COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027093-178
(500-06-000783-163)

DATE: November 30, 2017

IN THE PRESENCE OF THE HONOURABLE ROBERT M. MAINVILLE, J.A.

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
ROBERT L. ROSIELLO
ROBERT A. INGRAM
RONALD H. FARMER
THEO MELAS-KYRIAZI
G. MASON MORFIT
LAURENCE PAUL
ROBERT N. POWER
NORMA A. PROVENCIO
LLOYD M. SEGAL
KATHARINE B. STEVENSON
FRED HASSAN
COLLEEN GOGGINS
ANDERS O. LONNER
JEFFREY W. UBBEN
APPLICANTS — Respondents

v.

CELSO CATUCCI
NICOLE AUBIN, ès qualités trustee of the Aubin trust
RESPONDENTS — Applicants

and

J. MICHAEL PEARSON
HOWARD B. SCHILLER
PRICEWATERHOUSECOOPERS LLP
GOLDMAN, SACHS & CO.
GOLDMAN SACHS CANADA INC.

DEUTSCHE BANK SECURITIES INC.
BARCLAYS CAPITAL INC.
HSBC SECURITIES (USA) INC.
MITSUBISHI UFJ SECURITIES (USA) INC.
DNB MARKETS INC.
RBC CAPITAL MARKETS LLC
MORGAN STANLEY & CO. LLC
SUNTRUST ROBINSON HUMPHREY INC.
CITIGROUP GLOBAL MARKETS INC.
CIBC WORLD MARKETS CORP.
SMBC NIKKO SECURITIES AMERICA INC.
TD SECURITIES (USA) LLC
J.P. MORGAN SECURITIES LLC
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
BMO CAPITAL MARKETS CORP.
IMPLEADED PARTIES — Respondents

JUDGMENT

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[1] Valeant Pharmaceutical International Inc. and Robert L. Rosiello, Robert A. Ingram, Ronald H. Farmer, Theo Melas-Kyriazi, G. Mason Morfit, Laurence Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katharine B. Stevenson, Fred Hassan, Colleen Goggins, Anders O. Lonner and Jeffrey W. Ubben (collectively referred to as "**Valeant**"), seeks leave to appeal a judgment of the Honourable Madam Justice Chantal Chatelain of the Superior Court, District of Montreal (the "**Judge**"), rendered on August 29, 2017 (2017 QCCS 3870), granting Celso Catucci and Nicole Aubin (the "**Respondents**") authorisations pursuant to section 225.4 of the Quebec *Securities Act*, CQLR, c. V-1.1 (the "***QSA***") and under articles 574 to 577 of the Quebec *Code of civil procedure* ("***CPP***") for instituting a class action against Valeant and various other parties, including Valeant's underwriters and auditor.

[2] Valeant's leave application was heard at the same time as similar applications seeking leave to appeal the same judgment submitted respectively by it underwriters, its auditor, and two of its former directors, J. Michael Pearson and Howard B. Schiller.

[3] The description of the classes and sub-classes to the class action, the issues identified by the judge to be dealt with collectively in the class action, the conclusions sought by the class action, the claims of the Respondents under (a) Division I of Chapter II of Title VIII of the *QSA*, (b) Division II of Chapter II of Title VIII of the *QSA*, and (c) under general civil liability principles set out in article 1457 of the *Quebec Civil Code*, as well as the test for granting leave to appeal pursuant to article 578 *CCP* are all set out in the judgment dismissing Valeant's underwriters' application for leave to appeal and released at the same time as this judgment, and need not be reiterated here.

[4] Valeant raises two grounds of appeal which are described as follows in the application for leave to appeal:

> 4. Indeed, the judge in first instance committed an apparent and overriding error by failing to conclude that an action on behalf of individual qualified investors who acquired securities of the Appellant Valeant Pharmaceuticals International Inc. ("Valeant") in primary offerings (the "Primary Market Sub-Class") could not be sustained on the basis of the record before her, for the following reasons:
>
> a) *No appearance of right because no possible statutory liability for offering memorandum or prospectus misrepresentation*: It is clear as a matter of law that the Appellants can have no liability under the *Securities Act* for misrepresentation in an offering memorandum or a prospectus where the offering memoranda in question were not "prescribed by regulation", or where was no "distribution effected with a prospectus" in Canada;
>
> b) *No appearance of right or sufficient interest because no personal cause of action*: Neither Respondent is a member of the Primary Market Sub-Class, nor has a sufficient interest in the primary market-based causes of action, because neither purchased securities on the primary market in any of the offerings in question (nor has any other person who falls within the definition of the Primary Market Sub-Class been identified).

[5] These grounds of appeal are basically the same as those raised by Valeant's underwriters and which were rejected by the undersigned in the judgment dismissing the underwriters' application for leave to appeal. As a result, these grounds of appeal will also be rejected with respect to Valeant. The reasons for rejecting those grounds are set out in the judgment respecting the underwriters' application for leave to appeal and are incorporated herein by reference. They need not be reiterated here.

FOR THESE REASONS, THE UNDERSIGNED JUDGE:

[6] **DISMISSES** the *Application for leave to appeal from a Judgment Authorizing a Class Action and an Action pursuant to Section 225.4 of the Québec Securities Act* brought by Valeant Pharmaceutical International Inc., Robert L. Rosiello, Robert A. Ingram, Ronald H. Farmer, Theo Melas-Kyriazi, G. Mason Morfit, Laurence Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katharine B. Stevenson, Fred Hassan, Colleen Goggins, Anders O. Lonner and Jeffrey W. Ubben, with legal costs.

ROBERT M. MAINVILLE, J.A.

Mtre Éric Préfontaine
Mtre Allan David Coleman
OSLER, HOSKIN & HARCOURT
For Applicants

Mtre Shawn Faguy
Mtre Vincent Doré
FAGUY & CIE, AVOCATS INC.
Mtre Michael George Robb
SISKINDS
Mtre Garth Fraser Myers
Mtre Jonathan Elliot Ptak
KOSKIE MINSKY
For Respondents

Mtre Robert Torralbo
Mtre Simon Jun Seida
BLAKE, CASSELS & GRAYDON
For J. Michael Pearson

Mtre André Ryan
Mtre Shaun E. Finn
BCF
Mtre Jessica M. Starck
BENNETT JONES
For Howard B. Schiller

Mtre Pierre Y. Lefebvre
LANGLOIS AVOCATS
Mtre Noah Michael Boudreau
FASKEN MARTINEAU DuMOULIN
For Pricewaterhousecoopers LLP

Mtre William McNamara
Mtre Marie-Eve Gingras
SOCIÉTÉ D'AVOCATS TORYS
For Goldman, Sachs & Co., Goldman Sachs Canada Inc., Deutsche Bank Securities Inc., Barclays Capital Inc., HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA) Inc., DNB Markets Inc., RBC Capital Markets LLC, Morgan Stanley & Co. LLC, Suntrust Robinson Humphrey Inc., Citigroup Global Markets Inc., CIBC World Markets Corp., SMBC Nikko Securities America Inc., TD Securities (USA) LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and BMO Capital Markets Corp.

Date of hearing: November 22, 2017

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027092-170
(500-06-000783-163)

DATE: November 30, 2017

IN THE PRESENCE OF THE HONOURABLE ROBERT M. MAINVILLE, J.A.

PRICEWATERHOUSECOOPERS LLP
APPLICANT — Respondent
v.

CELSO CATUCCI
NICOLE AUBIN, ès qualités trustee of the Aubin trust
RESPONDENTS — Applicants
and

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
GOLDMAN, SACHS & CO.
GOLDMAN SACHS CANADA INC.
DEUTSCHE BANK SECURITIES INC.
BARCLAYS CAPITAL INC.
HSBC SECURITIES (USA) INC.
MITSUBISHI UFJ SECURITIES (USA) INC.
DNB MARKETS INC.
RBC CAPITAL MARKETS LLC
MORGAN STANLEY & CO. LLC
SUNTRUST ROBINSON HUMPHREY INC.
CITIGROUP GLOBAL MARKETS INC.
CIBC WORLD MARKETS CORP.
SMBC NIKKO SECURITIES AMERICA INC.
TD SECURITIES (USA) LLC
J.P. MORGAN SECURITIES LLC
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
BMO CAPITAL MARKETS CORP.
J. MICHAEL PEARSON

HOWARD B. SCHILLER
ROBERT L. ROSIELLO
ROBERT A. INGRAM
RONALD H. FARMER
THEO MELAS-KYRIAZI
G. MASON MORFIT
LAURENCE PAUL
ROBERT N. POWER
NORMA A. PROVENCIO
LLOYD M. SEGAL
KATHARINE B. STEVENSON
FRED HASSAN
COLLEEN GOGGINS
ANDERS O. LONNER
JEFFREY W. UBBEN
IMPLEADED PARTIES — Respondents

JUDGMENT

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[1] PriceWaterhouseCoopers LLP ("**PWC**") is the auditor of Valeant Pharmaceuticals International Inc. ("**Valeant**"). PWC seeks leave to appeal a judgment of the Honourable Madam Justice Chantal Chatelain of the Superior Court, District of Montreal (the "**Judge**"), rendered on August 29, 2017 (2017 QCCS 3870), granting Celso Catucci and Nicole Aubin (the "**Respondents**") authorisations pursuant to section 225.4 of the Quebec *Securities Act*, CQLR, c. V-1.1 (the "***QSA***") and under articles 574 to 577 of the Quebec *Code of civil procedure* (the "***CCP***") for instituting a class action against Valeant, its directors and officers, its underwriters and its auditor PWC.

[2] PWC's leave application was heard at the same time as similar applications seeking leave to appeal the same judgment submitted respectively by Valeant's underwriters, two former directors of Valeant, J. Michael Pearson and Howard B. Schiller, and by Valeant itself and the other individual defendants.

[3] The description of the classes and sub-classes to the class action, the issues identified by the Judge to be dealt with collectively in the class action, the conclusions sought by the class action, the claims of the Respondents under (a) Division I of Chapter II of Title VIII of the *QSA*, (b) Division II of Chapter II of Title VIII of the *QSA*, and (c) under general civil liability principles set out in article 1457 of the *Quebec Civil Code*, as well as the test for granting leave to appeal pursuant to article 578 *CPP* are all set out in the judgment dismissing Valeant's underwriters application for leave to appeal and released at the same time as this judgment, and need not be reiterated here.

