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# Not close enough: Superior Court dismisses securities class action on jurisdictional grounds


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Last month, the Superior Court of Québec dismissed a proposed securities class action against Aphria Inc. on the basis that it lacked a close connection with Québec[1]. The decision paves a way forward for jurisdictional objections at the authorization stage of class actions and provides helpful insight on the application of the "close connection" test in securities litigation.

## What you need to know

- Class plaintiffs, both Québec residents, alleged that Aphria made material misrepresentations concerning the value of one of its acquisitions which, when publicly corrected, caused its share price to fall by 25%.
- The action was based on Québec's *Securities Act*[2] and on general principles of civil liability[3].
- Plaintiffs bore the burden of establishing Québec courts' jurisdiction.
- The defendants were not domiciled in Québec, had no establishment or employees in Québec and there were no agreements under which disputes arising out of their relationship with shareholders would be submitted to Québec courts.

## The decision

Justice Davis of the Superior Court granted the defendants' application to dismiss the proposed action on jurisdictional grounds. Because this was a decision on an application to dismiss rather than on authorization[4], where allegations are taken as true, the Court nuanced case law holding that courts may only decide pure questions of law at this stage. It found that no additional evidence than had been produced was necessary to determine jurisdiction.

### Application of the *Securities Act*

One central issue was whether the secondary market provisions of the *Securities Act* applied to Aphria Inc., which the Court found was not a reporting issuer during the class period. The plaintiffs argued Québec courts nevertheless had jurisdiction under the Act's provisions on the distribution of securities. The Court disagreed, finding the action was not about the distribution of securities, but rather about the purchase and sale of securities that had already been

distributed, and the effect of the alleged misrepresentations on these securities.

### A "close connection" with Québec

Plaintiffs bore the burden of establishing Québec courts' jurisdiction under the *Civil Code of Québec* (CCQ). or that Aphria had a "close connection" to Québec under the *Securities Act.* The Court found they had not met this burden, namely because:

- the fact that Aphria may have sold shares *to* Québec residents was not the same as selling shares *in* Québec, which required Aphria to be a reporting issuer;
- Aphria's commercial agreements with Québec's cannabis distributor did not create a close connection for the purposes of an action concerning alleged breaches of a reporting issuer's obligations under securities legislation;
- pursuant to the Supreme Court's decision in *Infineon*[5], any damages suffered by the plaintiffs were only accounted for in Québec, with no actual prejudice being suffered in Québec.

The Court also found that no fault was committed in Québec. Class plaintiffs' accounts were based in Ontario, and their orders for shares were made through an Ontario investment broker, with transactions also occurring in Ontario. Moreover, the Court recognized that the alleged fault of the defendants was not in the sale or trading of shares, but rather regarding misrepresentations made in Ontario in respect of transactions with third parties that involved foreign corporations, also generated in Ontario. While the Court recognized that the prejudicial effect of the alleged representations extended beyond Ontario, it found the fault occurred outside of Québec.

### *Forum non conveniens* in the class action context

The Court also addressed the defendants' arguments that Québec is *forum non conveniens*, relying on prior case law[6] to find that the principles of *forum non conveniens* could be imported to the class actions context, but that it would take an exceptional situation for the Québec court to decline competence. The Court found the more likely solution would be to suspend the proceedings, which would allow it to monitor the interests of Québec class members in parallel litigation in Ontario.

## Conclusion

While the bar for class action authorization in Québec remains low, this decision confirms that defendants may validly object to Québec courts' jurisdiction at this stage. It clarifies that the reach and chain of events initiated by alleged misrepresentations in the securities context is not infinite and cannot be used to ground Québec courts' jurisdiction where no actual prejudice occurred in Québec. The Superior Court's approach may prove a useful precedent across Canada for the way it advances the challenging issues of jurisdiction and forum with respect to securities litigation.

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[1] *Ranger c. Aphria inc.*, 2021 QCCS 534.

[2] CQLR, c. V-1.1 [*Securities Act*].

[3] Art. 1457 *Civil Code of Québec*.

[4] Authorization is the equivalent in Québec of certification in common-law provinces.

[5] *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

[6] *Zuckerman c. Target Corporation*, 2017 QCCS 110.

*To discuss these issues, please contact the author(s).*