all or some of those securities until after the Corrective Disclosure;

"Class Period" means the period from February 1st, 2016 to November 21st, 2016, inclusively;

"Excluded Persons" means the Defendant and members of the Defendant's immediate family;

[130] **DECLARES** that the following questions of fact and law to be dealt with collectively are :

i) Were there misrepresentations in the Impugned Documents?
ii) Did the Defendant mislead the public or commit a fault?
iii) Were the alleged faults and breaches done intentionnally?
iv) Is the Defendant liable to the Class Members in virtue of applicable laws or regulations?
v) What are the damages sustained by the Class Members?

[131] **AUTHORIZES** the class action proceedings to comprise the following conclusions:

> **GRANTS** this class action on behalf of the Class;
>
> **GRANTS** the Representative Plaintiffs' action against the Defendant in respect of the rights of action asserted against the Defendant under Title VIII, Chapter II, Division II of the QSA and article 1457 of the CCQ;
>
> **CONDEMNS** the Defendant to pay to the Representative Plaintiffs and the Class compensatory damages for all monetary losses;
>
> **ORDERS** collective recovery in accordance with articles 595 to 598 of the *Code of Civil Procedure*;
>
> **THE WHOLE** with interest and additional indemnity provided for in the *Civil Code of Quebec* and with full costs and expenses, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action;

[132] **RESERVES** to a separate judgment the content and publication of the Notices to members and related issues;

[133] **FIXES** the delay for a class member to opt out of the class at sixty (60) days from the date of the publication of the notice to the members and **DECLARES** that all

members of the class who have not requested their exclusion from the class in the prescribed delay will be bound by any judgment to be rendered on the class action to be instituted;

[134] **COSTS TO FOLLOW SUIT**.

_____
FRANÇOIS P. DUPRAT, J.S.C.

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Date of hearing: September 23rd and 24th 2019