[4] PWC raises two grounds of appeal which are described as follows in its application for leave to appeal:

7. The Appellant respectfully submits that the learned Judge erred in the application of the criteria for authorization set out in art. 575(2) CCP, by deferring to the trial of the common issues the resolution of threshold issues of law that were ripe for decision, on which it is apparent that the Respondents have no appearance of right. In particular:

    a) *No appearance of right because no possible statutory liability for offering memorandum or prospectus misrepresentation:* It is clear as a matter of law that the Appellant can have no liability under the QSA for misrepresentation in an offering memorandum or in connection with the March 2015 Share Offering because the offering memoranda in question were not "*prescribed by regulation*", and there was no *"distribution effected with a prospectus";* and

    b) *No appearance of right or sufficient interest because no personal cause of action:* Neither Respondent has a personal cause of action as against the Appellant with respect to the Valeant Securities issued in the primary market, nor a sufficient interest in the primary market-based causes of action, because neither purchased securities on the primary market in any of the Offerings in question, and indeed never owned Notes.

[5] These grounds of appeal are basically the same as those raised by Valeant's underwriters and which were rejected by the undersigned in the judgment dismissing the underwriters' application for leave to appeal. As a result, these grounds of appeal will also be rejected with respect to PWC. The reasons for rejecting those grounds are set out in the judgment respecting the underwriters' application for leave to appeal and are incorporated herein by reference. They need not be reiterated here.

FOR THESE REASONS, THE UNDERSIGNED JUDGE:

[6] **DISMISSES** the *Application for leave to appeal dated October 10, 2017* brought by PriceWaterhouseCoopers LLP, with legal costs.

ROBERT M. MAINVILLE, J.A.

Mtre Pierre Y. Lefebvre
LANGLOIS AVOCATS
Mtre Noah Michael Boudreau
FASKEN MARTINEAU DuMOULIN
For Applicant

Mtre Shawn Faguy
Mtre Vincent Doré
FAGUY & CIE, AVOCATS INC.
Mtre Michael George Robb
SISKINDS
Mtre Garth Fraser Myers
Mtre Jonathan Elliot Ptak
KOSKIE MINSKY
For Respondents

Mtre Éric Préfontaine
Mtre Allan David Coleman
OSLER, HOSKIN & HARCOURT
For Valeant Pharmaceuticals International Inc., Robert L. Rosiello, Robert A. Ingram, Ronald H. Farmer, Theo Melas-Kyriazi, G. Mason Morfit, Laurence Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katharine B. Stevenson, Fred Hassan, Colleen Goggins, Anders O. Lonner and Jeffrey W. Ubben

Mtre William McNamara
Mtre Marie-Eve Gingras
SOCIÉTÉ D'AVOCATS TORYS
For Goldman, Sachs & Co., Goldman Sachs Canada Inc., Deutsche Bank Securities Inc., Barclays Capital Inc., HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA) Inc., DNB Markets Inc., RBC Capital Markets LLC, Morgan Stanley & Co. LLC, Suntrust Robinson Humphrey Inc., Citigroup Global Markets Inc., CIBC World Markets Corp., SMBC Nikko Securities America Inc., TD Securities (USA) LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and BMO Capital Markets Corp.

Mtre Robert Torralbo
Mtre Simon Jun Seida
BLAKE, CASSELS & GRAYDON
For J. Michael Pearson

Mtre André Ryan
Mtre Shaun E. Finn
BCF
Mtre Jessica M. Starck
BENNETT JONES
For Howard B. Schiller

Date of hearing: November 22, 2017

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027091-172
(500-06-000783-163)

DATE: November 30, 2017

IN THE PRESENCE OF THE HONOURABLE ROBERT M. MAINVILLE, J.A.

GOLDMAN, SACHS & CO.
GOLDMAN SACHS CANADA INC.
DEUTSCHE BANK SECURITIES INC.
BARCLAYS CAPITAL INC.
HSBC SECURITIES (USA) INC.
MITSUBISHI UFJ SECURITIES (USA) INC.
DNB MARKETS INC.
RBC CAPITAL MARKETS LLC
MORGAN STANLEY & CO. LLC
SUNTRUST ROBINSON HUMPHREY INC.
CITIGROUP GLOBAL MARKETS INC.
CIBC WORLD MARKETS CORP.
SMBC NIKKO SECURITIES AMERICA INC.
TD SECURITIES (USA) LLC
J.P. MORGAN SECURITIES LLC
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
BMO CAPITAL MARKETS CORP.
APPLICANTS — Respondents

v.

CELSO CATUCCI
NICOLE AUBIN, ès qualités trustee of the Aubin trust
RESPONDENTS — Applicants

and

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
PRICEWATERHOUSECOOPERS LLP
J. MICHAEL PEARSON

HOWARD B. SCHILLER
ROBERT L. ROSIELLO
ROBERT A. INGRAM
RONALD H. FARMER
THEO MELAS-KYRIAZI
G. MASON MORFIT
LAURENCE PAUL
ROBERT N. POWER
NORMA A. PROVENCIO
LLOYD M. SEGAL
KATHARINE B. STEVENSON
FRED HASSAN
COLLEEN GOGGINS
ANDERS O. LONNER
JEFFREY W. UBBEN
IMPLEADED PARTIES — Respondents

JUDGMENT

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[1] Goldman, Sachs & Co., Goldman Sachs Canada Inc., Deutsche Bank Securities Inc., Barclays Capital Inc., HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA) Inc., DNB Markets Inc., RBC Capital Markets LLC, Morgan Stanley & Co. LLC, Suntrust Robinson Humphrey Inc., Citigroup Global Markets Inc., CIBC World Markets Corp., SMBC Nikko Securities America Inc., TD Securities (USA) LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated and BMO Capital Markets Corp. (collectively referred to as the "**Underwriters**"), seek leave to appeal a judgment of the Honourable Madam Justice Chantal Chatelain of the Superior Court, District of Montreal (the "**Judge**"), rendered on August 29, 2017 (2017 QCCS 3870), granting Celso Catucci and Nicole Aubin (the "**Respondents**") authorisations pursuant to section 225.4 of the Quebec *Securities Act*, CQLR, c. V-1.1 (the "***QSA***") and under articles 574 to 577 of the Quebec *Code of civil procedure* (the "***CCP***") for instituting a class action for the following classes and sub-classes:

> Primary Market Sub-Class: All persons and entities, wherever they may reside or may be domiciled, who, during the Class Period, acquired Valeant's Securities in an Offering, and held some or all of such Securities at any point in time between October 19, 2015 and October 26, 2015, excluding any claims in respect of Valeant's Securities acquired in the United States (but not excluding any claims in respect of Valeant's 4.50% Senior Notes due 2023 offered in March 2015); and
>
> Secondary Market Sub-Class: All persons and entities, wherever they may reside or may be domiciled who, during the Class Period, acquired Valeant's Securities in the secondary market and held some or all of such Securities at any point in

time between October 19, 2015 and October 26, 2015, excluding any claims in respect of Valeant's Securities acquired in the United States;

Excluded from the class are the Defendants, the Individual Defendants, members of the immediate families of the Individual Defendants, and the directors, officers, subsidiaries, and affiliates of Valeant and its subsidiaries.

[2] The issues identified by the Judge to be dealt with collectively as well as the conclusions sought by the class action are the following:

[352] **IDENTIFIES** the issues to be dealt with collectively as follows:

a) Did the Impugned Documents (as defined in the present motion) contain one or more misrepresentations within the meaning of the *QSA* or, as applicable, within the meaning of the other Securities Legislation or the laws of another jurisdiction? If so, what documents contained what misrepresentations?

b) Are any of the Defendants, other than the Underwriters (as defined in the present motion), liable to the Secondary Market Sub-Class, or any of the members of the Secondary Market Sub-Class, under Title VIII, Chapter II, Division II of the *QSA* or, as applicable, under the concordant provisions of the other Securities Legislation or the laws of another jurisdiction? If so, what Defendant is liable and to whom?

c) Are any of the Defendants liable to the Primary Market Sub-Class, or any of the members of the Primary Market Sub-Class, under Title VIII, Chapter II, Division I of the *QSA* or, as applicable, under the concordant provisions of the other Securities Legislation or the laws of another jurisdiction? If so, what Defendant is liable and to whom?

d) Did any of the Defendants owe a duty of diligence or care to the Class, or any of the members of the Class, under the general private law of Quebec or, as applicable, under the general private law of another jurisdiction? If so, what Defendant owed a duty of diligence or care and to whom?

e) If some or all of the Defendants owed a duty of diligence or care to the Class, or any of the members of the Class, did any of the Defendants violate such duty of diligence or care and commit a fault under article 1457 of the *Civil Code of Quebec* or, as applicable, a tort or other wrong under the law of another jurisdiction? If so, what Defendant committed a fault, a tort or other wrong and with respect to whom?

f) What damages are sustained by the Applicants and the other members of the Class?

g) Are any of the Defendants liable to the Applicants and the Class, or any of them, for damages? If so, what Defendant is liable, to whom and in what amount?

[353] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

a) **GRANT** this class action on behalf of the Class;

b) **GRANT** the Applicants' action against the Defendants in respect of the rights of action asserted against Defendants under Title VIII, Chapter II, Divisions I and II of the *QSA* and, if necessary, the concordant provisions of the other Securities Legislation, and article 1457 of the *Civil Code of Quebec*;

c) **CONDEMN** the Defendants to pay to the Applicants and the Class compensatory damages for all monetary losses;

d) **ORDER** collective recovery in accordance with articles 595 to 598 of the *Code of Civil Procedure*;

e) **THE WHOLE** with interest and additional indemnity provided for in the *Civil Code of Quebec* and with full costs, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action.

THE CLAIMS

[3] In their proceedings, the Respondents assert that Valeant Pharmaceutical International Inc. ("**Valeant**") conducted improper financial reporting practices, suffered from significant and material internal controls deficiencies, and carried out various questionable business activities, including maintaining relationships with so-called "Speciality Pharmacies" and conducting its business with these so as to engage in improper pricing and distribution practices. The Respondents further assert that Valeant and all other defendants to the action were required to disclose all material information about these matters, but failed to do so or, worse, misrepresented or concealed the information.

[4] The Respondents further assert that, as a result, the public price or value of Valeant's common shares and notes was artificially inflated during the class period spanning from February 28, 2013 to October 26, 2015, with the result that the class members acquired these at artificially inflated prices. As the misrepresentations began to be publicly corrected, the price or value of these common shares and notes plummeted by as much as 80% and Valeant's market capitalization declined by tens of billions of dollars, leading to significant damages for the class members which the Respondents now seek to recover from the defendants. They hold Valeant, its directors and officers, its

auditor PriceWaterhouseCoopers LLP ("**PWC**") and the Underwriters of the securities liable for these losses.

[5] The Respondents claim under (a) Division I of Chapter II of Title VIII of the *QSA* ("**Division I**"), (b) Division II of Chapter II of Title VIII of the *QSA* ("**Division II**"), as well as (c) under general civil liability principles set out in article 1457 of the *Quebec Civil Code* (the "***Civil Code***").

Division I claims

[6] Division I provides rights of action for any person who subscribed to or acquired securities in a distribution effected with a prospectus containing a misrepresentation. Under section 221 of the QSA, these rights of action may also be exercised if a misrepresentation is contained in (1) the information incorporated in a simplified prospectus, (2) the offering memorandum prescribed by regulation, or (3) in any other document authorized by the "Autorité des marchés financiers" (the "**Authority**") for use in lieu of a prospectus. These rights of action lie in the primary market in securities.

