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Foreign Public Issuers Take Note: Québec Court Dismisses Securities Class Action for Lack of Jurisdiction

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In *Chandler v Volkswagen Aktiengesellschaft*, the Superior Court of Québec recently dismissed a securities class action brought against Volkswagen Aktiengesellschaft (VW). It did so even though the Court had previously dismissed VW's jurisdictional arguments at the authorization (certification) stage and had allowed the action to proceed to the merits.

This decision, which provides clarity to foreign defendants and particularly foreign public issuers facing securities misrepresentation claims in Québec, indicates the following:

- Defendants may contest jurisdiction even after a class action has been authorized and are not foreclosed from doing so at a later stage.
- Québec courts, like their counterparts in the rest of Canada, will be reluctant to assume jurisdiction over securities misrepresentation claims relating to securities of a foreign issuer traded on foreign exchanges.

Background

The plaintiff had brought a class action on behalf of all Québec residents who had purchased VW's securities between March 12, 2009, and September 18, 2015. He alleged that he and the class members had suffered monetary damages when the price of VW securities declined following disclosures of VW's alleged misrepresentations regarding its emissions standards compliance for diesel-powered vehicles.

On May 28, 2018, the Québec Superior Court granted the plaintiff's application for class action authorization, allowing the class action to proceed to the merits. The Superior Court dismissed VW's jurisdictional arguments at the authorization stage, finding that VW had waived its right to contest jurisdiction (having earlier indicated that it would not contest jurisdiction) and that the plaintiff had, on a prima facie basis, suffered harm in Québec. For these and other reasons, the class action was authorized.

The Decision

Despite not succeeding at the authorization stage, VW reiterated its jurisdictional arguments at the merits stage and – with new evidence – brought a formal application to contest jurisdiction.

In response, the plaintiff argued that (i) VW had submitted to the jurisdiction of Québec courts (which is a ground for jurisdiction under art. 3148(5) of the *Civil Code of Québec* (CCQ)); (ii) VW had an establishment in Québec, as it had a subsidiary here (art. 3148(2) CCQ); (iii) a fault was committed in Québec (art. 3148(3) CCQ); or (iv) and an injury was suffered in Québec. Any one of these would have been sufficient to grant jurisdiction.

However, at the merits stage the Superior Court reversed its previous position and held that it did not have jurisdiction to hear the class action, finding the following:

- VW had not submitted to the Court's jurisdiction or waived its right to contest it. Although VW had not formally contested jurisdiction at authorization, once the case proceeded to the merits, VW "consistently and repeatedly" indicated that it contested the Court's

jurisdiction. The Court held that an originating application (i.e., statement of claim) issued after authorization is a new action, in response to which preliminary applications can be brought.

- The presence of an indirect subsidiary in Québec was insufficient to ground jurisdiction in Quebec. Specifically, the fact that Notes were issued in Québec by such an indirect subsidiary (VCCI) through prospectus exemptions was not enough to ground jurisdiction. The Court also cautioned against conflating VW and its indirect subsidiary as a single entity.
- No fault was committed in Québec. The impugned disclosures were found to be prepared in Germany and there was no evidence of a specific fault or omission committed in Québec. That VCCI had submitted prospectuses incorporating VW's financial statements by reference to Québec's securities regulator did not give rise to a fault by VW committed in Québec.
- No injury was suffered in Québec. The Court found that the *situs* of the injury was where the class members purchased and sold the securities, which was Europe for VW's shares or the United States for other over-the-counter securities – not Québec. There was no jurisdiction on the basis of section 236.1 of the *Securities Act*, which provides that "an action...may be brought before the court of the plaintiff's residence." The Court held that the class action was not "related to the distribution of a security" but rather an action based on civil liability (the plaintiff did not rely upon secondary market provisions of the Québec *Securities Act*).
- However, the Court held that if it did have jurisdiction, it would not have stayed the action in Québec in favour of another appropriate forum, finding that the *forum non conveniens* factors – the residence and location of the parties, witnesses, experts and material evidence – did not weigh in favour of a foreign court. The Court also expressed concerns about the notice and claims process for a parallel United States settlement relating to similar claims.

Key Implications

This decision is a reminder that foreign defendants facing class actions in Québec should evaluate and consider jurisdictional applications at both the authorization and the merits stage of a class action. An unfavourable outcome at the authorization stage does not foreclose – and should not discourage – a defendant from raising jurisdictional objections later.

Moreover, foreign issuers that face securities misrepresentation claims in Québec should consider whether their securities were actually traded in Québec and put forward evidence regarding the mechanics of such trades.

Finally, this decision indicates that Québec courts are following the trend in the rest of Canada, where similar securities class actions against foreign issuers have been dismissed. In fact, in August 2018, a parallel class action brought in Ontario (*Leon v Volkswagen AG*) was dismissed on jurisdictional grounds. The Ontario court found that there was "nothing unfair in expecting Ontario residents who purchase a foreign company's shares on a foreign exchange [...] to litigate their claims against this foreign defendant in the jurisdiction of the foreign exchange."

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