

Legal update

Disclosure of an insured's policies: the Quebec Court of Appeal reiterates its position

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Insurance

On January 29, the Quebec Court of Appeal handed down a judgment that will interest insurers and other actors in the insurance industry on the issue of disclosing insurance policies in the context of court proceedings. In *Amaya Inc. v Derome*,¹ the insured, a defendant in a class action proceeding in damages for alleged misrepresentation in the secondary market for securities, had received a request for the disclosure of certain non-public documents. Among the many documents sought by the plaintiffs, a request was made for the disclosure of the company's general liability insurance policy, its errors and omissions policy and its directors and officers liability policy (collectively: the Insurance Policies).

The Superior Court judgment

The plaintiffs' request for documents was formulated by them prior to obtaining the authorization to bring both: (1) a claim under the *Securities Act*² (the Act), and (2) a class action as provided by the *Code of Civil Procedure*. This request was based on the Supreme Court findings in *Theratechnologies*, in which the court found that “[a] case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. [...] however, [...] the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. [...]”³

The Superior Court ruled document disclosure was possible in Quebec at this stage of the proceedings and concluded that the Insured Policies could be disclosed. The motion judge relied on Article 2501 of the *Civil Code of Québec* (C.C.Q.), which provides that a third-party claimant can bring an action against either the insured or the insurer, or both, and concluded that the immediate disclosure of the Insurance Policies is in line with “the considerations of practicality and fairness that are essential for the proper, efficient and cost-effective administration of justice in this province.”⁴

The Court of Appeal's judgment

The Court of Appeal found that the Superior Court was correct in ordering the disclosure of the Insurance Policies. The court held that there was no connection between the Insurance Policies and the screening mechanism provided at section 225.4 of the Act, whose counterparts in other provinces had been interpreted by Canadian courts as prohibiting document discovery at that stage to avoid “fishing expeditions,” “frivolous lawsuits” and “a mini-trial” before leave is granted.⁵ In doing so, the Court of Appeal reiterated the principle it held previously in *Champagne v CEGEP de Jonquière*⁶ in a case involving a civil action between two parties (and not in the context of a class action lawsuit). The court had determined in that case that it would be illogical to provide a third-party claimant with a direct recourse against an insurer, as provided by Article 2501 C.C.Q., and subsequently refuse that same person access to the

relevant insurance policies on procedural grounds.⁷ In *Amaya*, the Court of Appeal added that disclosing the Insurance Policies was relevant to the case, given the possibility that the plaintiffs, should they be successful with their action, be compensated by the defendant's insurer.⁸ The Court of Appeal also added that the communication of the Insurance Policies would not lead to "any meaningful prejudice" for the parties involved.⁹

Conclusion

The time period for appeal of the Court of Appeal judgment at the Supreme Court of Canada has not yet lapsed. Seeing as an appeal is still possible, we do not know the full impact that this decision will have on the procedural rules at large guiding the disclosure of insurance documents in similar contexts.

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Footnotes

¹ *Amaya Inc. v Derome*, 2018 QCCA 120. (*Amaya*).

² *Securities Act*, C.Q.L.R., c. V-1.1.

³ *Theratechnologies Inc. v 121851 Canada Inc.*, [2015] 2 S.C.R. 106, para. 39.

⁴ *Derome c Amaya Inc.*, 2017 QCCS 44, para. 91.

⁵ *Amaya*, para. 93.

⁶ *Champagne v CEGEP de Jonquière*, 1996 CanLII 5798 (QC CA).

⁷ A contradictory judgment was recently rendered on this issue by the Superior Court of Quebec in *Durand v Attorney General of Québec*, 2017 QCCS 2455. In this judgment, a petitioner in a class action proceeding in damages caused by the alleged cumulative effects of electromagnetic frequency pollution (not ruled by the *Securities Act*), had requested the disclosure of insurance documents of the 40 defendants. This motion had taken place before the authorization to proceed with the class action was granted. The Superior Court rejected this request stating that it was premature to order such a disclosure at this early stage of the proceedings and that it would be contrary with the purpose of the screening mechanism resulting from the authorization.

⁸ *Amaya*, para. 114.

⁹ *Ibid.*

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