[7] In addition to having the contract rescinded or the price revised, the plaintiff may claim damages from the issuer or the holder whose securities were distributed, from its officers and directors, from the dealer under contract with the issuer or holder and from any person required to sign an attestation in the prospectus. The plaintiff may also claim damages from the expert (including an accountant or an auditor) whose opinion, containing a misrepresentation, appeared, with his consent, in the prospectus.

[8] The defendant, except if he is the issuer or the holder, may escape liability, but only if it is proved that he acted with prudence and diligence or that the plaintiff knew, at the time of the transaction, of the misrepresentation. Significantly, the plaintiff is not required to prove that he relied on the document containing the misrepresentation when he subscribed for, acquired or disposed of a security.

Division II claims

[9] Division II provides for rights of action to any person who acquires or disposes of a security of a reporting issuer or of any issuer closely connected to Quebec whose securities are publicly traded. Valeant is such an issuer. Division II claims concern the secondary market. Division II emerged out of Canada-wide efforts to develop more meaningful and accessible recourses for investors in secondary markets. Justice Abella described these efforts and their purpose in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 1 S.C.R. 106:

> [27] Section 225.4 emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors. Historically, Canadian investors in the secondary trading market did not have access to a statutory cause of action when they suffered losses as a result of breaches of legislated continuous disclosure obligations. In common law jurisdictions, investors

had to rely on the tort of negligent misrepresentation, which required, among other things, that investors prove that they had relied on the misinformation or omission of information to their detriment [...]. Because it was extremely difficult to prove such reliance when securities were purchased in the secondary market, this requirement put meaningful redress out of reach for many who were harmed by dubious disclosure practices [...].

[28] In Quebec, investors faced a similarly heavy burden under the *Civil Code*. To establish civil liability, claimants were required to prove a fault, such as the publication of misinformation or the failure to meet a statutory disclosure obligation; that they suffered prejudice; *and* that there was a causal link between the fault and the prejudice -- that is, that they had relied on the misinformation in making the trade: arts. 1457 and 1607 of the *Civil Code of Québec*. Demonstrating the requisite causal link proved to be particularly onerous in the securities context [...]

[29] During the 1990s, following a series of high profile misrepresentations and incidents of questionable disclosure practices among publicly traded companies in Canada, the Toronto Stock Exchange created the Allen Committee to re-examine the regime governing disclosure in the secondary market. The Allen Committee concluded that the "current sanctions and funding available to regulators... are inadequate" and "the remedies available to investors in secondary trading markets who are injured by misleading disclosure are so difficult to pursue that they are, as a practical matter, largely hypothetical": Committee on Corporate Disclosure, *Final Report - Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange, 1997), at p. 5. It recommended the creation of a statutory civil liability regime that would help investors sue issuers, directors, and officers who violated their statutory disclosure obligations.

[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 [...]

[...]

[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.
>
> ("Étude détaillée", at p. 1)

> [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.

[10] Division II thus allows a person who acquires or disposes of an issuer's securities to bring various actions based on misrepresentations. Depending on the circumstances set out in sections 225.8 to 225.10 of the *QSA*, such actions may be brought against the issuer, its directors and officers, an influential person, the directors and officers of an influential person, an expert (including an accountant or auditor) and a person who made a misleading public oral statement.

[11] Division II also allows a person that acquires or disposes of an issuer's security during the period between the time when the issuer failed to make timely disclosure of a material change and the time the material change was disclosed in the manner required under the *QSA* or its regulations to bring an action against the issuer, its directors and officers who authorized, permitted or acquiesced in the failure and each influential person, and each director and officer of an influential person, who knowingly influenced the issuer or a mandatary or other representative of the issuer in the failure.

[12] A Division II claim must be authorized by the court pursuant to section 225.4 of the *QSA*. Such authorization is granted if the court deems that the claim is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.

[13] Once authorized under section 225.4 of the *QSA*, the plaintiff to a Division II claim is not required to prove that he relied on the document or public oral statement containing a misrepresentation or on the issuer having complied with its timely disclosure obligations when he acquired or disposed of the issuer's security.

[14] In a Division II misrepresentation claim, unless the defendant is an expert or the misrepresentation was contained in a core document (including a prospectus and annual and interim financial statements), the plaintiff must prove that the defendant knew, at the time the document was released or the public oral statement was made, that the document or public oral statement contained a misrepresentation or deliberately avoided acquiring such knowledge at or before that time, or was guilty of a gross fault in connection with the release of the document or the making of the public document.

[15] In a Division II claim based on the failure to make timely disclosure, unless the defendant is the issuer or one of its officers, the plaintiff must prove that the defendant, at the time that a material change report should have been filed, knew of the change and that the change was a material change, or deliberately avoided acquiring such knowledge at or before that time, or was guilty of a gross fault in connection with the failure to make timely disclosure.

[16] The provisions of the *QSA* dealing with Division II claims also provide for various defences; for various mechanisms to assess damages in favour of a plaintiff that acquired or disposed of an issuer's securities; for rules to apportion responsibility between defendants; and certain damages caps; all of which need not be reviewed here.

[17] Significantly, a Division II claim cannot be made in the following circumstances which are set out in the second paragraph of section 225.2 of the *QSA*:

> However, this division [II] does not apply to a person that subscribes for or acquires a security during the period of a distribution of securities made with a prospectus or, unless otherwise provided by regulation, under a prospectus exemption granted by this Act, a regulation made under this Act or a decision of the Authority; nor does it apply to a person that acquires or disposes of a security in connection with or pursuant to a take-over bid or issuer bid, unless otherwise provided by regulation, or to a person that makes any other transaction determined by regulation.
>
> (Emphasis added)

> Toutefois, elles [les dispositions de la section II] ne s'appliquent pas à la personne qui souscrit ou acquiert un titre à l'occasion d'un placement effectué avec un prospectus, ou, sauf disposition contraire prévue par règlement, sous le régime d'une dispense de prospectus prévue par la présente loi, par un règlement pris en application de celle-ci ou par une décision de l'Autorité; elles ne s'appliquent pas non plus à la personne qui acquiert ou cède un titre à l'occasion d'une offre publique d'achat ou de rachat, sauf disposition contraire prévue par règlement, ou à la personne qui effectue toute autre opération déterminée par règlement.
>
> [Soulignement ajouté]

General civil liability claims

[18] The Respondents also claim against all defendants under the general civil liability provisions of the *Civil Code* which are set out in article 1457 thereof:

> 1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the
>
> 1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages

circumstances, usage or law, so as not to cause injury to another.	ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.	Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

[19] The Respondents plead a fault in violation of the general private law duty of diligence that the defendants owed to the members of both the primary and secondary market sub-classes. They assert that the defendants failed to abide by the rules of conduct incumbent on them at law and as reasonably required of them in the circumstances of their relationships with the members of the class and the transactions in which they acted. As a result, the defendants would have committed a fault and therefore caused injuries to the members of the class in the form of significant monetary damages and losses on investments, which they are bound to repair under general civil liability principles.

THE INVOLVEMENT OF THE UNDERWRITERS

[20] The Underwriters are sued by the Respondents as underwriters, runners, dealers or initial purchasers of various offerings of common shares and notes issued by Valeant by way of various offering memoranda and prospectuses during the class period spanning from February 28, 2013 to October 26, 2015. They allege that the Underwriters sold Valeant securities to investors and helped it raise billions of dollars in offerings conducted on the basis of false and misleading documents. They claim that, in so doing, the Underwriters violated their professional obligations and contravened their statutory and civil law duties owed to the class members.

[21] The Judge described as follows the involvement of the Underwriters:

> [72] The Underwriters are involved in the primary offerings of securities.
>
> [73] They are initial purchasers in respect of two offerings of common shares of Valeant allegedly made through prospectuses [...] and four offerings of debt securities made through offering memoranda [...]:
>
> a) An offering of common shares completed in or around June 2013 (the "**June 2013 Common Share Offering**");

b) An offering of debt securities completed in or around July 2013 (the "**July 2013 Note Offering**");

c) An offering of debt securities completed in or around December 2013 (the "**December 2013 Note Offering**");

d) An offering of debt securities completed in or around January 2015 (the "**January 2015 Note Offering**");

e) An offering of debt securities completed in or around March 2015 (the "**March 2015 Note Offering**"); and

f) An offering of common shares completed in or around March 2015 (the "**March 2015 Common Share Offering**").

[22] In light of the Respondents proceedings, the Judge concluded that the Underwriters' involvement was exclusively in the distribution of shares and notes in the primary market:

> [6] The Underwriters are only involved in primary market distribution of shares and notes. Therefore, the claims against them are limited to the primary market claims and exclude the Division II Claim as well as the Civil Claim for misrepresentations in the secondary market.

THE GROUNDS FOR LEAVE TO APPEAL RAISED BY THE UNDERWRITERS

[23] The Underwriters seek leave to appeal pursuant to article 578 *CCP* which provides a new right of appeal from a judgment authorizing a class action:

578. A judgment authorizing a class action may be appealed only with leave of a judge of the Court of Appeal. A judgment denying authorization may be appealed as of right by the applicant or, with leave of a judge of the Court of Appeal, by a member of the class on whose behalf the application for authorization was filed. The appeal is heard and decided by preference.	**578.** Le jugement qui autorise l'exercice de l'action collective n'est sujet à appel que sur permission d'un juge de la Cour d'appel. Celui qui refuse l'autorisation est sujet à appel de plein droit par le demandeur ou, avec la permission d'un juge de la Cour d'appel, par un membre du groupe pour le compte duquel la demande d'autorisation a été présentée. L'appel est instruit et jugé en priorité.
(Emphasis added)	[Soulignement ajouté]

[24] From 1982 to 2015, a defendant had no right to appeal a judgment authorizing a class action, while plaintiffs could appeal as of right a judgment refusing to authorize such an action. With the coming into force of the new *CCP* on January 1st, 2016, the judgment

authorizing a class action is now subject to appeal, albeit with leave. The test for granting leave was set out by Chamberland, J.A. in *Centrale de l'enseignement du Québec v. Allen*, 2016 QCCA 1878:

> [UNOFFICIAL TRANSLATION]
>
> [57] In my opinion, the respondents are right to assert that the test must be demanding.
>
> [58] The appeal must be reserved for exceptional cases.
>
> [59] The judge will grant leave to appeal where the judgment appears to him to bear a *prima facie* overriding error respecting the interpretation of the criteria to authorize the class action or the assessment of the facts respecting these criteria, or if the Superior Court manifestly lacks jurisdiction.
>
> [60] This test respects the legislative intent that the appeal only concern the criteria to authorize the class action. It seeks to set aside useless appeals or appeals which only concern secondary aspects which have no incidence on the authorization of the class action. It respects the discretion of the judge who authorized the class action. It is not flexible to the point of impeding the burden of those who seek to pursue a class action and to bring it to fruition within reasonable timeframes. It also ensures that the class action does not proceed on a wrong base, thus avoiding that the parties are driven into a long and costly judicial debate.

