CITATION: Vecchio Longo Consulting Services Inc. v. Aphria Inc., 2021 ONSC 5405
COURT FILE NO.: CV-19-00614086-00CP
DATE: 20210806

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
VECCHIO LONGO CONSULTING SERVICES INC.	)	
Plaintiff	)	*Joel P. Rochon, Peter R. Jervis*, and *Douglas Worndl for the Plaintiff.*
- and -	)	
	)	
APHRIA INC., VICTOR NEUFELD, CARL MERTON, COLE CACCIAVILLANI, CLARUS SECURITIES INC., CANACCORD GENUITY CORP., CORMARK SECURITIES INC., HAYWOOD SECURITIES INC. and INFOR FINANCIAL GROUP INC.	)	*Dana M. Peebles* and *Bryn Gray* for the Defendants Aphria Inc., Victor Neufeld, Carl Merton and Cole Cacciavillani.
Defendants	)	*David Di Paolo, Caitlin Sainsbury* and *Graham Splawski* for the Defendants Clarus Securities Inc., Canaccord Genuity Corp, Cormark Securities Inc., Haywood Securities Inc., and INFOR Financial Inc.
	)	
	)	**HEARD**: June 23, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Defendant Aphria Inc. is an "issuer" under the Ontario *Securities Act*,[1] and the Defendants Victor Neufeld, Carl Merton, and Cole Cacciavillani were directors and officers of Aphria (collectively, the Aphria Defendants).

[2] Pursuant to the *Class Proceedings Act, 1992*,[2] the Ontario *Securities Act*, and Other Canadian Securities Legislation[3], the Plaintiff Vecchio Longo Consulting Services Inc. ("Vecchio") sues the Aphria Defendants for: (a) common law misrepresentation; (b) an oppression remedy pursuant to the Ontario *Business Corporations Act*;[4] (c) misrepresentation in the secondary market pursuant to s. 138.3, Part XXIII.1 of the Ontario *Securities Act*; and, (d) misrepresentation in the primary market pursuant to s. 130, Part XXIII of the Ontario *Securities Act*.

[3] Vecchio also sues Canaccord Genuity Corp., Clarus Securities Inc., Cormark Securities Inc., Haywood Securities Inc., and Infor Financial Group Inc. (collectively, the Underwriters) for misrepresentation in the primary market pursuant to s. 130, Part XXIII of the Ontario *Securities Act*. These defendants were the underwriters for a $258 million Prospectus Offering made by Aphria that closed on June 28, 2018, which was during the Class Period of the proposed class

[1] R.S.O. 1990, c. S.5.
[2] S.O. 1992, c. 6.
[3] Alberta *Securities Act* RSA 2000, c S-4; British Columbia *Securities Ac*t, RSBC 1996, c 418; Manitoba, *Securities Act*, CCSM c S50; New Brunswick *Securities Act*, SNB 2004, c. S-5.5; Newfoundland and Labrador *Securities Act*, RSNL 990, c S-13; North West Territories *Securities Act*, SNWT 2008, c. 10; Nova Scotia *Securities Act*, RSNS 1989, c 418; Nunavut *Securities Act*, S Nu 2008, c 12; Prince Edward Island *Securities Act*, RSPEI 1988, c S-3.1; Québec *Securities Act*, RSQ, c V-1.1; Saskatchewan *Securities Act*, 1988, SS 1988-89, c S-42.2, and Yukon *Securities Act*, SY 2007, c 16.
[4] R.S.O. 1990, c. B.16.

action. The Prospectus Offering was a "bought deal" in which the Underwriters purchased and then sold the Aphria shares pursuant to a prospectus.

[4] Some of Vecchio's causes of action concern the effect of alleged misrepresentations by the Aphria Defendants on the buying and selling of shares in the secondary market. The alleged misrepresentations concerned: (a) what is known as the "Nuuvera Transaction"; and (b) what is known as the "LATAM Transaction". Some of Vecchio's causes of action concern the effect of alleged misrepresentations by the Aphria Defendants about the Nuuvera Transaction on the purchases of shares in the bought deal Prospectus Offering.

[5] Vecchio brings a motion for: (a) permission to discontinue all causes of action against Mr. Merton; (b) permission to discontinue the common law misrepresentation cause of action and the oppression remedy claim against the Aphria Defendants; (c) leave to assert the misrepresentation in the secondary market claim pursuant to Part XXIII.1 of the Ontario *Securities Act*; (d) certification as a class action of the misrepresentation claims in the secondary market against the Aphria Defendants (except Mr. Merton); and (e) certification of the misrepresentation claim in the primary market pursuant to Part XXIII as a class action against the Aphria Defendants and the Underwriters.

[6] The Aphria Defendants consent to the relief being sought by Vecchio save for the certification of the statutory primary market misrepresentation cause of action pursuant to s. 130 Part XXIII against them and against the Underwriters. The Aphria Defendants take no position as to whether that statutory claim pursuant to s. 130 of Ontario *Securities Act* should be certified.

[7] The Underwriters oppose the certification of the s. 130 Part XXIII statutory cause of action. The Underwriters oppose certification on two grounds.

a. First, the Underwriters submit that in accordance with the law of Ontario associated with the line of cases *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*.[5] and *Hughes v. Sunbeam Corp. (Canada)*[6] (the *Ragoonanan Principle*), which law is binding on this Court, notwithstanding that Vecchio is eligible to be a Representative Plaintiff to advance a Part XXIII.1 claim under the Ontario *Securities Act*, it is not eligible to be a Representative Plaintiff to assert a claim under Part XXIII of the *Act*. In making this argument, the Underwriters dispute Vecchio's arguments that: (a) the *Ragoonanan* line of cases is distinguishable; or (b) the *Ragoonanan* line of cases is no longer good law in Ontario because of the Supreme Court of Canada's decision in the Québec case of *Bank of Montreal v. Marcotte*.[7]

b. Second, the Underwriters submit that there is no basis in fact that there are two or more Class Members that have a claim they wish to pursue for misrepresentation pursuant to s. 130 of the Ontario *Securities Act*.

[8] In an alternative submission, the Underwriters submit that if an action against them pursuant to s. 130, Part XXIII of the Ontario *Securities Act* is certified, then there should be a subclass for the Class Members with a primary market claim.

[9] For the reasons that follow:

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[5] (2000), 51 OR (3d) 603 (S.C.J.).
[6] (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal to S.C.C. ref'd [2002] S.C.C.A. No. 446.
[7] 2014 SCC 55, aff'g 2012 QCCA 1396, aff'g J., 2009 QCCS 2764.

a. I grant permission to Vecchio to discontinue the action against Mr. Merton.

b. I grant permission to Vecchio to discontinue the common law misrepresentation claim and the oppression remedy claim against the Aphria Defendants.

c. I grant leave to Vecchio to assert the misrepresentation claim in the secondary market (s. 138.3, Part XXIII.1 Ontario *Securities Act*) against the Aphria Defendants (except Mr. Merton) and I certify that claim as a class action against the Aphria Defendants (except Mr. Merton) with Vecchio as the Representative Plaintiff.

d. I order that each Underwriter deliver within thirty days an affidavit listing their respective purchasers of shares in the $258 million Prospectus Offering made by Aphria that closed on June 28, 2018.

e. I certify the misrepresentation claim in the primary market (s. 130 Part XXIII Ontario *Securities Act*) as a class action against the Aphria Defendants (except Mr. Merton) and the Underwriters, conditional upon Class Counsel bringing a motion within one hundred days for the appointment of a Representative Plaintiff for a class of Class Members that purchased Aphria shares in the primary market during the Class Period.

B. Procedural Background

[10] On February 7, 2019, Rochon Genova LLP commenced a proposed class action on behalf of Vecchio against the Aphria Defendants and the Underwriters.

[11] There was a carriage fight with another proposed class action, and on June 19, 2019, Vecchio was granted carriage.[8] It shall be important to note that the rival class action did not assert any causes of action with respect to the Nuuvera Transaction or with respect to the $258 million Prospectus Offering.

[12] On March 13, 2020, Vecchio delivered a 13 Volume (5,195 pages) motion record for leave under Part XXIII.1 of the Ontario *Securities Act* and for certification under the *Class Proceedings Act, 1992*.

[13] On June 5, 2020, Vecchio delivered a Supplementary Motion Record (37 pages).

[14] On December 12, 2020, the Aphria Defendants delivered a 3 Volume Responding Motion Record (2,004 pages).

[15] On December 29, 2020, the Underwriters delivered a Responding Motion Record (1,415 pages).

[16] On March 8, 2021, Vecchio delivered a 6 Volume Reply Motion Record (2,359 pages).

[17] On April 19, 2021, Vecchio delivered a Supplementary Reply Motion Record (26 pages).

[18] On June 7, 2021, Vecchio delivered a Second Supplemental Reply Motion Record (56 pages).

[19] Before, during, and after the cross-examinations, the parties discussed the possibility of a consent leave and certification of the proposed class action. Eventually an agreement was negotiated in which, subject to court approval: (a) the Aphria Defendants consented to leave and

[8] *Rogers v. Aphria Inc*., 2019 ONSC 3698.

for certification of the cause of action pursuant to s. 138.3, Part XXIII.1 of the Ontario *Securities Act;* (b) Vecchio and the Aphria Defendants agreed that the common law claim of negligent misrepresentation and the oppression remedy claim under the Ontario *Business Corporations Act* should be dismissed; and (c) Vecchio and the Aphria Defendants agreed that all claims should be dismissed as against the Defendant Carl Merton. Vecchio and the Aphria Defendants also agreed on the common issues to be certified.

[20] With respect to the cause of action against the Aphria Defendants and the Underwriters pursuant to s. 130 of the Ontario *Securities Act*, (which does not require leave to assert), the Aphria Defendants agreed to take no position.

[21] Vecchio proposes the following class definition:

> All persons other than Excluded Persons, wherever they may reside or be domiciled, who acquired Aphria common shares during the Class Period, where excluded persons are defined as Defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of an Individual Defendant.

[22] Vecchio proposes that the Class Period be defined as "the period of time after 07:00 ET January 29, 2018 until 08:25 ET December 2, 3018.

[23] After discontinuing against Mr. Merton, Vecchio seeks to certify against the Aphria Defendants the statutory claim for damages arising out of misrepresentation in secondary market disclosure pursuant to Part XXIII.1 of the Ontario *Securities Act* and the concordant provisions of the Other Canadian Securities Legislation as set out in the Statement of Claim. The Aphria Defendants consent to certification of the Part XXIII.1 of the Ontario *Securities Act* causes of action.

[24] Vecchio seeks to certify against the Aphria Defendants and the Underwriters the statutory claim for damages arising out of misrepresentation in the primary market pursuant to Part XXIII of the Ontario *Securities Act* and the concordant provisions of the Other Canadian Securities Legislation as set out in the Statement of Claim.

[25] Vecchio proposes the following common issues:

PROPOSED COMMON ISSUES

Liability: Part XXIII.1 of the *Securities Act*

1. Which of the "Impugned Documents", as defined by the Amended Fresh as Amended Statement of Claim (the "Claim"), were:
    a. "documents" as defined by section 138.1 of the *Securities Act*;
    b. "core documents" as defined by section 138.1 of the *Securities Act*;
    c. "non-core documents" as contemplated by section 138.4(1) of the *Securities Act*?
2. Are any of the alleged misrepresentations in the Claim barred by the *Limitations Act, 2002*?

