

SUPERIOR COURT

(Class Actions Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000914-180

DATE : June 21, 2019

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

MAJESTIC ASSET MANAGEMENT LLC,
es qualité as manager, vested with the full
administration powers over the
TURN8 TACTICAL EQUITY FUND
and

TURN8 PARTNERS INC.

Applicants

v.

THE TORONTO-DOMINION BANK

Respondent

JUDGMENT
(Authorization to institute a class action)

1- OVERVIEW

[1] Applicants seek the authorization of the Court to bring an action pursuant to Section 225.4 of the *Quebec Securities Act*¹ ("QSA") in the form of a class action and to be named as Representative Plaintiffs. The Respondent does not contest the demand.

[2] The proposed class action seeks compensation for class members who purchased The Toronto-Dominion Bank's ("TD") securities during the period from December 3, 2015 to March 9, 2017 ("Class Period").

[3] The proposed class is described as follows:

Class and the Class Members are comprised of, other than the Excluded Persons²:

- I. **Primary Market Sub-Class:** All persons and entities, wherever they may reside or may be domiciled, who, from December 3, 2015 to March 9, 2017 (inclusively), acquired the Toronto-Dominion Bank's securities in an **Offering** and held some, or all of those securities until the end of the **Class Period**; and
- II. **Secondary Market Sub-Class:** All persons and entities, wherever they may reside or may be domiciled, who, from December 3, 2015 to March 9, 2017 (inclusively), acquired the Toronto-Dominion Bank's securities in the secondary market, other than stock traded on a United States exchange, and held some, or all of those securities until the end of the **Class Period**;

2- CONTEXT

[4] Majestic Asset Management LLC ("Majestic") is said to be a legal person having its elected domicile and its principal place of business in Quebec. Majestic is an investment fund manager. Majestic is the Turn8 Tactical Equity Fund's ("the Fund") Manager vested with the full powers of administration over the Fund. The Fund allegedly held TD securities and suffered damages further to alleged misrepresentations and omissions of material fact by TD.

[5] Turn8 Partners Inc. ("Turn8") is said to be a legal person which carries out its principal business activities in Quebec as a portfolio manager and, at all material times, purportedly made the investment decisions for the Fund.

¹ CQLR, c. V-1.1.

² The specific definition is set forth at page 3 of the Re-Amended Motion for Authorization.

[6] The proposed class action relates to The Toronto-Dominion Bank's ("TD") alleged misrepresentations and omissions of material fact regarding its implementation of what is described as an unethical, illegal and predatory employee sales target, monitoring and redistribution system referred to as "The Pressure Selling Program".

[7] The Pressure Selling Program is alleged to have placed pressure on TD's employees to (i) sell to clients products and services that were unnecessary, inappropriate and/or unsolicited; (ii) upsell clients more expensive products and services, although these were unnecessary, inappropriate and/or unsolicited; (iii) omit to disclose to clients the true costs and risks involved in its products, services or programs; (iv) illegally subscribe, enrol or upgrade clients into programs or services without their knowledge and consent; and (v) illegally increase clients' credit lines without their knowledge or consent.

[8] The Pressure Selling Program was allegedly applied to TD's retail employees, financial advisors and managers.

[9] According to Applicants, TD made a series of statements and released documents (the "Impugned Documents") concerning: (i) customer service experience; (ii) the providing of the right products, services, tools, and solutions to clients; (iii) the optimizing of shareholder value through disciplined risk management practices; (iv) reputational risk monitoring and oversight; (v) ethical behaviour; and (vi) responsible banking.

[10] When the purported truth about the Pressure Selling Program was revealed, TD's securities declined and allegedly caused the class members significant damages, and this due to what is described as TD's securities largest decline since 2009;

[11] The proposed class action seeks compensation for class members who purchased TD securities at what is said to be artificially-inflated prices and who then suffered damages when TD securities dropped in value after the release of certain corrective disclosures in the media.

3- APPLICANTS' POSITION

[12] According to Applicants, TD's misrepresentations and omissions relate to three subjects, being increased revenue in its Canadian retail business segment, its business practices and its internal controls.

[13] More specifically, they allege that TD:

- failed to disclose the existence of the Pressure Selling Program and its effects;

- issued materially false and misleading statements in documents concerning customer service experience, its ability to provide adequate products, services, tools, and solutions to clients, the optimizing of shareholder value through disciplined risk management practices, reputational risk monitoring and oversight, ethical behaviour and responsible banking; and
- the TD internal controls and the disclosure controls and procedures were ineffective and defective despite its representations in that regard, and its documentation failed or omitted to reveal material facts regarding its business practices, risk management and ethics policies;

4- **THE APPLICABLE LAW**

[14] Applicants seek to institute a class action that alleges TD's liability in relation to the issuance of securities in both the primary and secondary markets, to the exclusion of stocks traded on a United States exchange.

[15] In such cases, not only must the applicable criteria of Article 575 C.C.P. be met, but so too must the criteria set forth at Section 225.4 of the QSA, which reads as follows:

No action for damages may be brought under this division without the prior authorization of the court.

The request for authorization must state the facts giving rise to the action. It must be filed together with the projected statement of claim and be served by bailiff to the parties concerned, with a notice of at least 10 days of the date of presentation.

The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.

The request for authorization and, if applicable, the application for authorization to institute a class action required under article 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.