[25] With this test in mind, the Underwriters offer three grounds of appeal to justify leave to appeal:

(a) First, they submit that they can have no liability under Division I for misrepresentation in an offering memorandum or a prospectus because the offering memoranda in question were not "prescribed by regulation" and there was no "distribution effected with a prospectus".

(b) Second, they claim that the Respondents have no personal cause of action against them, nor a sufficient interest in a cause of action because (i) neither purchased securities on the primary market in any of the note Offerings or in the March 2015 Share Offering, and (ii) neither ever owned Notes at all, whether purchased on the primary or the secondary markets.

(c) Third, the allegations set out in the Respondent's proceedings are inadequate to sustain a claim against the Underwriters for civil liability pursuant to article 1457 of the *Civil Code* because they are vague, not particularized and not factual in nature.

[26] In essence, the Underwriters assert that they acted in the primary market under the "accredited investor" exemption set out under *Regulation 45-106 Respecting Prospectus Exemptions*, chapter V-1.1, r. 21, and are therefore immune from any statutory liability under Division I. They also claim immunity or exemption from statutory

liability under Division II pursuant to the second paragraph of section 225.2 of the *QSA* reproduced above at par. [17], which excludes a person that subscribed or acquired a security "under a prospectus exemption granted by [...] a regulation made under this Act [...]". Finally, though the Underwriters do recognize a potential liability in the primary market resulting from general civil liability principles set out in article 1457 of the *Civil Code*, they assert that this potential liability cannot be pursued under the class action since (i) the Respondents have no personal cause of action in the primary market and therefore cannot act as class representatives of the primary market sub-class and (ii) in any event, the proceedings, as drafted, are inadequate to sustain a general civil liability claim related to the primary market.

[27] It should be noted that these grounds for leave to appeal raised by the Underwriters with respect to the primary market are also similarly raised by two former directors of Valeant, namely J. Michael Pearson and Howard B. Schiller, by Valeant's auditor PWC, and by Valeant itself and the other individual defendants in separate applications for leave to appeal the same judgment. Since the submissions of the Underwriters on these grounds are adopted by all these other applicants, these reasons also apply to them.

[28] I shall review in turn these grounds of appeal.

No appearance of right because no possible statutory liability for offering memorandum or prospectus misrepresentation

A- The Note Offerings

[29] As discussed above, the Division I rights of action may be exercised if a misrepresentation is contained in the information incorporated in a prospectus, a simplified prospectus, the offering memorandum prescribed by regulation or in any other document authorized by the Authority for use in lieu of a prospectus.

[30] The Underwriters submit that the July 2013 Note Offering, the December 2013 Note Offering, the January 2015 Note Offering and the March 2015 Note Offering (collectively referred to as the "**Note Offerings**") were made to "accredited investors" under the accredited investor prospectus exemption provided pursuant to the *Regulation 45-106 Respecting Prospectus Exemptions*. By virtue of that exemption, no prospectus or offering memorandum was required by the *QSA* for each of the Note Offerings. Subsection 2.3(1) of *Regulation 45-106* reads as follows:

2.3. Accredited investor	**2.3. Investisseur qualifié**
(1) The prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor.	1) L'obligation de prospectus ne s'applique pas à un placement si l'acquéreur ou le souscripteur acquiert ou souscrit les titres pour son propre compte et est investisseur qualifié.

[31] As an example, the November 2013 Note Offering (Exhibit P-42) provided for the following:

> The Canadian Offering Memorandum is not, and under no circumstances is to be construed as, a prospectus, an advertisement of a public offering of these securities in Canada [...]
>
> The Notes have not been nor will they be qualified for sale to the public under applicable Canadian securities laws and, accordingly, any offering and sale of the Notes in Canada will be made on a basis which is exempt from the prospectus requirements of Canadian securities laws.

[32] Moreover, the Underwriters submitted the required reporting *Forms 45-106F1 – Report of Exempt Distribution*, for each of the Note Offerings.

[33] Finally, the Underwriters assert that legislation adopted in 2006, namely the *Act to amend the Securities Act and other legislative provisions*, S.Q. 2006, c. 50, ss. 70(3) ("***Bill 29***") demonstrates a legislative intent not to apply Division I to securities offerings made to « accredited investors » under the accredited investor prospectus exemption. Bill 29 proposes to amend section 221 of the *QSA* to add the following trigger for Division I rights of action, namely a misrepresentation contained in "the offering memorandum provided voluntarily under an exemption granted by regulation." Though this amendment to the *QSA* has yet to come into force, the Underwriters conclude from it that the *QSA*, as presently drafted, excludes Division I rights of action with respect to misrepresentations contained in an offering memoranda provided voluntarily under the "accredited investor" exemption.

[34] The Underwriters' overall conclusion is that the Offering Memoranda provided to "accredited investors" in connection with the Note Offerings were not "prescribed by regulation" under the meaning of subsection 221(2) of the *QSA*, but rather were provided voluntarily under an exemption granted by regulation. As a result, the Underwriters submit that, as a matter of law, there can be no liability under Division I for the Note Offerings.

[35] Nevertheless, the Judge did not consider this issue as an impediment to authorizing the class action. She explained her reasoning as follows:

> [269] Section 221 *QSA* creates a cause of action for a misrepresentation that is made in an offering memorandum that is "prescribed by regulation".
>
> > 221. Rights of action established under sections 217 to 219 may also be exercised if a misrepresentation is contained in
> >
> > [...]
> >
> > (2) the offering memorandum prescribed by regulation;
>
> (Emphasis by the Judge)

> [270] Although it is not disputed that there were offering memoranda relating to the four Note Offerings, the Defendants claim that these offering memoranda were not *"prescribed by regulation"* within the meaning of the *QSA*.
>
> [271] Rather, the offering memoranda at issue would have been provided voluntarily to accredited investors pursuant to the prospectus exemption under *Regulation 45-106*, the regulation governing exemptions from the prospectus requirement under the *QSA* for the distribution of securities. *Regulation 45-106* is a complex piece of regulation of over 200 pages.
>
> [272] According to Defendants, an offering memorandum would be "prescribed by regulation" within the meaning of section 221 *QSA* only if it was delivered under section 2.9 of *Regulation 45-106* which further expands on prospectus requirements.
>
> [273] In other words, the Defendants plead that because the offering memorandum was provided voluntarily, it is necessarily not "prescribed by regulation".
>
> [274] The Court cannot accept that argument at face value at the authorization stage. Namely, the Court notes that article 221 *QSA* does not use the expression "required by regulation", but rather the expression "prescribed by legislation" [this is obviously a typing error by the Judge since section 221 of the QSA uses the term "regulation" not "legislation"] or, in French, "prévue par règlement".
>
> [275] Whether the Defendants are right to submit that section 221 *QSA* shows a clear intent to exclude offering memorandum provided voluntarily is a matter better left for the merits of the action.
>
> [276] Considering the low standard applicable at this stage, the Court is satisfied that there is at a minimum "some evidence" to establish an appearance of right with respect to the Offering memoranda.

[36] The Underwriters submit that the Judge erred by declining to address the merits of their legal arguments with respect to the Note Offerings. They add that the Judge did not specifically address Bill 29 in her reasons. Had she addressed their arguments, including those related to Bill 29, she would have been bound to exclude the Note Offerings from the class action, at least with respect to Division I claims. They therefore submit that leave to appeal should be granted on this ground.

[37] I disagree with the Underwriters for the following reasons.

[38] As consistently held by the Supreme Court of Canada and this Court, the judge's function in deciding to authorize a class action is limited to filtering out untenable claims, since the burden on those seeking authorization for a class action is only to establish a *prima facie* case or an arguable case. In *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at par. 65, 67 and 68, Justices LeBel and Wagner explained the process as follows:

> [65] As can be seen, the vocabulary may change from one case to another. But some well-established principles for the interpretation and application of art. 1003 of the *C.C.P.* can be drawn from the jurisprudence of this Court and of the Court of Appeal. First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "*apparence sérieuse de droit*", or a "*prima facie* case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.
>
> [...]
>
> [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 380 (CanLII), 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.
>
> (Emphasis added)

[39] In *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299 ("*Sibiga*"), at par. 34, Kasirer J.A. expanded on this:

> [34] While the compass for appellate intervention is indeed limited, so too is the role of the motion judge. In clear terms, particularly since its decision in *Infineon*, the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The Court stressed that the law does not impose an onerous burden on the person seeking authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted" [*Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 600, par. 37].
>
> (Emphasis added)

[40] The Judge found that the Respondents have made out a *prima case* that the Note Offerings are subject to a Division I claim. I find no *prima facie* overriding error with respect to this finding.

[41] Indeed, it is not apparent that the Offering Memoranda for the Note Offerings are not contemplated by subsection 221(1) of the *QSA* as a result of the "accredited investor"

prospectus exemption. Subsection 2.3(1) of *Regulation 45-106 Respecting Prospectus Exemptions* (reproduced above at par. [30]) clearly provides that the "prospectus requirement does not apply to a distribution of a security" to an "accredited investor" who purchases it as principal, implying that **no** prospectus is required for an "accredited investor" : section 41 of the *QSA*. However, if and when an issuer nevertheless chooses to supply a prospectus or an equivalent document to an "accredited investor", does that document not itself trigger Division I rights of action if it contains misrepresentations? Is the document not then "another document authorized by the Authority for use in lieu of a prospectus" under the meaning of subsection 221(2) of the *QSA* or some other provision? If an issuer is exempted from supplying a prospectus, does that exemption still apply if the issuer nevertheless supplies a prospectus or an equivalent document? A full evidentiary record, including expert evidence, as well as full arguments are required to properly answer these questions.

[42] The submissions of the Underwriters, if accepted, would result in a situation where offerings made under a prospectus exemption pursuant to *Regulation 45-106 Respecting Prospectus Exemptions* would be exempted from any statutory liability claims for misrepresentation under the *QSA.* Only general civil liability claims under the *Civil Code* would apply. Consequently, an "accredited investor" who acquires securities in the primary market would be left without any statutory recourse for misrepresentations made directly to him by the issuer, while that same "accredited investor" would have the full range of Division II recourses if the securities are purchased by him in the secondary market without any direct misrepresentations to him. These are curious results. A full evidentiary record with full argument are necessary to sort out these issues.