3. Did any or all of the representations, as described in the Claim, made by any of the Defendants (except the Underwriters), during the Class Period, constitute a misrepresentation within the meaning of sections 1(1) and 138.3 of the *Securities Act*.?

Core Documents

4. If the answer to (3) is "Yes", were any such misrepresentations made in an Impugned Document which was a "core document"?

5. If the answer to (4) is "Yes", did any of the Individual Defendants authorize, permit, or acquiesce in the release of any or all of those Impugned Documents containing a misrepresentation within the meaning of section 138.3 of the *Securities Act*?

Non-Core Documents

6. If the answer to (3) is "Yes", were any such misrepresentations made in an Impugned Document which was a "non-core document"?

7. If the answer to (6) is "Yes", did any of the Defendants (except the Underwriters):

    a. know, at the time that the document was released, that the document contained the misrepresentation;

    b. at or before the time that the document was released, deliberately avoid acquiring knowledge that the document contained the misrepresentation; or

    c. commit, through action or failure to act, gross misconduct in connection with the release of the document that contained the misrepresentation?

Public Correction and Defenses

8. If the answer to (3) is "Yes", were the misrepresentations contained in the Impugned Documents publicly corrected and if so by what means?

9. If the answer to any of (4), (5), (6), or (7) is "Yes", have the Defendants (except the Underwriters), or any of them established a "reasonable investigation" defense as contemplated by section 138.4(6) and 138.4(7) of the *Securities Act* or any other defenses under section 138.4 of the *Securities Act*?

Damages

10. If the answers to (3) and (8) are both "yes", and after any defenses raised under (9) are considered, is one or more of the Defendants liable to the Class Members for misrepresentation(s) under sections 138.3 of the *Securities Act*?:

    a. If the answer is "yes", did the Class Members suffer damages and, if so, on what basis are the damages suffered by Class Members to be determined?

    b. In calculating such damages, was any change in the market price of Aphria's securities unrelated to the misrepresentation(s) for which

liability is established, pursuant to section 138.5(3) of the *Securities Act*, and if so, in what amount?

c. After taking into account the answers to 10 (a) and (b), what are the aggregate damages suffered by the Class for the Defendant(s)' liability under Part XXIILI of the *Securities Act*?

d. Does any Defendant liable to the Class for damages have a liability limit under section 138.7(1), and if so, what is that limit?

e. Subject to any limits set out in subsection 138.7(l), what is the proportionate, joint or several liability of each of the liable Defendants, pursuant to section 138.6 of the *Securities Act*?

Liability: Part XXIII of the *Securities Act*

11. Did the Prospectus contain a misrepresentation as particularized in the Claim, within the meaning of sections 1(1) and 130 of the *Securities Ac*t?

12. If the answer to (9) is "Yes", have the Defendants, or any of them proven a "reasonable investigation" defense or any other defense pursuant to section 130 of the *Securities Act*?

Damages: Part XXIII of the *Securities Act*

13. If one or more of the Defendants are liable to Class Members who acquired Aphria shares offered by the Prospectus during the period of distribution or during distribution to the public under section 130 of the *Securities Act*,

a. What are the damages on a per share basis for the Aphria shares acquired by Class Members which shares were offered by the Prospectus during the period of distribution or during distribution to the public*?*

b. What are the aggregate damages of the Class Members who acquired Aphria shares offered by the Prospectus during the period of distribution or during distribution to the public?

c. What are the limits, if any, on the Underwriter Defendants' liability individually and collectively pursuant to section 130(6) of the *Securities Act*?

d. Can any or all of the Defendants rely on section 130(7) of the *Securities Act* in order to limit the damages payable to Class Members?

e. What are the limits, if any, on the Defendants' liability pursuant to section 130(9) of the *Securities Act*?

f. Pursuant to section 130(8) of the *Securities Act*, which Defendants are jointly and severally liable to Class Members for damages arising out of misrepresentations in the Prospectus?

ANCILLIARY COMMON ISSUES

14. Should the Defendants, or any of them, pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

15. If the court determines that the Defendants are liable to the Class, and if the court considers that participation of individual Class Members is required to determine individual issues:

    a. Are any directions necessary?

    b. Should any special procedural steps be authorized?

    c. Should any special rules relating to admission of evidence and means of proof be made?

    d. What directions, procedural steps or evidentiary rules ought to be given or authorized?

16. Should the Defendants, or any of them, pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compounded interest?

C. Evidentiary Background

[26] Vecchio supported its motions for leave and for certification with the following evidentiary record.

- Affidavit of **James L. Canessa** dated March 8, 2021. He is the Vice President at Forensic Economics, Inc., a consulting firm specializing in providing and supporting expert witness damages testimony in business dispute matters.
- Affidavit of **Krishna Desai** dated December 20, 2019. Mr. Desai is a partner of the Jamaica law firm Myers, Fletcher & Gordon.
- Affidavit of **Gregg M. Edwards** dated April 16, 2021. Mr. Edwards is a Vice President at Forensic Economics Inc. He has BS (Electrical Engineering Technology, Rochester Institute of Technology) and an MBA (Simon Business School, University of Rochester). He is an accredited senior appraiser in business valuation (ASS, American Society of Appraisers).
- Affidavit of **Carol Hansell** dated March 1, 2021. Ms. Hansell is the founder and senior partner of Hansell LLP, a corporate and securities law firm in Toronto, Ontario.
- Affidavits of **Gregg A. Jarrell** dated February 13, 2020 and February 23, 2021. Dr. Jarrell has a Ph.D. in Business Economics (1978) and an MBA (1976) both from the University of Chicago. He was a tenured Professor of Economics and Finance at the University of Rochester's Simon School of Business from 1988 until he retired effective July 1, 2018.
- Affidavit of **Bernd Jochem** dated February 19, 2021. Mr. Jochem is a partner of the law firm Rotter Rechtsänwalte Partnerschaft mbB in Munich, Germany.

- Affidavits of **David Lauer** dated June 4, 2020 and February 19, 2021. Mr. Lauer is the CEO of Urvin AI, an artificial intelligence agency that provides consulting services. He has a BA/MA in Economics and Finance, with a minor in Computer Science, from Brandeis University.
- Affidavit of **Edward Longo**, the principal of the Plaintiff, dated February 13, 2020.
- Affidavits of **Ronald Podolny** dated March 12, 2020, February 24, 2021, and June 1, 2021. Mr. Podolny is a partner at Rochon Genova LLP.
- Affidavits of **Gordon D. Richardson** dated March 12, 2020 and February 24, 2021. Dr. Richardson is the KPMG Professor of Accounting at the Rotman School of Management, University of Toronto. He has a Ph.D. from Cornell University, an MBA from York University, and a B.A. from the University of Toronto. He holds the F.C.A. and C.A. designations from the Institute of Chartered Accountants of Ontario.
- Affidavits of **Ignacio Santamaria** dated February 10, 2020 and February 22, 2021. Mr. Santamaria is a partner of the Argentinian law firm of Marval, O'Farrell & Mairal.
- Affidavits of **Roberto E. Silva, Jr.** dated December 20, 2019 and December 26, 2019. Mr. Silva is a partner of the Argentinian law firm of Marval, O'Farrell & Mairal.
- Affidavit of **Cino Raffa Ugolini** dated February 19, 2021. Mr. Ugolini is a partner at Legister Avvocati, a law firm in Milan, Italy. He has a J.D. from the University of Milan Law School and an LL.M from the New York University School of Law.

[27] The Aphria Defendants resisted the motion for leave and for certification with the following evidentiary record.

- Affidavit of **Quentin Broad** dated December 12, 2020. Mr. Broad is an expert in equity research and analysis. He has held senior positions at CIBC World Markets, including Global Head of Research, Global Head of Equity Research, and Global Head of Equity Sales.
- Affidavit of **Stephen Dineley** dated December 12, 2020. Mr. Dineley is a retired partner of KPMG with over 35 years of experience in public company accounting. He was the Chief Financial Officer of Extendicare and is currently the Chair of the Audit Committee and a member of the Board of Directors of Medical Facilities Corp., a publicly traded company on the Toronto Stock Exchange (TSX").
- Affidavit of **Vinita Juneja** dated December 4, 2020. Dr. Juneja is the Managing Director of NERA Economic Consulting and Chair of NERA's Global White Collar, Investigations & Enforcement Practice. He has a Ph.D. and an M.A. in economics from Harvard University and a B.A. from the University of Western Ontario.
- Affidavit of **Jim Meloche** dated December 4, 2020. Mr. Meloche is the founding principal of Origin Merchant Partners, an independent Canadian advisory firm providing a full range of advisory services including for mergers and acquisitions, valuations, fairness opinions, restructuring, recapitalizations, and private placement financings.
- Affidavit of the Defendant **Carl Merton** dated December 11, 2020.

[28] The Underwriters resisted the certification motion with the following evidentiary record.

- Affidavit of **Jose Ladeira** dated December 18, 2020. Mr. Ladeira is the Chief Compliance Officer of the Defendant Clarus.
- Affidavits of **Fionnuala Martin** dated December 18 and 28, 2020. She is the principal of Fionnuala Martin & Associates, which provides capital markets consulting services. She has over 40 years of experience in the capital markets industry, conducting trading analysis and performing compliance functions.
- Affidavit of **Adrian Pelosi** dated December 18, 2020. Mr. Pelosi is the Executive Vice President, Chief Risk Officer and Treasurer of Canaccord Genuity Group Inc., the parent of the Defendant Canaccord.
- Affidavit of **Wendy Rudd** dated December 28, 2020. Ms. Rudd is the principal of War Room Consulting Inc., which provides capital markets consulting services. She has over 28 years of experience in the capital markets industry and capital markets regulation, including as Senior Vice President, Market Regulation & Policy of the Investment Industry Regulatory Organization of Canada.

D. Facts

[29] Aphria is a cannabis company incorporated under the Ontario *Business Corporations Act*. Its shares trade on the Toronto Stock Exchange ("TSX") and, since November 2018, also on the New York Stock Exchange ("NYSE").

[30] Between January 2018 and December 2018, Aphria's periodic financial disclosure, and accompanying MD&A and CEO and CFO certificates (NI 52-109 Certificates) represented to the market that: (a) Aphria's filings were free from misrepresentation; (b) Aphria's interim and annual financial statements complied with IFRS (International Financial Reporting Standards); (c) Aphria's interim and annual financial statements and the other financial information contained in its other filings, fairly presented in all material respects the financial condition of the company; and, (d) Aphria's ICFR (Internal Control Over Financial Reporting) and DC&P (Disclosure Controls and Procedures), including governance controls that were directed at avoiding conflicts of interest, were designed and operating effectively.

[31] On January 29, 2018, Aphria announced that it was taking over. *i.e.*, it was purchasing the shares of Nuuvera Inc., another public cannabis company for approximately $485 million. The purchase price was by way of the issuance of new Aphria shares. The transaction closed in March 2018.

[32] Vecchio alleges and there is some basis in fact that the Nuuvera Transaction was a scheme by Aphria insiders, including the defendants Neufeld and Cacciavillani, to transfer wealth from non-insider Aphria shareholders to themselves and to family members.

[33] It is alleged and there is some basis in fact that by their self-dealing, Messrs. Neufeld, and Cacciavillani made millions of dollars for themselves. Further, it is alleged and there is some basis in fact that Aphria was managed in a manner that was oppressive to the interests of non-insider Aphria shareholders and that violated statutory and common law duties.