[16] This statutory cause of action recognizes the difficulties encountered in seeking remedial and deterrence remedies in secondary market misrepresentation scenarios, and hence offers a presumption in favour of investors as to reliance and failure to disclose material change.³

³ *Theratechnologies Inc. v. 121851 Canada Inc.*, 2013 QCCA 1256, at paras 57 and following.

[17] In exchange, the investor must demonstrate that the action is not being brought in bad faith, and this so as to avoid promoting inappropriate claims such as those with little chance of success and costly strike suits. Applicant must demonstrate a “reasonable possibility” of a favorable outcome.

[18] It has correctly been the view that the criteria applicable to Section 225.4 QSA is more demanding than that stipulated at Article 575 C.C.P. for class actions generally.

[19] Nonetheless, it remains a screening mechanism as stated by Justice Chatelain in *Valeant*⁴:

(...) Although the Court must undertake a reasoned consideration of the evidence to determine whether the applicable threshold under the QSA is satisfied, the test for authorization under the QSA remains a screening mechanism and the threshold to be crossed is necessarily below the threshold of the balance of probabilities.

5- **ANALYSIS**

[20] The Court at this stage is not to conclude on the merits of the proposed action but is to determine whether the criteria of Section 225.4 QSA and Article 575 C.C.P. are met.

[21] In the Court’s view, that is the case in the present matter. Otherwise said, not only have the Applicants demonstrated an “arguable” cause of action for the purposes of article 575 (2) C.C.P., but they have also demonstrated a reasonable possibility that the action will have a favourable outcome, within the meaning of Section 225.4 QSA.

[22] That conclusion stems from the factual allegations set forth in the Re-Amended Motion for Authorization, as well as from the “credible evidence”⁵ submitted in support thereof, including affidavits (Exhibits P-17, P-18 and P-20) and the expert report of Craig J. McCann, Ph.D., C.F.A., dated June 5, 2018 (Exhibit P-24).

[23] As regards the criteria set forth at Article 575 (1), (3) and (4), the Court is of the view that they too have been met in the present matter, and no argument has been raised otherwise.

[24] In the circumstances of the present matter, the Court is satisfied that the proposed action should be authorized so that a hearing on the merits may be held and a judgment rendered based on all the proof made available by the parties.

⁴ *Catucci v. Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, at para. 156.

⁵ *Theratechnologies inc. c. 121851 Canada inc.*, [2015] 2 SCR 106, at para. 39.

FOR THESE REASONS, THE COURT:

[25] **GRANTS** the present Motion;

[26] **AUTHORIZES** the bringing of a class action and an action pursuant to section 225.4 of the *Quebec Securities Act*;

[27] **DESIGNATES** Majestic Asset Management LLC and Turn8 Partners Inc. as Representative Plaintiffs on behalf of a group of persons described as follows:

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

- I. **Primary Market Sub-Class:** All persons and entities, wherever they may reside or may be domiciled, who, from December 3, 2015 to March 9, 2017 (inclusively), acquired the Toronto-Dominion Bank's securities in an **Offering** and held some, or all of those securities until the end of the **Class Period**; and
- II. **Secondary Market Sub-Class:** All persons and entities, wherever they may reside or may be domiciled, who, from December 3, 2015 to March 9, 2017 (inclusively), acquired the Toronto-Dominion Bank's securities in the secondary market, other than stock traded on a United States exchange and held some, or all of those securities until the end of the **Class Period**;

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

- a. Did the Defendant set up and put into effect the Pressure Selling Program?
- b. Did the Pressure Selling Program cause or induce employees to sell and/or upsell clients, or subscribe or enroll clients to TD banking products and services that were unnecessary, inappropriate and/or unsolicited and did the Pressure Selling Program cause or induce employees to misinform, or fail to inform clients as to the risks and appropriateness of these products and services?
- c. During the Class Period, did the Defendant release, or caused to be released, Impugned Documents containing omissions of material fact, materially false and misleading information and/or misrepresentations within the meaning of the QSA and/or, as applicable, the Securities Legislation relating to the Pressure Selling Program? If so, what documents contained what misrepresentations?

- d. Did the Representative Plaintiffs and the Class Members suffer damages as a result of the Defendant's faults, practices and/or breaches of applicable laws and/or regulations?
- e. Is the Defendant liable for damages suffered by the Class Members and if so, what damages have the Class Members suffered?
- f. In order to succeed with the claim under article 1457 *CCP*, do the Representative Plaintiffs and the Class need to establish they relied on the impugned documents or other misrepresentations to purchase TD securities? If so, are any presumptions available to satisfy any such requirement?

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

GRANTS this class action on behalf of the Class;

GRANTS the Representative Plaintiffs' action against the Defendant in respect of the rights of action asserted against the Defendant under Title VIII, Chapter II, Divisions I and II of the QSA and, if necessary, the concordant provisions of the Securities Legislation, and article 1457 of the CCQ;

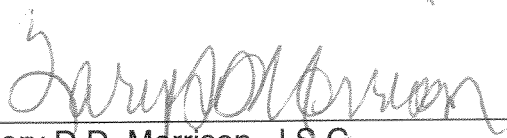
CONDEMNNS the Defendant to pay to the Representative Plaintiffs and the Class compensatory damages for all monetary losses;

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

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

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

THE WHOLE without costs.



Gary D.D. Morrison, J.S.C.

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Date of Hearing : June 14, 2019