[43] With respect to Bill 29, well over a decade has passed since its adoption, and still the amendment to section 221 has not come into force. Is this because the legislative intent is to exclude Division I recourses for "accredited investors" buying in the primary market? Or, is it rather because the amendment is deemed no longer necessary at this time to allow "accredited investors" to pursue Division I claims in the primary market? It is interesting to note that Bill 19, *An Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15, which brought Division II to the *QSA*, was assented to on November 9, 2007, thus after the adoption of Bill 26; did Bill 19 overtake Bill 29? Again, a full evidentiary record and full arguments will be required to properly answer these questions.

[44] Consequently, only a hearing on the merits of all the claims allowing for a complete evidentiary record and full arguments, will allow all of these issues to be decided.

[45] As a result, the Judge was right to leave the Note Offerings issue to be decided on the merits of the class action. She would have erred had she proceeded otherwise, as the judgments of this Court in *Lambert (Gestion Peggy) v. Écolait ltée*, 2016 QCCA 659, par 37-38; *Belmamoon v. Brossard (Ville de)*, 2017 QCCA 102, par. 82-83 and 96; *Société québécoise de gestion des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199, par. 60 and 69; and *Asselin v. Desjardins Cabinet de services financiers inc.*,

2017 QCCA 1673, at par. 40-43, make abundantly clear. The applicable principle was summed up as follows by Kasirer, J.A. in *Sibiga*, at par. 83, quoting on this point from the reasons of Gagnon J.A. in *Carrier v. Québec (Procureur général)*, 2011 QCCA 1231:

> [83] By considering grounds of defence at this early stage, the judge thus trenched on the work of the trial judge. This Court has been clear in its direction to motion judges that the time to weigh such defences as against the allegations in the motion for authorization that are assumed to be true is, as a general rule, at trial. Speaking of the defence of immunity that the Attorney General sought to raise at authorization in a class action in Carrier, my colleague Guy Gagnon, J.A. wrote for the Court:
>
> > [TRANSLATION]
> >
> > [37] At the authorization stage, when the sufficiency of the evidence is assessed only in a *prima facie* manner, as a rule, it is premature to find that an immunity defence applies in favour of the State. What amounts to one of several grounds of defence, the immunity argued in this case by the respondent cannot, in considering the authorization, be raised to the ranks of grounds for dismissal. Failing a finding that the motion is *prima facie* frivolous or bound to fail or else that the facts alleged are insufficient or that it is [translation] "undisputable" that the right claimed is without merit, it seems to me that, apart from these circumstances, it is not advisable at the start of the analysis to decide the absolute value of such a defence.
>
> (Emphasis added)

[46] This was recently expanded upon by Hilton J.A. in *Panasonic Corporation v. Option consommateurs*, 2017 QCCA 1442, at par. 8:

> [UNOFFICIAL TRANSLATION]
>
> [8] It is not because a question is a legal novelty that the Court must entertain an appeal at the authorization stage without, obviously, the benefit of a judgment on the merits from the Superior Court. On the contrary, it is generally desirable to wait for an eventual appeal on the merits, at which point the file submitted to the Court's review is much more comprehensive.

[47] The Underwriters have thus failed to convince me that they have met the demanding test for authorizing an appeal of the Judge's decision based on the Notes Offering issue.

B- The March 2015 Common Share Offering

[48] The Underwriters further assert that the March 2015 Common Share Offering was also made pursuant to a prospectus exemption and that, therefore, the Prospectus Supplement related to this offering was a distribution prospectus under American legislative requirements but was not subject to the prospectus requirements of Canadian

securities laws. Here again, the Judge did not consider this issue an impediment to authorizing the class action:

> [277] With respect to the March 2015 Common Share Offering, the Defendants argue that sections 217-219 *QSA* only create a cause of action in respect of a distribution effected with a prospectus containing a misrepresentation.
>
> [278] According to the Defendants, although that offering was made through a prospectus, there was no prospectus *within* the meaning of the *QSA* with respect to that offering. Rather, they argue that any distribution of shares outside the United States was pursuant to the "accredited investor exemption" and does not give rise to a statutory cause of action under the *QSA*.
>
> [279] They add that pursuant to the March 2015 Common Share Offering, no securities in that offering were distributed in Canada and that the distribution outside of Canada was done by way of an exemption to the prospectus requirement.
>
> [280] The Prospectus Supplement dated March 17, 2015 relating to that offering states:
>
> > Although the Common Shares have been registered under the U.S. Securities Act of 1933, as amended, the Common Shares have not been qualified for distribution by prospectus under the securities laws of any province or territory of Canada, and sales of the Common Shares outside Canada are being made pursuant to an exemption from the prospectus requirements of Canadian securities laws. Investors seeking to purchase Common Shares will be required to deliver a signed representation letter. See "Requirements of the Offering" beginning on page S-iv of this prospectus supplement.
> >
> > (Emphasis by the Judge)
>
> [281] Notwithstanding the exemption from the prospectus requirements of Canadian securities laws, the question remains as to whether the prospectus which was in fact used in relation to the March 2015 Common Share Offering is a prospectus *within* the meaning of the *QSA* which can give rise to the cause of action set out at sections 217-219 *QSA*.
>
> [282] The Defendants may be right in the final outcome, but, again, considering the low standard applicable at this stage, the Court is satisfied that there is at a minimum "some evidence" to establish an appearance of right with respect to the March 2015 Common Share Offering.
>
> [283] Although the arguments of the Defendants are appealing, at the authorization stage, the Court must refrain from making a decision on the merits of the case, even more so when the argument is based in evidence.
>
> (Emphasis added)

> [284] It will be incumbent on the Applicants, on the merit of the action and on a full record, to show that their argument must prevail.

[49] For the same reasons as those set out above with respect to the Note Offerings, the Underwriters have failed to convince me that they have met the test for authorizing an appeal based on their arguments respecting the March 2015 Common Share Offering.

No appearance of right or sufficient interest because no personal cause of action

[50] The Underwriters further submit that the Respondents, acting in their capacity as representative plaintiffs, must have a personal right of action with respect to each aspect of the class action claims. Since the Respondents have neither acquired any notes under the Note Offerings nor in the secondary market, nor acquired any shares under the March 2015 Common Share Offering, but rather in the secondary market, they would have no right nor any sufficient interest to pursue either primary or secondary market claims in relation to the notes or primary market claims with relation to the March 2015 Common Share Offering.

[51] The approach suggested by the Underwriters was rejected under the more stringent provisions of the old *CCP* dealing with the qualifications of representative plaintiffs to class actions. As noted by Justices Rothstein and Wagner in *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725:

> [31] [...] The question is also whether the law permits a collective action where the representative does not have a direct cause of action against, or a legal relationship with, each defendant. In our opinion it does. Article 55 of the *CCP* must be interpreted in harmony with Book IX of the *CCP* in order to achieve the outcome that is best suited to the goals of class actions. However, a few points merit further clarification: how to interpret *Agropur*, and how to apply the principle of proportionality found in art. 4.2 of the *CCP*.
>
> [32] We will begin with the Court of Appeal judgment. In our opinion, Dalphond J.A. correctly concluded that art. 55 of the *CCP*, which requires plaintiffs to have "sufficient interest" in the action, must be adapted to the context of class actions in accordance with the principle of proportionality found in art. 4.2 of the *CCP*. We note in particular the effect of art. 1051 of the *CCP* which renders the other provisions of the *CCP*, including art. 55, applicable to class action proceedings, but in a way that respects the spirit of Book IX of the *CCP*. The nature of this "sufficient interest" has to reflect the collective and representative nature of a class action. Justice Dalphond also correctly distinguished between the ability to adequately act as a representative and the ability to obtain a judgment against a defendant. As long as the representative plaintiff is an adequate representative of the class per art. 1003(*d*) of the *CCP* and the actions against each defendant involve identical, similar or related questions of law or fact per art. 1003(*a*), it is open to a judge to authorize the class action. This conclusion ensures the economy

of judicial resources, increases access to justice, and averts the possibility of conflicting judgments on the same question of law or fact.

[33] It is an approach that is consistent with most other Canadian jurisdictions. In *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21, the British Columbia Court of Appeal held that a cause of action against each defendant could be held by class members rather than by the representative plaintiff (para. 51). Alberta, Manitoba and Saskatchewan followed suit (see Court of Appeal reasons, at paras. 55-57).

[34] It is an approach that is also consistent with the *CCP* itself. As Dalphond J.A. notes in the Court of Appeal reasons, art. 55 requires that interest be direct and personal to be sufficient:

> [TRANSLATION] This interest may result from a contractual relationship between the plaintiff and the named defendant or from an extra-contractual breach by the named person against the plaintiff. This does not mean, however, that the plaintiff must always be the one with the standing (the victim of a fault who sues the wrongdoer, for example). Indeed, Quebec law acknowledges that some people may sue on behalf of an interested person (e.g., the tutor of a minor (article 159 *C.C.Q.*), the ad hoc tutor (article 190 *C.C.Q.*) or the mandatary designated by mandate in anticipation of incapacity (article 2166 *C.C.Q.*)). This acknowledgement of a person's capacity to act on behalf of others arises from explicit statutory authorization (e.g., parents' tutorship of their minor, unemancipated children, article 192 *C.C.Q.*), from appointment (e.g., article 200 *C.C.Q.*), or from a judgment (article 205 *C.C.Q.*). [Emphasis added; para. 61.]

Additionally, art. 1048 of the *CCP* allows a corporate body or association to act as a representative in a class action as long as one of its members is part of the class and that member's interest against the defendant is linked to the objects for which the corporate body or association was constituted. The CCP therefore permits an entity or person without a direct and personal interest in the claims against some of the defendants to represent the class in various circumstances.

[35] Moreover, the malleability of the "sufficient interest" criteria is evident in art. 1015, which states that a representative plaintiff "is deemed to have a sufficient interest notwithstanding his acceptance of the defendant's offers respecting his personal claim". In a similar vein, the Quebec Court of Appeal allowed a class action where the representative's personal claim was prescribed, but the majority of group members' actions were not (*Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), at para. 66, leave to appeal refused, [2007] 1 S.C.R. xi).

(Emphasis added)

[52] These principles are reinforced in the new *CCP* which applies as of January 1st, 2016. In *Ameublement Tanguay inc. v. Cantin*, 2017 QCCA 1330, at par. 44, the Court expressed the view that it is not necessary that the claim of the representative plaintiffs be based on a situation similar to those of all other class members; it suffices that the situations experienced by the representative plaintiffs raise related questions of law or

fact permitting them to properly represent all the class members, notwithstanding the fact that their situations may differ.