[34] Further, it is alleged and there is some basis in fact that Aphria repeatedly made misrepresentations in required financial and other disclosure documents regarding IFRS compliance and about the integrity of Aphria's internal controls and governance and

management practices.

[35] Vecchio alleges and there is some basis in fact that Aphria made misrepresentations in press releases in January, February and March 2018 about the Nuuvera Transaction; namely: (1) Aphria misrepresented the profitability of Nuuvera; (2) Aphria represented that Nuuvera was a leading, global cannabis company, when in truth, it was a fledgling start-up company with annual revenues of $36,756 and a net loss of $37.5 million in its first and only year of operations; (3) Aphria failed to disclose that the Nuuvera Transaction was a related-party transaction in which Aphria insiders, including Messrs. Neufeld, Merton, and Cacciavillani personally profited; (4) Aphria misrepresented the value of Nuuvera's assets, which were worth a small fraction of the approximately $485 million in consideration being paid; (5) Aphria misrepresented its compliance with IFRS, which misrepresentation was tied to the value of the assets acquired in the Nuuvera Transaction; (6) Aphria misrepresented that its ICFR and DC&P were properly designed and operating effectively.

[36] On March 21, 2018, a report by the investment firm Hindenburg Research disclosed that Nuuvera was worth less than the consideration paid by Aphria and that the Nuuvera Transaction was initiated by a Mr. DeFrancesco.

[37] On March 25, 2018, a *Globe and Mail* article revealed that Messrs. Neufeld, Merton, and Cacciavillani held undisclosed interests in Nuuvera at the time of the Nuuvera Transaction.

[38] On May 30, 2018, a Business Acquisition Report filed by Aphria to regulators confirmed that the March 21 Hindenburg Report and the facts revealed by the March 25 *Globe and Mail* article were accurately reported.

[39] On June 22, 2018, by a Prospectus Offering, Aphria issued 21,835,510 common shares at $11.85 per share for total gross proceeds of $258,750,794. The Underwriters in what was a bought-deal offering were the Defendants Clarus Securities Inc., Canaccord Genuity Corp., Cormark Securities Inc., Haywood Securities Inc., and Infor Financial Inc. The Underwriters know the identities of the purchasers to whom they sold the Aphria issued shares.

[40] The Prospectus Offering followed the closing of the Nuuvera Transaction by approximately three months. Aphria’s representations about the transaction were incorporated by reference in the June 22, 2018 Prospectus.

[41] In the Vecchio Action, it is alleged that Aphria made the same misrepresentations in the Prospectus as it made in its secondary market disclosures. It is alleged that the financial statement incorporated into the Prospectus contained misrepresentations that Aphria was IFRS compliant and that appropriate DC&P and ICFR were in place.

[42] In his expert’s reports, Mr. Lauer opined that he observed trading patterns in Nuuvera shares that were highly suggestive of artificial price manipulation during the trading leading up to the announcement of the Nuuvera Transaction on January 29, 2018, and that the observed trading patterns were not consistent with natural market movements. He identified Clarus Securities and Canaccord Genuity (the co-lead Underwriters of the Prospectus Offering) as being central figures in the manipulation of the Nuuvera share price.

[43] In the Vecchio Action, it is alleged and there is some basis in fact that the Underwriter Defendants certified that the Prospectus constituted full true and plain disclosure of all material facts relating to the securities offered. It is alleged, however, and there is some basis in fact that the Prospectus failed to disclose that: (a) the Nuuvera Transaction involved a gross overvaluation

of the acquired assets, which personally enriched Aphria insiders at the expense of non-insider shareholders; (b) Aphria's financial statements, which were incorporated by reference in the prospectus were not IFRS compliant; and (c) Aphria's disclosure regarding the integrity of its internal controls including its governance practices, which were designed to avoid conflicts of interest, were not effective.

[44] It is alleged that the Underwriter Defendants are liable under Part XXIII, s. 130 of the Ontario *Securities Act.*

[45] In fairness, it should be noted that for the certification motion, the Underwriters delivered evidence that may when the merits are adjudicated prove that there was no manipulation and no liability under Part XXIII, s. 130 of the Ontario *Securities Act.* For example, the Underwriters filed a report from Wendy Rudd, the former Senior Vice President of Market Regulation & Policy with the Investment Industry Regulatory Organization of Canada ("IIROC"), the Underwriters' regulator), and the author of the IIROC Guidance on Certain Manipulative and Deceptive Trading Practices and her opinion refuted Mr. Lauer's opinion. Now, however, is not the time to resolve the merits.

[46] Returning to the factual background for the purposes of the certification motion, on July 17, 2018, Aphria announced in a press release the LATAM Transaction. Pursuant to this Transaction, Aphria acquired companies that had operations and interests in the Latin American cannabis industry in Jamaica, Argentina and Colombia. To pay for the acquisition, Aphria issued approximately 15.7 million new shares with a value of about $274 million.

[47] It is alleged and there is some basis in fact that it was later revealed that, like the Nuuvera Transaction, some Aphria insiders were self-dealing and lining their own pockets at the expense of the non-insider shareholders and that the LATAM Transaction involved Aphria purchasing assets at a gross overvalue.

[48] On November 29, 2018, Vecchio purchased 2,000 Aphria shares at an average price of about $10.55 per share. Vecchio is an Ontario company resident in Mississauga, Ontario. Edward Longo is its principal. Mr. Longo is a retired executive. He has held various senior executive positions including being the CFO of Playtex Canada Ltd. Mr. Longo's responsibilities included among other things, ensuring compliance with the US *Sarbanes-Oxley Act*, the 2002 statute which was designed to ensure oversight of financial reporting of public companies to improve the accuracy and reliability of corporate disclosure for the purposes of investor protection.

[49] It is to be noted that Vecchio only purchased shares in the secondary market. It did not purchase shares from the Underwriters.

[50] On November 30, 2018, the last trading day before the weekend, Aphria's share price was $10.51.

[51] On December 3, 2018, two investment firms, Hindenburg Research and Quintessential Capital Management issued a report: *Aphria: A Shell Game with a Cannabis Business on the Side*. The release of the Report was accompanied by a presentation by Quintessential Capital Management principal, Gabriel Grego, at a short sellers' conference which was broadcast on YouTube. The presentation was called "*The Black Hole".*

[52] The Hindenburg-Quintessential Report and the presentation revealed that: (a) the assets underlying the LATAM Acquisition had been acquired by Andy DeFrancesco; (b) these assets

were then purchased by Canadian shell companies under the control of Mr. DeFrancesco and of Aphria insiders, including Messrs. Neufeld, Cervini, and Cacciavillani; (c) the purchasers attempted to cover-up their ownership and control of the shell companies; (d) the shell companies agreed to be acquired by Scythian Biosciences Corp, which then sold the companies to Aphria at a large markup; (e) Mr. DeFrancesco and the Aphria insiders received cash and Scythian shares and Scythian got cash and Aphria shares; (f) Aphria acquired assets worth far less than their purchase price; and (g) the nature, extent and caliber of the operations of the LATAM assets were vastly overstated.

[53] It is alleged and there is some basis in fact that the revelations of the Hindenburg-Quintessential Report are a corrective disclosure of the misrepresentations and oppressive conduct associated with the LATAM Transaction and also complete the corrective disclosure of the misrepresentations and oppressive conduct associated with the Nuuvera Transaction.

[54] On December 3, 2018, following the Hindenburg-Quintessential Report, on heavy trading volume, Aphria's share price fell to $7.60. On December 4, 2018, the price fell to $5.99. There was a drop in Aphria's market capitalization of approximately 43% or approximately $1.13 billion.

[55] Thus, on November 30, 2018, the last trading day before December 3, the closing price for Aphria shares was $10.51/share on 5,186,739 shares traded. The closing price on December 3, 2018, after the initial alleged corrective disclosure, was $7.60/share on 53,632,716 shares traded; and the closing price on December 4, the second day of the alleged corrective event, was $5.88/share on 43,823,116 shares traded. Following the two-day corrective event, the Aphria share price had dropped $4.63 representing 44% of its value.

[56] Pausing here in the narrative, it was economist Dr. Jarrell's opinion that the December 3, 4, 2018 disclosures were corrective of revelations about the Nuuvera Transaction over-valuation and self-dealing (which preceded the Prospectus Offering) and also about the LATAM Transaction. This opinion was shared by economist Mr. Edwards who concluded based on Dr. Jarrell's opinion and his own research that artificial inflation was present in Aphria's share price at the time of the June 2018 Prospectus Offering.

[57] Mr. Edwards analyzed public trading data of some of the Prospectus Purchasers, namely institutional investors whose shareholdings in Aphria were recorded in the US Thomson Reuters database. He found that some institutions increased their shareholdings in Aphria during the Prospectus Offering and kept their shares through the December 3-4, 2018 corrective event. He, therefore, concluded that there were purchasers of Aphria shares in the primary market that suffered losses because of the Aphria Defendants' misrepresentations.

[58] Mr. Podolny, in his supplementary affidavit dated June 1, 2021 (which for reasons I shall explain later, I admit as evidence notwithstanding the Underwriters' objection) deposed that he had been advised by Ma)tco Financial Inc., the investment fund manager of the Matco Fund, that the fund had purchased Aphria shares at $11.85 per share pursuant to the Prospectus Offering and sold them after the December 3-4, 2018 corrective event at $7.18 per share. The Matco Fund was one of the funds investigated by Mr. Edwards.

[59] Returning to the narrative, on December 6, 2018, Aphria announced that its Board of Directors had appointed a special committee of independent directors to review the LATAM acquisition.

[60] On December 27, 2018, Aphria announced that Mr. Neufeld was being replaced as Chair of the Aphria board.

[61] On December 28, 2018, Vecchio sold its Aphria shares at an average price of approximately $8.00 per share suffering a loss of about $2.32 per share or $4,645.

[62] On January 11, 2019, Aphria announced that Messrs. Neufeld and Cacciavillani would be transitioning out of their executive roles with Aphria in the coming months but that they would remain on the board of directors.

[63] On February 7, 2019, Rochon Genova LLP commenced a proposed class action on behalf of Vecchio against the Aphria Defendants and the Underwriters. This action involves allegations that the Defendants profoundly misled the market from January 29, 2018 to December 3, 2018 in relation to three key transactions; namely: (a) the Nuuvera Transaction; (b) the June 2018 Prospectus Offering, and (c) the LATAM Transaction. It is alleged that misrepresentations resulted in the substantial inflation of the value of Aphria's shares throughout the Class Period.

[64] On February 15, 2019, Aphria announced the conclusion of the special committee's review of the LATAM Acquisition. The Committee's report disclosed that several non-independent directors of the Company had conflicting interests that were not fully disclosed to the board of directors. On the same day, Aphria announced the resignation of Messrs. Cacciavillani, Neufeld, and Cervini from their directorships and executive positions effective March 1, 2019. Aphria also announced that it would adopt new corporate governance and management practices.

[65] On February 19, 2019, Aphria issued a Material Change Report that reported the results of the Special Committee investigation into the LATAM Transaction. The Report announced that Messrs. Neufeld and Cacciavillani were no longer executives and that they were also no longer members of the Board of Directors effective March 1, 2019. In addition, it was announced that Mr. Cervini was removed from the board but would remain with the company only in a non-executive operational capacity. Mr. Cervini was among the Aphria Directors who had previously undisclosed financial interests in the Nuuvera Transaction. He personally made approximately $965,000 on that transaction.

[66] On April 15, 2019, Aphria issued a press release announcing its Q3/2019 financial results. The press release disclosed that, at the insistence of the Ontario Securities Commission, Aphria was taking a write-down of $50 million on the value of its LATAM Transaction assets.

E. The Discontinuance of the Common Law Misrepresentation and the Oppression Remedy Claims and the Claims against Mr. Merton

[67] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, dismissal, or settlement of a class action. Section 29 states:

> *Discontinuance, abandonment, and settlement*
>
> 29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

[68] A motion for discontinuance or abandonment should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose; whether, if necessary, there is a viable replacement party so that putative class members are not prejudiced; or whether the defendant will be prejudiced.[9]

[69] The fundamental concern on a motion for court approval of a discontinuance is that the interests of putative Class Members will not be prejudiced or that any prejudice is mitigated.[10] The test for approving a discontinuance is different from the test for approving a settlement. A discontinuance of a class action does not have to be beneficial or in the best interests of the putative class members; whereas a settlement must, in all circumstances, be fair, reasonable, and in the best interests of the class.[11]

[70] Vecchio and the Aphria Defendants have agreed that the common law claim of negligent misrepresentation and the oppression remedy claim under the Ontario *Business Corporations Act* should be dismissed.

[71] Further, Vecchio and the Aphria Defendants have agreed that all claims should be dismissed as against the Defendant Carl Merton. Vecchio and the Aphria Defendants, including Mr. Merton, agree that Mr. Merton so long as he remains employed by Aphria, will be its representative for the examinations for discovery and if he is no longer employed, he will be examined for discovery for one day if he is not presented as Aphria's discovery representative.

[72] Some of the benefits of the consent order being sought by Vecchio and the Aphria Defendants are: (a) it removes the litigation risk for Secondary Market Class Members that leave and certification will not be granted; (b) it avoids the delay of inevitable appeals of a decision after a contested motion; and (c) it recognizes a global class, such that all eligible Class Members, wherever they reside may benefit from this Class Action.

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[9] *Lam v. Canada Goose Holdings Inc.*, 2021 ONSC 2627; *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).
[10] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*, 2012 ONSC 5288; *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137; *Hudson v. Austin*, 2010 ONSC 2789.
[11] *Frank v. Farlie, Turner & Co*, LLC, 2011 ONSC 7137

[73] In assessing the advantages and disadvantages of the proposed consent order, it may be noted that Aphria's counsel has advised that: (a) Aphria has existing indemnity agreements with Messrs. Neufeld and Cacciavillani; and (b) there is a total of $35 million in Directors' and Officers' insurance, plus an additional $14 million in coverage if certain conditions are met. However, the insurers have reserved rights with respect to allegations of intentional dishonesty against the individual defendants subject to a final finding or admission of such conduct.

[74] It also may be noted that the Plaintiffs' investigations indicate that Messrs. Neufeld and Cacciavillani are persons of considerable financial means. The value of the Aphria shares that they respectively sold and that they still own is estimated to exceed $100 million.

[75] Save for the matter of the calculation of damages being uncapped for a common law negligence claim and possibly differently calculated than the statutory claim, as I noted in *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.* at paragraph 48, from a liability perspective, there is no particular prejudice to the Class in dropping the common law and oppression claims. In that case, I stated:

> 48. In my opinion, from the perspective of establishing liability, there is no particular prejudice to the plaintiffs in abandoning the oppression remedy and the common law negligence claim. Practically speaking, the common law negligence claim and the oppression remedy claims present disadvantages or more difficulties to the plaintiffs than do the statutory claims under Part XXIII.1 of the Ontario *Securities Act*. For example, reliance is an element of the common law negligence claim, and this element may make it more difficult to have the claim certified as a class action. Reliance is not an element of the statutory claim.

[76] In the immediate case, the statutory limits for the claim against the corporate issuer defendant Aphria at between $170 million to $190 million, which is below a common law claim, and the statutory limits for Messrs. Neufeld and Cacciavillani are very modest – unless it is proven as has been pleaded - that they authorized, permitted, or acquiesced in the making of the misrepresentation while knowing it was a misstatement. If this central allegation is proven, the damages cap is removed.

[77] In *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, *supra*, I addressed a similar situation about the discontinuance of claims that might have different and more favourable damages calculations, and I stated at paragraphs 50-51:

> 50. It is unclear, however, if the class members would be giving up much in the way of recoverable damages by forgoing their common law claims. Although the aggregate damages estimated by Professor Cumming might exceed liability limits, there is uncertainty as to whether damages in that higher amount could be proven if the plaintiffs asserted common law and oppression claims. Put simply, the calculation of damages caused by misrepresentations that influence the value of shares trading in a public market is highly contentious. Moreover, for the common law claims, if class members are required to show individual reliance, aggregate damages would be reduced to the extent that class members failed to proffer sufficient evidence of their detrimental reliance.
>
> 51. With respect to the oppression claim, the jurisprudence is undeveloped and there is uncertainty as to whether or not the court would certify an oppression claim in these circumstances. With respect to the common law negligent misrepresentation claim, the jurisprudence is divided on

> whether this claim is amenable to certification. Given the state of the relevant jurisprudence, there is little question that any decision certifying these claims would be appealed.[12]

[78] I adopt those comments to the circumstances of the immediate case.

[79] As for letting Mr. Merton out of the action, because Messrs. Neufeld and. Cacciavillani remain defendants and because Mr. Merton will be available for examination for discovery, there is little to no prejudice to the Class in letting Mr. Merton out of the Action.

[80] Given (a) the causes of action that will be asserted; (b) the liability and litigation risks associated with the claims for which leave to discontinue are being sought; and (c) the advantages, disadvantages, and factors that might lessen the disadvantages to the Class Members, this is an appropriate case to approve the discontinuances and dismissals, and I so order.

F. Leave under Part XXIII.1 of the Ontario *Securities Act*

[81] Under s.138.8 (1) of the Ontario *Securities Act*, leave of the Court is required to assert a statutory misrepresentation cause of action. Section 138.8 (1) reads:

> 138.8 (1) No action may be commenced under s.138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[82] Thus, an action for secondary market misrepresentation under s. 138.3 of the Ontario *Securities Act* requires leave of the Court. Leave will be granted if the Court is satisfied that the action is brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[83] In the leave test, "good faith" has been interpreted to mean that the plaintiff has brought his or her action in the honest belief that he or she has an arguable claim, for reasons that are consistent with the purpose behind the statutory remedy, not for an oblique or collateral purpose, and with the genuine intention and capacity to prosecute the claim if leave is granted.[13]

[84] The reasonable possibility of success requirement of the leave test is a meaningful but low threshold, merits-based test that is more than a superficial examination of the merits of the plaintiff's statutory cause of action, but a meaningful examination of the evidence to ensure that the action has some merit.[14] The leave test is meant to create a robust deterrent screening mechanism with a reasoned consideration of the evidence from both parties so that cases without

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[12] In *Rooney v. ArcelorMittal*, 2018 ONSC 1878; leave to appeal denied 2018 ONSC 5225 (Div. Ct.), an oppression remedy claim was certified in a securities misrepresentation class action in the context of a take-over bid. The case pleaded damages or $1 billion. After eight years of litigation including an appeal to the Court of Appeal, the case settled in 2019 for $6.5 million.

[13] *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 at paras. 107-112; *Silver v. Imax Corp*., [2009] O.J. No. 5573 at para. 308, leave to appeal refused [2011] O.J. 656 (Div. Ct.).

[14] *Bradley v. Eastern Platinum Ltd.*, 2016 ONSC 1903 at para. 51; *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp*., 2014 ONCA 901, aff'g 2013 ONSC 6864; *Green v. CIBC*, 2014 ONCA 90, var'g 2012 ONSC 3637, aff'd 2015 SCC 60, leave to appeal refused [2011] O.J. 656 (Div. Ct.).

merit are prevented from proceeding.[15]

[85] Having reviewed the motion record, I am satisfied that the action has been brought in good faith and that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[86] Accordingly, I grant leave under Part XXIII.1 of the Ontario *Securities Act*.

G. Certification of the Part XXIII.1 of the Ontario *Securities Act* Causes of Action

[87] The Court is required to certify an action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[88] Pursuant to s. 5 (1) of the *Class Proceedings Act, 1992*, having reviewed the motion record, I am satisfied that all of the criteria for certification of the Part XXIII.1 causes of action have been satisfied.

H. Certification of the Part XXIII Causes of Action: Overview

[89] I turn now to the matter of the certification of the claims against the Aphria Defendants and the Underwriters pursuant to s. 130, Part XXIII of the Ontario *Securities Act.*

[90] For the discussion that follows, it is helpful to set out sections 5 (1) and (2) of the *Class Proceedings Act, 1992*, which state:

> *Certification*
>
> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,

[15] *Catucci c. Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870; *Mask v. Silvercorp Metals Inc*., 2016 ONCA 641 at paras. 42-43, aff'g 2015 ONSC 5348; *CIBC v. Green*, 2015 SCC 60 at paras. 120-123, 147, 212; *Theratechnologies Inc. v. 121851 Canada Inc*., 2015 SCC 18 at para. 38.

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
>
> *Idem, subclass protection*
>
> (2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,
>
> (a) would fairly and adequately represent the interests of the subclass;
>
> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
>
> (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

[91] The Aphria Defendants take no position with respect to whether the claim pursuant to s. 130, Part XXIII of the Ontario *Securities Act* against them and the Underwriters should be certified, and the Aphria Defendants have agreed to the common issues for that claim should it be certified.

[92] It is only the Underwriters that oppose the certification of s. 130 Part XXIII statutory cause of action. They do so on two grounds.

[93] First, the Underwriters submit that the certification motion should be dismissed because there is no basis in fact that there are two or more Class Members that have a claim they wish to pursue for misrepresentation pursuant to s. 130 of the Ontario *Securities Act*.

[94] Second, the Underwriters submit that in accordance with the law of Ontario associated with the line of cases *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*.[16] and *Hughes v. Sunbeam Corp. (Canada)*,[17] notwithstanding that Vecchio is eligible to be a Representative Plaintiff to advance a Part XXIII.1 claim under the Ontario *Securities Act*, it is not eligible to be a Representative Plaintiff to assert a claim under Part XXIII of the *Act*.

[95] In making this second argument, the Underwriters dispute Vecchio's arguments that: (a) the *Ragoonanan* line of cases is distinguishable; and (b) the *Ragoonanan* line of cases is no longer good law in Ontario because of the Supreme Court of Canada's decision in the Québec case of *Bank of Montreal v. Marcotte*.[18]

[96] It should be noted that should both arguments fail, the Underwriters do not dispute that Vecchio satisfies all five of the certification criteria. In these circumstances, it is, therefore, not necessary for me to review the law associated with each of the five certification criteria. In the balance of these reasons for decision I shall focus my attention on the Underwriters' two

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[16] (2000), 51 OR (3d) 603 (S.C.J.).
[17] (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal to S.C.C. ref'd [2002] S.C.C.A. No. 446.
[18] 2014 SCC 55, aff'g 2012 QCCA 1396, aff'g J., 2009 QCCS 2764.

arguments.

[97] I foreshadow to say that although there is no merit in the first argument, there is, however, merit in the Underwriters' second argument about the *Ragoonanan* line of cases, which remains good law in Ontario. This line of authority cannot be distinguished, and it has not been overturned by the Supreme Court of Canada's decision in *Bank of Montreal v. Marcotte*. However, there is a solution to what has sometimes been called the *Ragoonanan* Problem. The answer is to recruit an eligible Representative Plaintiff. That solution is appropriate in the immediate case.