[53] It does not matter that the legal and factual issues raised in the class proceedings are not identical in a claim based on Division I, Division II or the general liability provisions of the *Civil Code*. It suffices that these issues are "similar or related": art. 575(1) *CCP*. As noted in *Société de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199, par. 100 ("*Copibec*"): "the threshold requirement for common questions is low". That threshold is met in this case, as the Judge found in par. 311 to 325 of her judgment

[54] In my opinion, there are no *prima facie* overriding errors in the Judge's following analysis respecting the status of the Respondents as representative plaintiffs:

> [287] The Court disagrees that the fact that the Applicants did not acquire securities on the primary market is a bar to authorizing the proposed class action with respect to the Division I Claim.
>
> [288] Rather, it would be ineffective and contrary to the goals underlying the class action regime, which include judicial economy, access to justice and deterrence, to carve out the proposed class as suggested by the Defendants [*Bank of Montreal v. Marcotte*, 2014 SCC 55, par. 31-33].
>
> [289] In essence, the proposed class action is intended to cover all persons who acquired Valeant securities during the Class Period.
>
> [290] The simple truth is that no matter whether the securities were acquired on the primary or on the secondary market, all proposed class members acquired securities during the Class Period and the alleged misrepresentations are essentially rooted in the same factual background. The distinction in the statutory provisions of the *QSA* between the primary and secondary market claims are not sufficient to obviate the fact that the main question that lies at the heart of the litigation relates to the legal characterization of the alleged representations.
>
> [291] The fact that two sub-classes exist, one for those who acquired the securities in an Offering and the other for those who acquired the securities in the secondary market, does not transform the class action into two distinct class actions.
>
> [292] Contrary to the assertions of the Defendants, and more particularly the Underwriters, the questions of facts and law raised are very similar as regards the primary and the secondary market.
>
> [293] The Court believes that it would be inappropriate to artificially divide the proposed class action into two distinct actions, one relating to the primary market and the other relating to the secondary market.

> [294] As recently confirmed by the Court of Appeal, the possibility of a representative not having the interest to represent a particular sub-class does not in itself justify rejecting a motion for authorization [*Société québécoise de gestion collective des droits de reproduction(Copibec) v. Université Laval*, 2017 QCCA 199, par. 120-121]:
>
> > [120] Chose certaine, la possibilité qu'un représentant n'ait pas l'intérêt voulu pour représenter un sous-groupe en particulier ne justifiait pas à elle seule de rejeter l'ensemble de la demande de Copibec.
> >
> > [121] En somme, je suis d'avis qu'au stade de l'autorisation, Copibec et les mis en cause partagent avec l'ensemble des membres du groupe l'essentiel des fondements juridiques de l'action collective envisagée. Je considère aussi qu'en cas de difficulté portant sur des questions périphériques rattachées à la représentativité, il était préférable pour le juge de laisser le soin de décider de ces questions à une étape ultérieure du déroulement de l'action judiciaire.

[55] Since the challenge the Judge's analysis does not meet the high threshold for granting leave, leave to appeal on this issue will be denied.

Respondents' allegations are insufficient to ground a claim for civil liability pursuant to article 1457 of the Civil Code

[56] Finally, the Underwriters submit that the allegations in the Respondents' proceedings are vague, general and imprecise with respect to the claims asserted under general civil liability principles, and largely consist of statements of opinion or are speculative or conclusory. The Underwriters also allege that these allegation fail to establish a causal link between any fault on their part and an injury. The Underwriters consequently conclude that the requirement set out under article 575(2) *CCP*, "that the facts alleged appear to justify the conclusions sought", has not been met. They therefore seek leave to submit this ground of appeal to a panel of the Court.

[57] The Respondents' proceedings allege *inter alia* the following with respect to the Underwriters:

> 205. Goldman Sachs Canada Inc. certified the Short Form Base Shelf Prospectus dated June 14, 2013, and a Prospectus Supplement dated June 18, 2013, falsely stating that it, together with the documents incorporated by reference therein, constituted full, true and plain disclosure of all material facts relating to the Securities offered by way of that prospectus;
>
> 206. Each Underwriter had obligations under the law to conduct all required due diligence in connection with each of their offering (see section 11(4), above). However, the Underwriters failed in their obligations and allowed, acquiesced and approved offerings made on the basis of disclosure documents which misstate material facts, do not follow applicable accounting standards and do not respect the *QSA* or other applicable

Securities Legislation;

249. As particularized herein, the Underwriters acted in connection with the Offerings as dealers under contract to distribute Valeant's Securities. In the context of each of the Offerings, the Underwriters had obligations to conduct due diligence on Valeant and its business and operations, and to ensure that the relevant offering documents provided full, plain and truthful disclosure of all material information underlying Valeant and the Securities offered in those Offerings;

250. The Underwriters' duties and responsibilities were informed by the Securities Legislation, subsidiary instruments including NI 51-102, NI 41-101, NI 45- 106 and their related rules and policies, U.S. securities laws, the professional rules and standards applicable to underwriters in public offerings, including the rules and guidelines established by the Investment Industry Regulatory Organization of Canada, the Underwriters' engagement contracts with Valeant, and the Underwriters' internal policies;

251. The Underwriters failed to respect these standards, and failed to comply with the duties and responsibilities applicable to them in the circumstances of the Offerings;

252. In addition to their direct liability, each Underwriter is liable for the faults committed by its partners and/or employees.

[58] The Judge concluded as follows with respect to the sufficiency of these allegations with respect to the civil claim under article 1457 of the *Civil Code*:

> [298] The Defendants argue that the Applicants have failed to allege facts with sufficient particularity to support a civil liability claim against them, in particular that they would have committed a fault.
>
> [299] The Court disagrees. Indeed, the allegations of the Motion covers all three constitutive elements of this cause of action.
>
> [300] First, the Applicants allege that the Defendants covered by this cause of action committed faults in violation of their general private law duty of diligence owed to the members of the class.
>
> [301] More specifically, the Applicants allege that the Defendants failed to abide by the rules of conduct incumbent on them in the circumstances of their relationships with the members of the class as well as the transactions in which they acted, at law and as reasonably required from them.

> [302] The discussion above further informs the alleged failures of each group of Defendants respecting their obligations in relation to Valeant's reporting requirements and their liability for the alleged misrepresentations.
>
> [303] Second, the Applicants add that the Defendants' fault caused injury to the members of the class in the nature of significant monetary damages and losses. They specifically allege causality notably at paragraph 253 of the Motion for Authorization:
>
> > 253. As a result of the Defendants' conduct and their misrepresentations in Valeant's disclosure documents, Valeant's securities traded at artificially inflated prices during the Class Period and the Class acquired those securities at prices that were inflated and did not reflect their true value. When the truth began to emerge, the market price or value of Valeant's plummeted, causing significant losses and damages to the Plaintiffs and the Class;
>
> [304] The Applicants conclude that the Defendants are bound to compensate these losses.
>
> [305] Whether or not the Applicants will be able to prove their allegations at trial is not to be decided at this point.

[59] After carefully reviewing the Respondents' proceedings, I find no *prima facie* overriding error respecting the interpretation of the criterion set out under article 575(2) *CCP* to authorize the class action, nor do I find any such error in the assessment of the facts respecting this criterion. The Underwriters have consequently failed to meet the high threshold set out in the test enunciated in *Centrale de l'enseignement du Québec v. Allen* to obtain leave to appeal the judgment authorizing the class action on the ground that the allegations are insufficient to sustain the civil liability claims.

FOR THESE REASONS, THE UNDERSIGNED JUDGE:

[60] **DISMISSES** the Underwriters' *Application for leave to appeal,* with legal costs.

ROBERT M. MAINVILLE, J.A.

Mtre William McNamara
Mtre Marie-Eve Gingras
SOCIÉTÉ D'AVOCATS TORYS
For Applicants

Mtre Shawn Faguy
Mtre Vincent Doré
FAGUY & CIE, AVOCATS INC.
Mtre Michael George Robb
SISKINDS
Mtre Garth Fraser Myers
Mtre Jonathan Elliot Ptak
KOSKIE MINSKY

Mtre Éric Préfontaine
Mtre Allan David Coleman
OSLER, HOSKIN & HARCOURT
For Valeant Pharmaceuticals International Inc., Robert L. Rosiello, Robert A. Ingram, Ronald H. Farmer, Theo Melas-Kyriazi, G. Mason Morfit, Laurence Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katharine B. Stevenson, Fred Hassan, Colleen Goggins, Anders O. Lonner et Jeffrey W. Ubben.

Mtre Pierre Y. Lefebvre
LANGLOIS AVOCATS
Mtre Noah Michael Boudreau
FASKEN MARTINEAU DuMOULIN
For Pricewaterhousecoopers LLP

Mtre Robert Torralbo
Mtre Simon Jun Seida
BLAKE, CASSELS & GRAYDON
For J. Michael Pearson

Mtre André Ryan
Mtre Shaun E. Finn
BCF
Mtre Jessica M. Starck
BENNETT JONES
For Howard B. Schiller

Date of hearing: November 22, 2017

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027094-176
(500-06-000783-163)

DATE: November 30, 2017

IN THE PRESENCE OF THE HONOURABLE ROBERT M. MAINVILLE, J.A.

J. MICHAEL PEARSON
APPLICANT — Respondent
v.

CELSO CATUCCI
NICOLE AUBIN, ès qualités trustee of the Aubin trust
RESPONDENTS — Applicants
and

GOLDMAN, SACHS & CO.
GOLDMAN SACHS CANADA INC.
DEUTSCHE BANK SECURITIES INC.
BARCLAYS CAPITAL INC.
HSBC SECURITIES (USA) INC.
MITSUBISHI UFJ SECURITIES (USA) INC.
DNB MARKETS INC.
RBC CAPITAL MARKETS LLC
MORGAN STANLEY & CO. LLC
SUNTRUST ROBINSON HUMPHREY INC.
CITIGROUP GLOBAL MARKETS INC.
CIBC WORLD MARKETS CORP.
SMBC NIKKO SECURITIES AMERICA INC.
TD SECURITIES (USA) LLC
J.P. MORGAN SECURITIES LLC
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
BMO CAPITAL MARKETS CORP.
VALEANT PHARMACEUTICALS INTERNATIONAL INC.
PRICEWATERHOUSECOOPERS LLP

HOWARD B. SCHILLER
ROBERT L. ROSIELLO
ROBERT A. INGRAM
RONALD H. FARMER
THEO MELAS-KYRIAZI
G. MASON MORFIT
LAURENCE PAUL
ROBERT N. POWER
NORMA A. PROVENCIO
LLOYD M. SEGAL
KATHARINE B. STEVENSON
FRED HASSAN
COLLEEN GOGGINS
ANDERS O. LONNER
JEFFREY W. UBBEN
IMPLEADED PARTIES — Respondents

JUDGMENT

---

[1] J. Michael Pearson ("**Pearson**") is the former CEO and Chairman of the Board of Valeant Pharmaceutical International Inc. ("**Valeant**"). He seeks leave to appeal a judgment of the Honourable Madam Justice Chantal Chatelain of the Superior Court, District of Montreal (the "**Judge**"), rendered on August 29, 2017 (2017 QCCS 3870), granting Celso Catucci and Nicole Aubin (the "**Respondents**") authorisations pursuant to section 225.4 of the Quebec *Securities Act*, CQLR, c. V-1.1 (the "***QSA***") and under articles 574 to 577 of the Quebec *Code of civil procedure* ("***CPP***") for instituting a class action against Valeant, its directors and officers, its auditor and its underwriters.

[2] Pearson's leave application was heard at the same time as similar applications seeking leave to appeal the same judgment submitted respectively by Valeant and Valeant's underwriters, its auditor, another of its former directors, Howard B. Schiller, as well as Valeant itself and the other individual defendants.

[3] The description of the classes and sub-classes to the class action, the issues identified by the judge to be dealt with collectively in the class action, the conclusions sought by the class action, the claims of the Respondents under (a) Division I of Chapter II of Title VIII of the *QSA*, (b) Division II of Chapter II of Title VIII of the *QSA*, and (c) under general civil liability principles set out in article 1457 of the *Quebec Civil Code*, as well as the test for granting leave to appeal pursuant to article 578 *CPP* are all set out in the judgment dismissing Valeant's underwriters application for leave to appeal and released at the same time as this judgment, and need not be reiterated here.

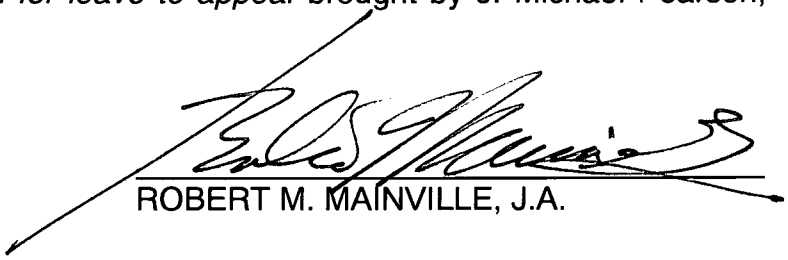
[4] Pearson raises two grounds of appeal which are described as follows in his application for leave to appeal:

> 5. The Appellant respectfully submits that the learned Judge erred in the application of the criteria for authorization set out in Article 572(2) CCP, by deferring to the trial of the common issues the resolution of threshold questions of law that were ripe to be decided. The Respondents have no appearance of right on these questions, which are dispositive of their claims against the Appellant for the Primary Market Sub-Class. In particular:
>
> a) *No possible statutory liability for misrepresentation in an offering memorandum or prospectus*: As a matter of law, the Appellant can have no liability under the QSA for misrepresentation in an offering memorandum or a prospectus because the offering memoranda at issue were not "prescribed by regulation", and there was no "distribution effected with a prospectus", both required conditions to liability; and
>
> b) *No personal cause of action:* Neither Respondent has a personal cause of action or a sufficient interest against the Appellant for the primary market-based causes of action because neither purchased securities on the primary market in any of the offerings at issues, and indeed never owned any of the notes at issue.

[5] These grounds of appeal are basically the same as those raised by Valeant's underwriters and which were rejected by the undersigned in the judgment dismissing the underwriters' application for leave to appeal. As a result, these grounds of appeal will also be rejected with respect to Pearson. The reasons for rejecting those grounds are set out in the judgment respecting the underwriters' application for leave to appeal and are incorporated herein by reference. They need not be reiterated here.

FOR THESE REASONS, THE UNDERSIGNED JUDGE:

[6] **DISMISSES** the *Application for leave to appeal* brought by J. Michael Pearson, with legal costs.



ROBERT M. MAINVILLE, J.A.

Mtre Robert Torralbo
Mtre Simon Jun Seida
BLAKE, CASSELS & GRAYDON
For Applicant

Mtre Shawn Faguy
Mtre Vincent Doré
FAGUY & CIE, AVOCATS INC.
Mtre Michael George Robb
SISKINDS
Mtre Garth Fraser Myers
Mtre Jonathan Elliot Ptak
KOSKIE MINSKY
For Respondents

Mtre William McNamara
Mtre Marie-Eve Gingras
SOCIÉTÉ D'AVOCATS TORYS
For Goldman, Sachs & Co., Goldman Sachs Canada Inc., Deutsche Bank Securities Inc., Barclays Capital Inc., HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA) Inc., DNB Markets Inc., RBC Capital Markets LLC, Morgan Stanley & Co. LLC, Suntrust Robinson Humphrey Inc., Citigroup Global Markets Inc., CIBC World Markets Corp., SMBC Nikko Securities America Inc., TD Securities (USA) LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and BMO Capital Markets Corp.

Mtre Éric Préfontaine
Mtre Allan David Coleman
OSLER, HOSKIN & HARCOURT
For Valeant Pharmaceuticals International Inc., Robert L. Rosiello, Robert A. Ingram, Ronald H. Farmer, Theo Melas-Kyriazi, G. Mason Morfit, Laurence Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katharine B. Stevenson, Fred Hassan, Colleen Goggins, Anders O. Lonner et Jeffrey W. Ubben.

Mtre Pierre Y. Lefebvre
LANGLOIS AVOCATS
Mtre Noah Michael Boudreau
FASKEN MARTINEAU DuMOULIN
For Pricewaterhousecoopers LLP

Mtre André Ryan
Mtre Shaun E. Finn
BCF
Mtre Jessica M. Starck
BENNETT JONES
For Howard B. Schiller

Date of hearing: November 22, 2017

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027096-171
(500-06-000783-163)

DATE: NOVEMBER 30, 2017

IN THE PRESENCE OF THE HONOURABLE ROBERT M. MAINVILLE, J.A.

HOWARD B. SCHILLER
APPLICANT — Defendant
v.

CELSO CATUCCI
NICOLE AUBIN
RESPONDENTS — Applicants
and

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
J. MICHAEL PEARSON
ROBERT L. ROSIELLO
ROBERT A. INGRAM
RONALD H. FARMER
THEO MELAS-KYRIAZI
G. MASON MORFIT
LAURENCE PAUL
ROBERT N. POWER
NORMA A. PROVENCIO
LLOYD M. SEGAL
KATHARINE B. STEVENSON
FRED HASSAN
COLLEEN GOGGINS
ANDERS O. LONNER
JEFFREY W. UBBEN
PRICEWATERHOUSECOOPERS LLP
GOLDMAN SACHS & CO.
GOLDMAN SACHS CANADA INC.

DEUTSCHE BANK SECURITIES INC.
BARCLAYS CAPITAL INC.
HSBC SECURITIES (USA) INC.
MITSUBISHI UFJ SECURITIES (USA) INC.
DNB MARKETS INC.
RBC CAPITAL MARKETS LLC
MORGAN STANLEY & CO. LLC
SUNTRUST ROBINSON HUMPHREY INC.
CITIGROUP GLOBAL MARKETS INC.
CIBC WORLD MARKETS CORP.
SMBC NIKKO SECURITIES AMERICA INC.
TD SECURITIES (USA) LLC
J.P. MORGAN SECURITIES LLC
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
BMO CAPITAL MARKETS CORP.
IMPLEADED PARTIES — Respondants

JUDGMENT

---

[1] Howard B. Schiller ("***Schiller***") is a former director and the former Executive Vice President and Chief Financial Officer of Valeant Pharmaceutical International Inc. ("**Valeant**"). He seeks leave to appeal a judgment of the Honourable Madam Justice Chantal Chatelain of the Superior Court, District of Montreal (the "**Judge**"), rendered on August 29, 2017 (2017 QCCS 3870), granting Celso Catucci and Nicole Aubin (the "**Respondents**") authorisations pursuant to section 225.4 of the Quebec *Securities Act*, CQLR, c. V-1.1 (the "***QSA***") and under articles 574 to 577 of the Quebec *Code of civil procedure* (the "***CCP***") for instituting a class action against Valeant, its directors and officers, its auditor and its underwriters.

[2] Schiller's leave application was heard at the same time as similar applications seeking leave to appeal the same judgment submitted respectively by Valeant's underwriters, Valeant's auditor, another of Valeant's former directors, J. Michael Pearson, as well as Valeant itself and the other individual defendants.

[3] The description of the classes and sub-classes to the class action, the issues identified by the Judge to be dealt with collectively in the class action, the conclusions sought by the class action, the claims of the Respondents under (a) Division I of Chapter II of Title VIII of the *QSA* ("**Division I**"), (b) Division II of Chapter II of Title VIII of the *QSA* ("**Division II**"), and (c) under general civil liability principles set out in article 1457 of the *Quebec Civil Code* (the "***Civil Code***"), as well as the test for granting leave to appeal pursuant to article 578 *CCP* are all set out in the judgment dismissing Valeant's underwriters application for leave to appeal released at the same time as this judgment, and need not be reproduced here.

[4] Schiller adopts the same grounds for leave to appeal as Valeant's underwriters. These grounds were rejected by the undersigned in the judgment dismissing the application brought by Valeant's underwriters for leave to appeal and are therefore also rejected with respect to Schiller's application. The reasons for rejecting those grounds are set out in the judgment respecting the application brought by Valeant's underwriters and are incorporated herein by reference. They need not be reproduced here.

[5] As a former director and officer of Valeant, Schiller also raises a distinct ground for seeking leave to appeal. He relies on the judgment of this Court in *Groupe d'action d'investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923 ["*Biosyntech*"] in which Schrager J.A. held that article 1607 of the *Civil Code* (which permits recovery of damage which is the direct consequence of a harmful act) and the rule in *Foss v. Harbottle* (1843), 67 E.R. 189, preclude the recovery by shareholders against directors for damage caused to the corporation by their fault and resulting in indirect damage in the form of loss of share value. However, *Biosyntech* did not preclude recovery of damage by shareholders (and, by extension, by other security holders) resulting from the direct harm caused by directors.

[6] These reasons address this distinct ground of appeal raised by Schiller with respect to the application of *Biosyntech*.

[7] Schiller is sued by the Respondents as an officer and director of Valeant, and for having orchestrated a string of misdeeds, including misrepresentations and failures to disclose, which resulted in dramatic drops in the price or value of Valeant's securities, leading to significant damages for the class members. The Respondents specifically identify the alleged misdeeds of Schiller in their proceedings, both in general and specific terms. They specifically refer to Schiller in paragraphs 32, 32.1 and 191 to 194 of their proceedings:

> 32. At all material times during the Class Period, Howard B. Schiller ("Schiller") was Valeant's Director, Executive Vice President and Chief Financial Officer ("CFO"). In his capacity as Valeant's CFO, Schiller: (a) certified each Impugned Document that was issued until June 2015, when he ceased to be Valeant's CFO; (b) signed each of the Impugned Documents that are Valeant's AIFs; and (c) signed and certified Valeant's Short Form Base Shelf Prospectus dated June 14, 2013, which was supplemented by the Prospectus Supplement dated June 18, 2013 (each an Impugned Document). In January and February 2016, Schiller served as Valeant's interim-CEO while, according to Valeant, Pearson was on medical leave. At all relevant times, Schiller was a director and/or an officer of Valeant within the meaning of the Securities Legislation;
>
> 32.1 In March 2016, in connection with Valeant's ad hoc committee investigations, Valeant stated that Schiller had engaged in improper conduct and provided incorrect information to Valeant's Audit and Risk Committee and auditors, which contributed to Valeant's financial statement misstatements. Additionally, Valeant stated that it had requested that Schiller resign from the Board of Directors, but that Schiller had declined that request. In April 2016, Valeant announced that

Schiller would not stand for re-election at the Annual General Meeting of Shareholders on June 14, 2016;

[...]