[98] Therefore, for the reasons that follow, I shall facilitate finding the solution to the *Ragoonanan* Problem by ordering that each Underwriter deliver within thirty days an affidavit listing their respective purchasers of shares in the $258 million Prospectus Offering.

[99] Therefore, for the reasons that follow, I certify the s. 130 Part XXIII Ontario *Securities Act* cause of action as a class action against the Aphria Defendants (except Mr. Merton) and the Underwriters, conditional upon Class Counsel bringing a motion within one hundred days for the appointment of a Representative Plaintiff for a class of Class Members that purchased Aphria shares in the primary market during the Class Period.

I. Are There Two or More Class Members that have a Claim Pursuant to s. 130 of the Ontario *Securities Act*?

[100] The Underwriters submit that Vecchio has not shown that there is some basis in fact that a class of two or more persons suffered a loss relating to shares purchased in the Prospectus Offering or that two or more persons wish to pursue a claim pursuant to s. 130 Part XXIII of the Ontario *Securities Act*, and, therefore, the Underwriters submit that sections 5(1)(b) (class definition criterion) and 5(1)(d) (preferable procedure criterion) are not satisfied.

[101] From an evidentiary perspective, it is a proven fact that the Underwriters purchased and then sold $258 million worth of shares during the Prospectus Offering. Thus, there is more than some basis in fact, indeed, it is a fact that there is a class of two or more persons that purchased shares in the Prospectus Offering.

[102] From an evidentiary perspective, there is some basis in fact to conclude that two or more of these purchasers from the Underwriters suffered a loss connected to the shares purchased in the Prospectus Offering.

[103] The some-basis-in-fact evidence that there are persons who potentially suffered from purchasing shares from the Prospectus Offering is available from a commonsense inference that if $258 million worth of shares were purchased during the Prospectus Offering, then some of the shares were held and not sold until after the alleged corrective disclosure that occurred in December 2018.

[104] But in the immediate case, there is more than this mundane commonsense inference to establish some basis in fact to think that some prospectus share purchasers shared in the $1.13 billion market value haircut following the corrective disclosure. There is, for instance, the investigation and the expert opinion evidence of economists Dr. Jarrell and Mr. Edwards.

[105] And there is, for instance, the hearsay evidence of Mr. Podolny that the Matco Fund purchased Aphria shares at $11.85 per share pursuant to the Prospectus Offering and sold them

after the December 3-4, 2018, corrective event at $7.18 per share, which is some basis in fact to conclude that there were losses to the prospectus share purchasers.

[106] The Underwriters, however, object to Mr. Podolny's evidence as inadmissible as improper reply (case-splitting) and as coming without leave after the evidentiary record for the certification was closed (contrary to case management direction). Without deciding the point, I shall ignore Mr. Podolny's evidence because it simply gilds the lily of the some-basis-in-fact evidence that is already available from the evidentiary record.

[107] While I do not rely on this thought, I suspect that based on their own sales records, the Underwriters can deduce that some of their customers were harmed by their purchase of Aphria shares. The Underwriters, however, persist in saying that there is no basis in fact to establish an identifiable class for the s.130 Part XXIII of the Ontario *Securities Act* claimants or to establish that a class action would be the preferable procedure to advance their statutory cause of action. The Underwriters persist in saying that sections 5(1)(b) (class definition criterion) and 5(1)(d) (preferable procedure criterion) are not satisfied because they submit that there is no basis in fact that two identified Prospectus Offering purchasers "wish to pursue" a statutory claim against the Underwriters.

[108] There, however, is no merit to this submission for two reasons.

[109] First, there is no requirement at the certification stage of a proposed class action that the putative Class Members be identified. Rather, the requirement of the *Class Proceedings Act, 1992,* s. 5(1)(b), is that there be a class definition by which the Class Members can identify themselves.

[110] In so far as class proceedings go and the identification of class members is an issue, a stock market crash case is not much different than a train crash case. The key identifier is whether the putative Class Member bought a ticket for the ride. In the immediate case, there is no problem with the class definition. There is some basis in fact that two identifiable Class Members took a ride on the stock market roller coaster based on the Prospectus Offering.

[111] Second, and focusing on the preferable procedure criterion, there is no requirement at the certification stage of a proposed class action that the putative Class Members "must wish to pursue" a claim against the Underwriters. In the immediate case, save for the matter of the Representative Plaintiff criteria, which I discuss in the next section of these Reasons for Decision, there is some basis in fact that all the certification criteria including the preferable procedure criterion are satisfied for the Prospectus Offering purchasers.

[112] Amongst the causes of action for which the *Class Proceedings Act, 1992* and Part XXIII of the Ontario *Securities Act* were designed are stock fraud and misrepresentations actions. It is the preferable procedure that provides access to justice, behaviour modification, and judicial economy.

[113] In persisting in their objection that the preferable procedure criterion is not satisfied in the immediate case, the Underwriters rely principally on Justice Nordheimer's decision in *Bellaire v. Independent Order of Foresters*.[19] In this regard, I quote paragraph 49 from the Underwriters' factum, which states [emphasis added by the Underwriters]:

[19] [2004] O.J. No. 2242 (S.C.J.).

> 49. Writing for this Court in *Bellaire v. Independent Order of Foresters*, Justice Nordheimer (as he then was) recognized that the machinery of class actions should only be employed where there is evidence that there is a group of parties that are interested in pursuing an actual complaint:
>
> > In my view, before the extensive process of a class proceeding is engaged, **it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process.** The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

[114] There, however, is no requirement in the *Class Proceedings Act, 1992* that the plaintiff to obtain certification must show some basis in fact that there is a "real and subsisting group who are desirous to having their common complaint determined" and *Bellaire v. Independent Order of Foresters* is an example of one of those relatively rare cases where Class Counsel trips and stumbles and cannot manage to step over the low hurdle of showing some basis in fact that a common complaint even exists.[20]

[115] The case at bar where there was an approximately $1.13 billion crash in the stock market value of Aphria's shares is not remotely like *Bellaire v. Independent Order of Foresters.*

[116] Earlier in his judgment in *Bellaire v. Independent Order of Foresters*, Justice Nordheimer stated at paragraph 27:

> 27. […] Section 5(1)(b) requires an identifiable class of two or more persons. In my view, that entails placing evidence before the court that there are other individuals who both share the same complaint as that of the plaintiff and wish to have the complaint litigated through the mechanism of a class proceeding, save and except for those factual situations where the existence of such other individuals is obvious.

[117] Unlike *Bellaire v. Independent Order of Foresters,* the immediate case is one of those factual situations where the existence of two or more persons who share the same complaint of purchasing Aphria shares under the misapprehension that the prospectus was honest and true is obvious.

[118] What the *Class Proceedings Act, 1992* is designed to do is to provide the putative Class Members one of three possible choices; namely: (a) the choice to participate in the certified class action and be a Class Member; (b) the choice to opt-out of the certified class action and sue the defendant with counsel of one's own selection; or (c) the choice to opt-out of the certified class action and do nothing either because the putative Class Member suffered no loss or because for idiosyncratic reasons they are not inclined to pursue a remedy for the loss.

[119] If in the immediate case it is true that there are no purchasers that wish to pursue a statutory claim, then they will all opt out and the Underwriters can move to have the class action decertified. This is hardly likely to occur and as far as I am aware it has never occurred in a stock fraud or stock misrepresentation class action.

[120] For the obvious reason that there is nothing to lose and something to gain by not opting out, opt-outs are rare in any kind of class action if the certification criteria are satisfied. But for the matter of whether there is a Representative Plaintiff to assert the statutory cause of action, I

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[20] See for examples, *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744, aff'd 2013 ONSC 1169 (Div. Ct.); *Chartrand v. General Motors Corporation*, 2008 BCSC 178; *Lau v. Bayview Landmark Inc*., [1999] O.J. No. 4060.

conclude that all of the certification criteria are satisfied in the action pursuant to s. 130 Part XXIII of the Ontario *Securities Act* as against the Aphria Defendants and against the Underwriters.

J. The *Ragoonanan* Problem

Introduction

[121] From an evidentiary perspective, it is a proven fact Vecchio did not purchase shares in the Prospectus Offering and that it is not a member of a class of two or more persons that suffered a loss relating to shares purchased in the Prospectus Offering. It is a proven fact that Vecchio is not a member of the class of persons who did purchase shares from the Prospectus Offering.

[122] In the immediate case, the Underwriters rely on the *Ragoonanan Principle* to submit that the Class Members' cause of action pursuant to s. 130 Part XXIII of the Ontario *Securities Act* cannot be certified because, at present, there is no plaintiff who has a cause of action against them. Technically speaking, the argument is that the cause of action criterion (s. 5(1)(a)) of the *Class Proceedings Act, 1992* and the Representative Plaintiff criterion (s. 5(1)(e)) are not satisfied and, therefore, the statutory action should not be certified.

[123] The Underwriters submit that although Vecchio may qualify as a Representative Plaintiff for the causes of action pursuant to Part XXIII.1 of the Act, nevertheless, it is not eligible to be the Representative Plaintiff for the cause of action under Part XXIII, because Vecchio does not itself have a claim under Part XXIII against either the Aphria Defendants or more particularly against the Underwriters. Vecchio is not a member of the class that it would purport to represent.

[124] Although it is undoubtedly true that Vecchio itself does not have a cause of action pursuant to s. 130 of the Ontario *Securities Act* against either the Aphria Defendants or the Underwriters, Vecchio argues that, properly understood, the *Ragoonanan Principle* does not disqualify it from being a Representative Plaintiff for the Class Members who do have a s. 130 statutory cause of action. Further, Vecchio argues that the *Ragoonanan Principle* has been overturned by the Supreme Court of Canada's decision in the Québec case of *Bank of Montreal v. Marcotte*.[21]

[125] It is and was not fanciful nor meritless that Class Counsel would argue that either the *Ragoonanan Principle* is distinguishable or that the principle from *Bank of Montreal v. Marcotte* could and should be applied in the immediate case. However, as I shall explain in this part of my reasons for judgment, I agree with the conclusion of the Underwriters' arguments that the *Ragoonanan Principle* continues to apply in Ontario and that it has not been overturned by *Bank of Montreal v. Marcotte*.

[126] Where, however, I part company with Underwriters is I disagree with their argument that Class Counsel should not be given an opportunity to recruit an eligible Representative Plaintiff to assert causes of action against the five Underwriters who have been joined as defendants. That approach is the conventional answer to the problems posed in practice by the *Ragoonanan Principle.*

[21] 2014 SCC 55, aff'g 2012 QCCA 1396, aff'g J., 2009 QCCS 2764.

[127] My explanation for why the *Ragoonanan Principle* still applies shall have five parts. First, I shall analyze the development of the *Ragoonanan Principle* from first principles. Second, I shall analyze the case law before the *Bank of Montreal v. Marcotte* decision. Third, I shall analyze the lower and appellate court decisions in *Bank of Montreal v. Marcotte*. Fourth, I shall examine the case law after *Bank of Montreal v. Marcotte,* including *Catucci c. Valeant Pharmaceuticals International Inc.*[22] Fifth, I shall discuss the solution to the *Ragoonanan* problem in the immediate case.

1. The Development of the *Ragoonanan Principle* from First Principles

[128] The so-called *Ragoonanan Principle* is that for a cause of action against a defendant to be certified under the *Class Proceedings Act, 1992,* there must be a Representative Plaintiff who personally has a cause of action against that defendant.

[129] As developed by the cases, discussed below, a corollary of the *Ragoonanan Principle* is that if a plaintiff has a cause of action against one defendant but no cause of action against a co-defendant, then for the cause of action against the co-defendant to be certified, there must be another plaintiff with a cause of action against the co-defendant and who thus would qualify to be a Representative Plaintiff against the co-defendant.

[130] As developed by the cases, discussed below, it is more a premise of and not so much a corollary of the *Ragoonanan Principle*, but if a plaintiff has no cause of action against any defendant, then he or she does not qualify to be a Representative Plaintiff against any defendant.

[131] To understand the *Ragoonanan Principle* and its corollary, it is necessary first to place the principle in the context of Ontario's *Rules of Civil Procedure*[23] and of Ontario's *Class Proceedings Act, 1992*, which is a procedural statute that does not create substantive rights or liabilities.[24] It is also helpful to place the *Ragoonanan Principle* in the context of Rule 75 of the former *Rules of Practice,*[25] the procedural provision for representative actions, that the *Class Proceedings Act, 1992* was designed to replace.

[132] Within this context, it quickly becomes apparent that the *Ragoonanan Principle* is an aspect of the law of civil procedure that governs the joinder of causes of actions and of parties.

[133] Rule 75 of the former *Rules of Practice* stated:

> 75. Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

[134] The relevant *Rules of Civil Procedure* are rules 5.01 to 5.05, which are the rules about the joinder of parties and of causes of action. These rules state:

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[22] 2017 QCCS 3870, leave to appeal denied, *Goldman, Sachs & Co. c. Catucci*, 2017 QCCA 1890.
[23] R.R.O. 1990, Reg. 194.
[24] *Bisaillon v. Concordia University,* 2006 SCC 19 at paras. 17-22; *Hollick v. Toronto (City),* [2001] 3 SCR 158; *Stone v. Wellington (County) Board of Education* (2000), 51 OR (3d) 603 at para. 48 (S.C.J.).
[25] R.R.O. 1980, Reg. 540.

PARTIES AND JOINDER

RULE 5 JOINDER OF CLAIMS AND PARTIES

Joinder of Claims

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

Joinder of Parties

Multiple Plaintiffs or Applicants

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

> (a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding; or
>
> (c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

Multiple Defendants or Respondents

(2) Two or more persons may be joined as defendants or respondents where,

> (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding;
>
> (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
>
> (d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or
>
> (e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

JOINDER OF NECESSARY PARTIES

General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

Claim by Person Jointly Entitled

(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.

Claim by Assignee of Chose in Action

(3) In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,

(a) the assignment is absolute and not by way of charge only; and

(b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.

Power of Court to Add Parties

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

Party Added as Defendant or Respondent

(5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.

Relief Against Joinder of Party

(6) The court may by order relieve against the requirement of joinder under this rule.

Misjoinder, Non-joinder and Parties Incorrectly Named

Proceeding not to be Defeated

5.04 (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties.

Adding, Deleting or Substituting Parties

(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

Adding Plaintiff or Applicant

(3) No person shall be added as a plaintiff or applicant unless the person's consent is filed.

Relief Against Joinder

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

> (c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;
>
> (d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or
>
> (e) make such other order as is just.

[135] The relevant provisions of the *Class Proceedings Act, 1992* that address the matter of the joinder of causes of action and parties are sections 2, 5, 6, 7, 12 and 35 of the Act, which state:

> *Plaintiff's class proceeding*
>
> 2. (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.
>
> *Motion for certification*
>
> (2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.
>
> […]
>
> *Certification*
>
> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
>
> […]
>
> *Certain matters not bar to certification*
>
> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different class members.
>
> 3. Different remedies are sought for different class members.
>
> 4. The number of class members or the identity of each class member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.
>
> *Refusal to certify: proceeding may continue in altered form*
>
> 7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or notice of application; and
>
> (c) make any further order that it considers appropriate.
>
> […]
>
> *Court may determine conduct of proceeding*
>
> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> […]
>
> *Rules of court*
>
> 35. The rules of court apply to class proceedings.

[136] As a progressive application of first principles from the *Rules of Civil Procedure* and from the *Class Proceedings Act, 1992,* about the joinder of parties and causes of action, it can be demonstrated how the *Ragoonanan Principle* and its corollaries emerge and were developed.

[137] Visualize the first scenario. A group of claimants, {P1…P(x)} all have a grievance or grievances with "D1" and also with "D2". "P1," a member of the group, asserts his or her causes of action against D1 and D2. Under the *Rules of Civil Procedure*, P1 is entitled to join multiple causes of action against multiple defendants. If the rest of the group, {P1…P(x)} hired the same lawyer, the group members' grievances against D1 and D2 could be joined to P1's causes of action against D1 and D2. This is a joinder collective action by {P1…P(x)} against the co-defendants.

[138] Visualize the second scenario. A group of claimants, {P1…P(x)} all have a grievance or grievances with "D1" and with "D2". "P1", a member of the group, asserts his or her causes of action against D1 and D2. P1 also wishes to assert the causes of action of the rest of the group, {P1…P(x)} against D1 and D2. The rest of the group, however, have not hired the same lawyer and in these circumstances, P1 requires a representation order to assert the causes of action of the

group of which he is a member.

[139] For the second scenario, under the former *Rules of Practice*, for P1 to sue on behalf of his or her group, he or she would need a representation order under Rule 75 which was rarely available.

[140] For the second scenario, with the enactment of the *Class Proceedings Act, 1992*, P1 needs to be appointed a Representative Plaintiff with his or her lawyer being appointed Class Counsel for {P1…P(x)}. Subject to their right to opt-out, the group members are joined as Class Member parties to advance their various joined causes of action. Pursuant to s. 2 of the *Class Proceedings Act, 1992*, P1 qualifies to seek a representation order because P1 is a member of a class of persons who may commence a proceeding in the court on behalf of the members of the class.

[141] Visualize the third scenario. A group of claimants, {P1… P(x)} all have a grievance or grievances with "D1". A different group of claimants, {C1… C(x)} all have a grievance or grievances with "D2". "P1", a member of the first group - but not a member of the second group, asserts his or her causes of action against D1. P1 also wishes to assert the causes of action on behalf of both {P1…P(x)} against D1 and also on behalf of {C1… C(x)} against D2. The members of both groups, however, have not hired the same lawyer, and in these circumstances, P1 requires a representation order to assert the causes of action of for both groups.

[142] It is for this third scenario that under the *Class Proceedings Act, 1992*, the *Ragoonanan Principle* emerges. While P1 can qualify to be a Representative Plaintiff for the members of the first group of which he is a Class Member, P1 does not qualify to be a Representative Plaintiff for a group of which he is not a Class Member.

[143] The explanation for the disqualification is to be found in section 2 of the Act, which prescribes that only a member of a class may commence an action on behalf of the other members of the class. P1 is not a member of {C1… C(x)} and thus P1 does not qualify to seek certification. A co-plaintiff, who is a member of {C1…C(x)} needs to step up to be a Representative Plaintiff.

[144] It is interesting and informative to note that but for the need for a representative order and but for section 2 of the *Class Proceedings Act, 1992*, it might have been possible to have the causes of action of the members of {C1… C(x)} against D2 joined to the causes of action of {P1… P(x)} against D1 if there was a co-plaintiff. In this regard, P1 could not join D2 to P1's action against D1 pursuant to rule 5.01(1) or rule 5.03 (1) because P1 has no claim against D2, and D2 is not a necessary party to P1's action against D1; however, if there was a co-plaintiff, the causes of action of {C1… C(x)} against D2 might have been joined pursuant to rule 5.02 (2)(a)(b), the rule that provides for the multiple joinder of defendants where: (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences; or (b) a common question of law or fact may arise in the proceeding. However, while the joinder of the causes of action of {C1… C(x)} is permissible, one of {C1… C(x)} would have to step up to be a co-plaintiff.

[145] Returning to the case at bar, the above analysis reveals that as a matter of first principles, the Underwriters' argument is sound that Vecchio does not qualify to be a Representative Plaintiff to assert the s. 130 Part XXIII of the Ontario *Securities Act* statutory causes of action.

[146] The above analysis also reveals and explains why the availability of a representative plaintiff is different in other provinces where the class action legislation contains a provision like s. 4(4) of Saskatchewan's *Class Actions Act*,[26] which states:

> 4(4) Where it is necessary to do so in order to avoid a substantial injustice to the class, the court may appoint a person who is not a member of the class as the representative plaintiff for the class action.

[147] Such a provision makes it easy to interpret the class action legislation to not require a representative plaintiff with a cause of action against each defendant. Thus Alberta,[27] British Columbia,[28] Manitoba,[29] and Saskatchewan[30] have declined to follow the *Ragoonanan Principle*.

2. The Case Law Before *Bank of Montreal v. Marcotte*

[148] The source of the *Ragoonanan Principle* is often attributed to *Stone v. Wellington (County) Board of Education*.[31] In this proposed environmental harm class action, Ms. Stone sued the City of Guelph, the Wellington Board of Education, and the Province of Ontario. On a motion pre-certification pursuant to Rule 21 of the *Rules of Civil Procedure*, Justice McKenzie dismissed the action because Ms. Stone's claim was statute-barred. However, it is pertinent to note that he did so without prejudice to the parties, including those persons described in the statement of claim as putative class members. It would be possible to reconstitute the action.

[149] Ms. Stone appealed to the Court of Appeal. In a brief 13-paragraph endorsement, the Court of Appeal dismissed the appeal. It stated at paragraphs 9 and 10:

> 9. […], the *Class Proceedings Act, 199*2 contemplates that the claims of the class members raise common issues (s. 51(c)) and that the representative plaintiff who commences the action is a member of the class (s. 2(1)).
>
> 10. Where a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class. The continuation of the action in those circumstances would be inconsistent with the clear legislative requirement that the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome.

[150] Several aspects of *Stone v. Wellington (County) Board of Education*, including the practice point that the *Rules of Civil Procedure* apply to class proceedings and that a Rule 21 motion could be brought before certification, were applied in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*.[32]

[151] The facts of *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*. were that Philip Ragoonanan was smoking a cigarette manufactured by Imperial Tobacco and he fell asleep on a coach in his sister Davina Ragoonanan's house. Philip's unextinguished cigarette set the couch

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[26] S.S. 2001, c. C-12.01.
[27] *Eaton v. HMS Financial Inc*., 2008 ABQB 631; *Alberta Society for Pension Reform v. Alberta*, 2008 ABQB 74; *Gillespie v. Gessert*, 2006 ABQB 949; *Condominium Plan No. 0020701 v. Investplan Properties Inc*., 2006 ABQB 224; *Pauli v. ACE INA Insurance*, 2002 ABQB 715.
[28] *MacKinnon v. National Money Mart Co*., 2004 BCCA 472,
[29] *Bellan v. Curtis*, 2007 MBQB 221.
[30] *Alves v. Sunquest*, 2011 SKCA 117.
[31] [1999] O.J. No. 1298 (C.A.), leave to appeal to S.C.C. ref'd [1999] S.C.C.A. No. 336.
[32] (2000), 51 O.R. (3d) 603 (S.C.J.).

on fire and then the house on fire. Philip, Davina's three-year old daughter, Jasmine, and Ranuka Baboolal, the 15-year-old daughter of Vashti Baboolal died in the house fire. Ms. Ragoonanan and Ms. Baboolal commenced a class action against Imperial Tobacco. They joined two other cigarette manufacturers, Rothmans, Benson & Hedges ("Rothmans") and JTI-MacDonald Inc. ("MacDonalds") as co-defendants. The theory of the plaintiffs' design negligence products liability lawsuit was that the cigarette manufacturers owed a duty of care to the Class Members to manufacture so-called "fire safe" cigarettes. The Co-defendants brought a pre-certification Rule 21 motion to have Ms. Ragoonanan's and Ms. Baboolal's action dismissed for failure to disclose a reasonable cause of action.