191. Pursuant to NI 52-109, Pearson, Schiller and Rosiello certified the 10-Qs and 10-Ks signed during the Class Period, attesting to the accuracy of the financial statements, that all material facts were disclosed and that Valeant had adequate internal financial controls;

192. *Inter alia*, Pearson, Schiller and Rosiello certified, at the relevant times, that:

(i) such documents did not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made;

(ii) they were responsible for establishing and maintaining Valeant's disclosure controls and procedures as well as Valeant's internal controls over financial reporting;

(iii) they had designed the disclosure controls and procedures, or caused them to be designed under their supervision, to provide reasonable assurance that material information relating to Valeant was made known to them by others, particularly during the period in which the documents were being prepared and information required to be disclosed by Valeant in its annual filings, interim filings or other reports filed or submitted under securities legislation was recorded, processed, summarized and reported within the time periods specified in securities legislation;

(iv) they had designed the internal controls over financial reporting, or caused it to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP or the international financial reporting standards ("IFRS"), as applicable; and

(v) in respect of Valeant's annual filings, the Individual Defendants had evaluated, or caused to be evaluated under their supervision, the effectiveness of Valeant's internal controls over financial reporting and Valeant's disclosure controls and procedures, at the financial year end and Valeant had disclosed in its annual filings their conclusions about the effectiveness of Valeant's controls;

193. The Individual Defendants oversaw the preparation and reporting of Valeant's disclosures to the market and knew or should have known of the foregoing misrepresentations;

> 194. The Individual Defendants authorized, permitted or acquiesced to the release of the (...) Impugned Documents, which contained the foregoing misrepresentations.

[8] As a matter of fact, on April 29, 2016, as part of its restatement of previously released financial statements, Valeant acknowledged that there had been misstatements regarding revenue recognition and material weaknesses in compliance and with respect to the efficacy of its internal controls. Valeant also indicated that improper conduct by Schiller resulted in the provision of incorrect information and contributed to the misstatement of financial results:

> Based on the results of the AHC Review, the Company's review of its financial records, and other work completed by management, the Company and the ARC have concluded that material weaknesses in the Company's internal control over financial reporting existed that contributed to the material misstatements in the consolidated financial statements described above. These material weaknesses relate to the tone at the top of the organization and the accounting and disclosure for non-standard revenue transactions particularly at or near quarter ends. The improper conduct of the Company's former Chief Financial Officer [Schiller] and former Corporate Controller, which resulted in the provision of incorrect information to the ARC and the Company's independent registered public accounting firm, contributed to the misstatement of financial results. In addition, as part of this assessment of internal control over financial reporting, the Company has determined that the tone at the top of the organization, with its performance-based environment, in which challenging targets were set and achieving those targets was a key performance expectation, may have been a contributing factor resulting in the Company's improper revenue recognition and the conduct described above.
>
> (Valeant's Annual Report on Form 10-K for the year ended December 31, 2015, as reproduced at par. 54 of the Judge's judgment. Emphasis added)

[9] Notwithstanding these allegations and the acknowledgement by Valeant of his improper conduct, Schiller submitted to the Judge that the class action should not be authorized against him since he could not be held liable for the damages suffered indirectly by shareholders and noteholders as a result of his actions. The Judge dismissed that submission for the following reasons:

> [307] Individual Defendant Howard B. Schiller argues that he cannot be properly sued because when a director or officer causes an injury to the corporation through his fault, he can be sued by the corporation which he injured but not by the stockholders whose securities were indirectly affected as a result.
>
> [308] In support of his argument, he notably relies on the matter of *Groupe d'action d'investisseurs dans Biosyntech v. Tsang*, [2016 QCCA 1923] which confirms that a damage by ricochet is not recoverable under Quebec law because it is not a direct damage.

> [309] However, Mr. Schiller's argument is ill-founded because the claim against the Individual Defendants here is not based on the loss that they may have caused to the corporation, but on the loss that they have allegedly caused directly to the class members through their own fault. The fact that the class members may be "victims by ricochet" does not prevent them from having sustained a direct damage in the circumstances of this case.
>
> [310] In fact, relying on *Infineon*, [2013 SCC 59] the Court of Appeal in *Biosyntech* specifically acknowledged "that a victim by ricochet has a recourse as long as the damage claimed is not by ricochet, *i.e.* it is direct." The Court of Appeal also offered insight as to what would constitute direct damages suffered by a shareholder which is distinct from the damage suffered by the corporation. The Court of Appeal endorsed the example given by the first judge as to what would constitute a direct damage suffered by a shareholder pursuant to the acts of a director. That example applies perfectly to this case: [*Biosynthec*, par. 30-31].
>
> > [3[0]] [...] The Supreme Court has since confirmed in *Infineon* that *a victim by ricochet has a recourse as long as the damage claimed is not by ricochet, i.e. it is direct*. Appellants (or other shareholders of the class) have admitted, in the proceedings before the Superior Court sitting in bankruptcy and insolvency, that the damages claimed are by ricochet.
> >
> > [31] Another example of direct damage suffered by a shareholder resulting from the acts of a director was described by the judge as the hypothetical case of the shareholder who purchases his shares based on the negligent or fraudulent misrepresentation of directors. Such a scenario causes the shareholder to have parted with his money to buy worthless shares and thus, suffers harm independent from the company giving rise to a good cause of action against directors for damages directly suffered by the shareholder...
> >
> > (Emphasis by the Judge)

[10] In his application for leave to appeal, Schiller does not dispute that the class action may proceed against him with respect to certain Division II rights of recourse. Indeed, subsections 225.8(1), 225.9(1), 225.10(3), and 225.11(1) of the *QSA* contemplate Division II claims against directors and officers of issuers in certain statutorily defined circumstances, notably when the director or officer authorized, permitted or acquiesced to the release of a document or the making of an oral statement containing a misrepresentation or in the failure to make timely disclosure.

[11] Schiller's specific ground of appeal is thus strictly limited to the claims based on general civil liability under article 1457 of the *Civil Code*. He claims that in dismissing his submissions, the Judge, basing herself on *Biosyntech*, relied on the principle that victims by ricochet may obtain damages from directors provided that they have sustained a direct injury. However, he asserts that the Judge then failed to consider whether, on the face of the Respondent's proceedings, he committed distinct faults or whether the injuries allegedly suffered were distinct from and independent of the loss suffered by Valeant. This would constitute an error in the Judge's application of subsection 575(2) *CPP* dealing

with the criterion for authorizing a class action requiring that "the facts alleged appear to justify the conclusions sought".

[12] He further submits that had the Judge carried out this analysis, she could only have concluded that the allegations against him refer to his misconduct as a director and officer of Valeant, misconduct which was internalized by Valeant and reflected in its public representations to the market. Moreover, the Respondents would have failed to allege that the class members suffered an independent loss due to his distinct faults. In other words, Schiller asserts that the loss in share and note value, which is the injury alleged, is the consequence of the harm suffered by Valeant, and not an immediate and direct consequence of the faults he allegedly committed.

[13] Schiller has failed to convince me that I should grant leave to appeal on this basis. It is clear from the Judge's reasons that she closely analysed the Respondent's proceedings and that she found these to include claims "against the individual Defendants [...] not based on the loss that they have caused to the corporation [Valeant], but on the loss that they have allegedly caused directly to the class members through their own fault": par. 309 of the Judge's reasons. It is thus incorrect to claim, as Schiller does, that the Judge failed to consider whether, on the face of the Respondent's proceedings, he committed distinct faults or whether the injuries allegedly suffered were distinct from and independent of the loss suffered by Valeant.

[14] Schiller's complaint cannot therefore be with the failure of the Judge to carry out the analysis, but rather with the results of that analysis, with which he disagrees.

[15] The extracts of Respondents' proceedings reproduced above make abundant reference to Schiller's specific faults, including misrepresentations which he is alleged to have made or authorized. In *Biosyntech*, there were no specific allegations with respect to misrepresentations by specific directors. On the contrary, here the Respondents allege specific improper conduct, misrepresentations and other misdeeds by Schiller, including certifying documents containing untrue statements and certifying financial statements containing misrepresentations. Only a full evidentiary record and full arguments will determine whether these allegations can be proven and whether the evidence which will be submitted can sustain a conclusion of liability and an order for damages against Schiller within the framework of general civil liability principles, including the principles set out in *Biosyntech*.

[16] As I pointed out in the judgment with respect to the application for leave to appeal brought by Valeant's underwriters, this Court and the Supreme Court of Canada have consistently held that the judge's function in deciding to authorize a class action is limited to filtering out untenable claims, since the burden on those seeking authorization to bring a class action is only to establish a *prima facie* case or an arguable case: *Infineon Technologies et al. v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at par. 65, 67 and 68. In *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, at par. 34, Kasirer J.A. expressed himself as follows in this regard:

> [34] While the compass for appellate intervention is indeed limited, so too is the role of the motion judge. In clear terms, particularly since its decision in *Infineon* [*Infineon Technologies et al. v. Option consommateurs*, [2013] 3 S.C.R. 600], the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The Court stressed that the law does not impose an onerous burden on the person seeking authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted" [*Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 600, par. 37].
>
> (Emphasis added)

[17] I have not been persuaded that a *prima facie* overriding error was committed by the Judge when she concluded that there was an arguable case for finding that Schiller caused direct damage to the shareholders and noteholders. Whether the Respondents can sustain their case against Schiller or whether a defence based on *Biosyntech* can be sustained by Schiller will be determined on the merits of the class action, with the benefit of a complete evidentiary record and full arguments. It is not at the authorization stage that Schiller's liability under general civil law principles should be decided, as the Court has consistently held in *Carrier v. Québec (Procureur général)*, 2011 QCCA 1231, par. 37; *Lambert (Gestion Peggy) v. Écolait ltée*, 2016 QCCA 659, par. 37-38; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, par. 83; *Belmamoun v. Ville de Brossard*, 2017 QCCA 102, par. 82-83 and 96; *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199, par. 60 and 69; and *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 40-43.

[18] Schiller has consequently failed to convince me that he has met the demanding test to grant an appeal of the Judge's decision based on the specific ground he raises.

FOR THESE REASONS, THE UNDERSIGNED JUDGE:

[19] **DISMISSES** the *Application for leave to appeal* brought by Howard B. Schiller, with legal costs.

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Date of hearing: November 22, 2017