[152] Justice Cumming allowed the proposed class action to continue against Imperial Tobacco because he concluded that the plaintiffs had pleaded a reasonable design negligence cause of action. Justice Cumming, however, dismissed the plaintiffs' action as against the co-defendants Rothmans and MacDonalds. His reasons for doing so and the articulation of the *Ragoonanan Principle* are found in paragraphs 50 and 52-56 of his reasons for decision, where he stated:

> 50. The essence of a class proceeding is that it is an action with a representative plaintiff on behalf of a group of persons (a class) who have a cause of action in respect of which there are common issues of fact or law. It is axiomatic that the representative plaintiff must have a cause of action against a defendant in the action. A "plaintiff" is, by definition, someone who brings an action against a defendant because of an asserted cause of action against the defendant. The pleading must disclose a "reasonable cause of action" in law. Otherwise, there is no good reason to utilize the machinery of the courts and the proceeding should be brought to an end.
>
> […]
>
> 52 Looked at in the context of the motion for certification there is arguably not a prerequisite required by s. 5(1)(a) to have a representative plaintiff with a cause of action against each defendant. For the purposes of certification, it may be enough if the pleading provides that class members have a cause of action against the defendants and there is at least one representative plaintiff. […]
>
> 53 It is not necessary to offer any definitive interpretation for s. 5(1)(a) of the CPA in the context of the rule 21 motion at hand. As I have said, it is recognized that the requirements of rule 21 and the procedural regime for class proceedings determined by the provisions of the CPA should be consistent one with the other.
>
> 54 In my view, and I so find, it is not sufficient in a class proceeding, for the purpose of meeting the requirement of rule 21.0(1)(b), if the pleading simply discloses a "reasonable cause of action" by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants.
>
> 55. At the earlier point in time of the rule 21.01(1)(b) motion, the representative plaintiff is the only plaintiff party to the pleading. The putative class members cannot be considered parties until certification is granted by the court. In addition, in the case at hand there cannot be any certainty that there are any persons with a cause of action against [Rothmans] and [MacDonalds]. There can not be a cause of action against a defendant without a plaintiff who has that cause of action. In my view, for every named defendant there must be a party plaintiff with a cause of action against that defendant to meet the rule 21 threshold.
>
> 56. This result does not inhibit class proceedings with multiple defendants when there is a generic product (or generic defect) in issue, so long as the pleading discloses a reasonable cause of action against each defendant by a representative plaintiff. The rule 21.01(1)(b) motion of course precedes any certification motion. The determination of this rule 21.01(1)(b) motion is without prejudice to a representative plaintiff with a cause of action against [Rothmans and MacDonalds]

> bringing a new class proceeding and seeking an order for joinder with the action at hand. Until there is a plaintiff who has such a cause of action, it is entirely speculative as to whether there is anyone with such a claim. A defendant should not be made subject to a speculative claim which presumes that one or more unknown persons possibly has a cause of action. It would be wrong to put a defendant to the expense of the litigation process if there is no reasonable cause of action against that defendant on the face of the pleading.

[153] It may be noted that Justice Cumming did not come to his conclusion that "for every named defendant there must be a party plaintiff with a cause of action against that defendant" as a matter of the *Class Proceedings Act, 1992* imposing that requirement. Rather, he decided that this was a requirement of Rule 21(1)(b) of showing a reasonable cause of action and that this requirement did not get in the way of class actions against multiple defendants.

[154] It should also be noted that Justice Cumming provided the solution for any problems associated with the *Ragoonanan Principle.* The solution was to join a co-plaintiff(s) who did have a cause of action against the co-defendant(s).

[155] In *Boulanger v. Johnson & Johnson Corp.*,[33] Justice Nordheimer agreed with the *Ragoonanan Principle,* but he held that the principle did not apply to the factual situation of that case. In *Boulanger v. Johnson & Johnson Corp.,* the plaintiff had a reasonable pharmaceutical products liability negligence claim against all of the defendants who manufactured the drug, but the putative class members had different claims for relief than the plaintiff. Justice Nordheimer concluded that a representative plaintiff who had a cause of action against a defendant(s) could act on behalf of Class Members who had different causes of action against the same defendant(s).

[156] Justice Nordheimer's reasoning is set out at paragraphs 24 to 27 of his Reasons for Decision, where he stated:

> 24. To resolve this issue, I go back to the provisions of the *Class Proceedings Act, 1992*. Section 2(1) of the Act states:
>
> > One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.
>
> 25. The use of the words "on behalf of" would suggest that it was intended under the Act that the representative plaintiff would advance claims for class members which the representative plaintiff might not have in his or her own personal capacity. I am reinforced in my conclusion in this regard by the provisions of section 6 of the Act.
>
> 26. Section 6 of the Act states: [see above]
>
> 27. The second and third grounds in section 6 refer to "separate contracts" and "different remedies" as not being reasons to refuse to certify a class action. If these are not grounds to refuse to certify a class action, then it follows that the statute must recognize that such claims might be advanced in a class action. Further, if these are not grounds to deny certification, then it would seem contradictory to conclude that they are matters which a class action could not even pursue. For example, if there are separate contracts, then clearly the representative plaintiff would not have a cause of action based on a contract separate from his or her own contract. Yet it is implicit in section 6 that such claims would be advanced in a class action otherwise it would not have been necessary to provide that the fact that such claims were based on separate contracts, and therefore separate causes of action, could not, in and of itself, preclude certification. The same appears to be true regarding the provision that the mere fact that different remedies are sought is not a bar to

[33] [2002] O.J. No. 1075 (S.C.J.), aff'd [2003] O.J. No. 1374 (Div. Ct.)

> certification. While different remedies might arise from the same cause of action, equally they could arise from different causes of action but again the Act implicitly accepts that that state of affairs may arise in a class action.

[157] In affirming Justice Nordheimer's decision, Justice J. MacDonald for the Divisional Court stated at para. 30:[34]

> The CPA, in ss. 2(1), authorizes "one or more members of a class of persons" to commence a proceeding "on behalf of the members of the class". Nordheimer J. stated herein that the words "on behalf of" demonstrate that the legislature intended to authorize a representative plaintiff to advance claims for class members which the representative plaintiff might not have in her personal capacity. I agree with this conclusion.

[158] Strictly speaking, the Divisional Court's decision in *Boulanger* is not binding authority that the *Ragoonanan Principle* is the governing principle on certification motions, because it is rather binding authority about a circumstance when the *Ragoonanan Principle* does not apply.

[159] The *Boulanger* line of cases stands for the proposition that if a plaintiff has a cause of action against a defendant, then the plaintiff qualifies to be a Representative Plaintiff for the Class Members who have the same or different causes of action against the defendant. In other words, a Representative Plaintiff need not have the same causes of action as the Class Members he or she represents, and their different causes of action can be joined to the Representative Plaintiff's causes of action against the common defendant. In short, the *Ragoonanan Principle* does not apply to this circumstance which involves differences amongst Class Members *vis à vis* the same target defendant.

[160] The honour of binding appellate authority about the *Ragoonanan Principle* goes to the Ontario Court of Appeal's decision in *Hughes v. Sunbeam Corp. (Canada)*,[35] which, as it happens, was an appeal of another decision by Justice Cumming.

[161] In *Hughes v. Sunbeam Corp. (Canada)*, Mr. Hughes sued First Alert Inc., BRK Brands, and Pittway Corp., and their parent corporation *Sunbeam Corp. (Canada)* for design negligence with respect to an allegedly defectively designed smoke detector. Mr. Hughes purchased his allegedly defective smoke detector from First Alert, and Justice Cumming applied the *Ragoonanan Principle* to strike the claims against BRK Brands, Pittway Corp., and Sunbeam Corp. The appeal to the Court of Appeal was dismissed; Justice Laskin stated at paragraphs 16 and 18:

> 16. Here, as the motions judge said, Hughes cannot claim to have a reasonable cause of action against the defendant manufacturers who did not manufacture the smoke alarm he purchased. He cannot resist a rule 21.01(1)(b) motion by alleging that some as yet unknown members of a proposed class may have a cause of action against these other manufacturers if the class action is certified. See also *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (Ont. S.C.J.) per Cumming J.
>
> […]
>
> 18. In Ontario a statement of claim must disclose a cause of action against each defendant. Thus, in a proposed class action, there must be a representative plaintiff with a claim against each defendant. Hughes, therefore, may not maintain his action against Sunbeam, BRK Brands and Pittway.

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[34] [2003] O.J. No. 1374 (Div. Ct.).
[35] (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal to S.C.C. ref'd [2002] S.C.C.A. No. 446.

[162] After *Hughes v. Sunbeam Corp. (Canada)*, up until *Bank of Montreal v. Marcotte*,[36] the subsequent case law about plaintiffs in Ontario suing co-defendants against whom they have no direct claim can be classified and explained as three types of cases; namely:

> (a) cases where the plaintiff has no claim against any defendant, because the claim never existed or if it existed was statute-barred, and therefore the plaintiff is not eligible to be a plaintiff, much less a representative plaintiff;[37]
>
> (b) cases where the *Ragoonanan Principle* is applied and or solved by the presence of properly correlated representative plaintiffs and defendants or by the recruitment or substitution of a co-plaintiff(s) to be a representative plaintiff against the co-defendant(s);[38] and,
>
> (c) cases where the principle from *Boulanger v. Johnson & Johnson Corp.* is applied and the recruitment of another plaintiff is unnecessary.[39]

3. ***Bank of Montreal v. Marcotte***

[163] *Bank of Montreal v. Marcotte*[40] was a Québec class action pursuant to the *Code of Civil Procedure*.[41] Mr. Marcotte had credit cards with the Bank of Montreal ("BMO") and the Fédération des caisses Desjardins du Québec ("Desjardins"). Mr. Marcotte alleged that BMO and Desjardins had made charges for the conversion of payments in foreign currencies in contravention of Québec's *Consumer Protection Act*.[42] He brought a class action against BMO and Desjardins and eight other Canadian banks carrying on business in Québec for refunds of the illegal charges.

[164] Mr. Marcotte's action was authorized, which is to say certified as a class action, against all ten banks without prejudice to the group of eight banks challenging Mr. Marcotte's standing to sue them at the trial of the merits. In a decision upheld by the Québec Court of Appeal, Justice Gascon found that the banks were liable and that in the class proceeding, Mr. Marcotte had the standing to sue on behalf of the cardholders of the eight banks with which Mr. Marcotte had no direct relationship.

[165] For reasons that differed in part from the courts below, in a judgment written by Justices Rothstein and Wagner, the Supreme Court upheld Justice Gascon's decision. The Supreme Court disagreed with the courts below that it was the authorization that gave Mr. Marcotte the standing to sue banks with which he did not have a personal right of action.

[166] Rather, Justices Rothstein and Wagner stated that Article 55 of Québec's *Code of Civil*

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[36] 2014 SCC 55, aff'g 2012 QCCA 1396, aff'g J., 2009 QCCS 2764.
[37] *Menegon v. Philip Services Corp.*, [2001] O.J. No. 5547 (S.C.J.), aff'd [2003] O.J. No. 8 (C.A.).
[38] *Workman Optometry v. Aviva Insurance*, 2021 ONSC 142; *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819; *Heron v Guidant Corporation*, [2008] O.J. No. 48 (Div. Ct.).
[39] *Kuiper v. Cook (Canada) Inc*., 2018 ONSC 6487 at para. 209; *Simmonds v. Armtec Infrastructure Inc*., 2012 ONSC 44 at para. 70; *Smith v. Sino-Forest Corporation*, 2012 ONSC 24, at para. 269; *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25; *McCann v. CP Ships Limited*, [2008] O.J. No. 5957 (S.C.J.); *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *Matoni v. C.B.S. Interactive Multimedia Inc*., [2008] O.J. No. 197 (S.C.J.); *Dobbie*; *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (S.C.J.).
[40] 2014 SCC 55, aff'g 2012 QCCA 1396, aff'g J., 2009 QCCS 2764.
[41] CQLR, c. C-25, art. 55.
[42] CQLR, c. P-40.

Procedure permitted a collective action (*i.e.,* a class proceeding) with a representative plaintiff who did not have a direct cause of action against or a legal relationship with each defendant. They said that Article 55 of Québec's *Code of Civil Procedure*, 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 Article 4.2 of Québec's *Code of Civil Procedure.* The key passage in Justice Rothstein's and Wagner's judgment is paragraph 32, which states:

> 32. […] 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. Dalphond J.A. 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.

[167] Vecchio, in the immediate case, submits that although the statement of law in paragraph 32 was made in a Québec class action under the Québec *Code of Civil Procedure*, it is a general statement of law that is applicable to all Canadian class actions including Ontario class actions. If this is correct, then the Supreme Court's decision would overturn the *Ragoonanan Principle*.

[168] In making this submission that the *Ragoonanan* line of cases is no longer good law in Ontario, Vecchio points out the next paragraph of Justices Rothstein and Wagner's judgment, where they state:

> 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).

[169] Vecchio's submission has to be taken very seriously because class action jurisprudence has developed into a genuinely national jurisprudence where Supreme Court of Canada decisions on appeals from any province have shaped the procedural law about class actions and collective actions uniformly across the country. Thus, it is certainly possible that a case out of Québec can yield a Supreme Court of Canada decision that is binding in the class action regimes across the country.

[170] However, while this is certainly juridically possible, it is not inevitable that all Supreme Court of Canada class action or collective action decisions establish a general country wide precedent. Thus, while I take Vecchio's submission seriously, in my opinion, the Supreme Court of Canada's decision in *Bank of Montreal v. Marcotte* cannot be read as a decision meant to have any effect outside of Québec.

[171] Justices Rothstein and Wagner obviously knew that in Ontario a direct cause of action between a representative plaintiff and a defendant was required. But they also would have known that "a sufficient interest" measure was not a part of the *Class Proceedings Act, 1992* as it is a measure of standing in the Québec *Code of Civil Procedure*. Justices Rothstein and Wagner do

not analyze or interpret the Ontario statute, and they do not suggest that the *Ragoonanan Principle* is wrong. After paragraphs 32 and 33 of their judgment, they return to an in-depth analysis of only the Québec *Code of Civil Procedure.* In this regard, the key passage in their judgment is paragraph 43, which only focusses on the *Code*, states:

> [43] Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action. The focus under art. 1003 of the *CCP* is on whether there are identical, similar or related questions of law or fact; whether there is someone who can represent the class adequately; whether there are enough facts to justify the conclusion sought; and whether it is a situation that would be difficult to bring with a simple joinder of actions under art. 67 of the *CCP* or via mandatary under art. 59 of the *CCP*. As noted in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, this Court has given a broad interpretation and application to the requirements for authorization, and "the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation" (para. 60). Article 1003(*d*) still requires the representative plaintiff to be "in a position to represent the members adequately". Under this provision, the court has the authority to assess whether a proposed representative plaintiff could adequately represent members of a class against defendants with whom he would not otherwise have standing to sue. [my emphasis added]

[172] That the approach Justices Rothstein and Wagner were advocating for Québec was consistent with "most other jurisdictions" cannot be taken as a criticism of Ontario's approach. As mentioned in the discussion of first principles above, the approach to joinder in other provinces can be explained based on express provisions in those jurisdictions that empower the court to appoint a representative plaintiff who does not have a direct cause of action "where it is necessary to do so in order to avoid a substantial injustice to the class." Thus, it is a more a matter of coincidence than consistency that the approach in Québec now falls in line with the approach in British Columbia, Alberta, Saskatchewan, and Manitoba.

[173] Further, also as explained in the discussion of first principles above, in Ontario, there are indications in the *Class Proceedings Act, 1992* that by the key operative section 2, the Legislature baked the *Ragoonanan Principle* into the Act. Thus, while all the class action statues are similar, the Ontario statute is different than the statutes in British Columbia, Alberta, Saskatchewan, Manitoba, and Québec on the matter of the *Ragoonanan Principle*. It becomes clear that the decision in *Bank of Montreal v. Marcotte* is a decision of particular application for Québec and not for the rest of Canada.

[174] Moreover, there are some positive policy features of the *Ragoonanan Principle*, and, as explained above in the discussion of the development of the principle, there are solutions to the problems posed by the *Ragoonanan Principle*.

[175] One positive feature of the *Ragoonanan Principle* is that it ensures that a representative plaintiff is a prototypical, characteristic, exemplification of the class members for whom he or she is a proxy and more than just a spokesperson. In this regard, it needs to be recalled that the Class Members who do not opt out are bound by the outcome of the common issues trial or settlement of the class action. In Ontario, a representative plaintiff because he or she is an actual member of the class is not an outsider like Class Counsel, another kind of representative and spokesperson for the class.

[176] It is informative and important to note that although Justice Cumming does not mention it in *Ragoonanan*, the policy decision that underlies *Ragoonanan* was a deliberate and considered

decision of the Ontario Legislature based on the recommendation of the Ontario Law Reform Commission in its *Report on Class Actions* (Ministry of the Attorney General, 1982). The Law Reform Commission stated at pages 349-350 of its report:

> The major argument in favour of a requirement that the class representative be a member of the class is that self-interest will help to ensure adequate representation for the class members. On the other hand, it may be contended that a personal stake in the litigation does not necessarily ensure adequate representation. Since many class actions will involve claims that are small in amount, the self-interest argument cannot be taken too far. Conversely, if the class representative's claim is a large one, his self-interest may ensure that his interests are advanced perhaps to the detriment of the other class members.
>
> While there may be some truth in the view that if the class representative has a personal stake in the action, the other class members are likely to benefit therefrom, it may be argued that the absence of a personal stake, or the lack of individual standing does not mean that the interests of the class will be protected or even that the interests of the class will be protected to a lesser degree. […]
>
> From the above discussion, it would appear that the arguments respecting the need for the class representative to be a member of the class are equally balanced. […]
>
> We have considered carefully the particular issue and have concluded that except where the Attorney General assumes the role of representative plaintiff, the proposed *Class Proceedings Act* should require that the class representative be a member of the class on whose behalf the action is brought. […]

[177] To conclude before moving on to discuss the case law after *Bank of Montreal v. Marcotte*, the point to emphasize is that the Supreme Court's decision does not purport to discuss Ontario's *Class Proceeding Act, 1992* and Justice Rothstein's and Wagner's judgment cannot be read as overturning the *Ragoonanan Principle* or the policies that underlie the *Ragoonanan Principle.*

4. The Case Law after *Bank of Montreal v. Marcotte*

[178] For present purposes, the discussion of the case law after *Bank of Montreal v. Marcotte* can be brief. As far as I am aware, the case at bar is a first instance decision about whether *Bank of Montreal v. Marcotte* has changed the law in Ontario about the *Ragoonanan Principle*. Justice Belobaba in *Workman Optometry v. Aviva Insurance*[43] and I in the carriage decision in *Kowalyshyn v. Valeant Pharmaceuticals International, Inc*.[44] have observed that the Supreme Court's decision might have changed the law but neither of us said anything substantive or determinative. As the discussion above reveals, my considered decision is that the *Ragoonanan Principle* is alive and well in Ontario.

[179] Relying on its argument that *Bank of Montreal v. Marcotte* did change the law, Vecchio submits that in the immediate case, the court should follow the lead of Justice Chatelain in *Catucci c. Valeant Pharmaceuticals International Inc.*[45] *Catucci* in Québec is the counterpart of *Kowalyshyn* in Ontario and is a securities misrepresentation case with causes of action in the

[43] 2021 ONSC 142 at footnote 10.
[44] 2016 ONSC 3819, at paras. 208-210.
[45] 2017 QCCS 3870, leave to appeal denied, *Goldman, Sachs & Co. c. Catucci*, 2017 QCCA 1890.

primary and the secondary market. In *Catucci*, Justice Chatelain followed *Bank of Montreal v. Marcotte.*

[180] For the reasons discussed above, *Catucci* does not provide any reason to think that the law has changed in Ontario.

5. The Solution to the *Ragoonanan* Problem

[181] Thus, in the immediate case where the Underwriters challenge certification of the s. 130 Part XXIII statutory cause of action, the first but not the second argument of the Underwriters fails. The success of the second argument, however, is a pyrrhic victory.

[182] As the discussion above of the facts and the law reveals, there is some basis in fact to conclude that there are Prospectus Offering purchasers of Aphria shares who would qualify to be a representative plaintiff for all the Class Members who have a statutory cause of action under s.130 Part XXIII of the Ontario *Securities Act.*

[183] However, Class Counsel has had difficulty in identifying and recruiting one of these candidates. In these circumstances, I shall exercise my authority pursuant to subsections 5 (1) (3) and (4) of the *Class Proceedings Act, 1992*: (a) to make a provisional certification order; (b) to adjourn the certification motion for further evidence; and (c) to require the Underwriters to provide evidence of the names and contact information for the purchasers during the Prospectus Offering.

[184] Subsection 5 (1) of the *Class Proceedings Act, 1992* is set out above. Subsections 5 (3) and (4) state:

> *Evidence as to size of class*
>
> (3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.
>
> *Adjournments*
>
> (4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

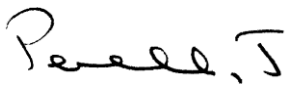
[185] The Underwriters shall have thirty days from the release of these Reasons for Decision to deliver their respective affidavits, and Class Counsel shall have one hundred days for the appointment of a Representative Plaintiff for a class of Class Members that purchased Aphria shares in the primary market during the Class Period. Pursuant to the *Boulanger* line of cases, only one additional Representative Plaintiff is required.

K. Conclusion

[186] For the above reasons, I make the Order set out in paragraph 9 above.

[187] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Vecchio's submissions within thirty days of the release of these Reasons

for Decision followed by the Defendants submissions within a further thirty days.



Perell, J.

Released: August 6, 2021

CITATION: Vecchio Longo Consulting Services Inc. v. Aphria Inc., 2021 ONSC 5405
COURT FILE NO.: CV-19-00614086-00CP
DATE: 20210806

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

VECCHIO LONGO CONSULTING SERVICES INC.

Plaintiff

- and -

APHRIA INC., VICTOR NEUFELD, CARL MERTON, COLE CACCIAVILLANI, CLARUS SECURITIES INC., CANACCORD GENUITY CORP., CORMARK SECURITIES INC., HAYWOOD SECURITIES INC. and INFOR FINANCIAL GROUP INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: August 6, 2021