Court of Appeal File No. COA-24-CV-0846

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**TERRY LONGAIR PROFESSIONAL CORPORATION**

Plaintiff
(Respondent)

- and -

**AKUMIN INC., RIADH ZINE-EL-ABIDINE, MOHAMMAD SALEEM, THOMAS DAVIES, STAN DUNFORD, MURRAY LEE, JAMES WEBB and ERNST & YOUNG LLP**

Defendants
(Appellants)

Proceeding under the *Class Proceedings Act, 1992*

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# RESPONDENT'S BOOK OF AUTHORITIES

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**Date:** May 1, 2025

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Ontario Superior Court of Justice,

G.E. Taylor J.

January 5, 2015

2015 ONSC 53 (CanLII)

**124 O.R. (3d) 459** | 2015 ONSC 53

## Case Summary

**Civil procedure — Class proceedings — Certification — Proposed class action asserting claim of misrepresentation under Part XXIII.1 of Securities Act, common law negligent misrepresentation and oppression — Leave to commence action under Securities Act granted — Motion to certify action as class proceeding granted in part — Certification denied for claims of negligent misrepresentation other than misrepresentation claims for which leave was granted under Securities Act — All three claims certified for global class — Securities Act, R.S.O. 1990, c. S.5, Part XXIII.1.**

The plaintiff brought a proposed class action asserting a misrepresentation claim under Part XXIII.1 of the *Securities Act*, a common law misrepresentation claim and an oppression claim under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Leave to commence an action under XXIII.1 of the *Securities Act* was granted with respect to some of the alleged misrepresentations. The plaintiff brought a motion to certify the action as a class proceeding.

**Held**, the motion should be granted in part.

The defendants conceded that the statement of claim disclosed causes of action in relation to the claims of statutory misrepresentation, negligent misrepresentation and oppression, and that the plaintiff would fairly and adequately represent the interest of the class.

It was not appropriate to certify as common issues for a claim of negligent misrepresentation questions of inferred reliance. Certification was denied for the claims of negligent misrepresentation other than the claims which were identical to those asserted in the statutory claim. The defendants accepted as appropriate all of the proposed common issues with respect to the statutory claim and the oppression claim. All three claims were certified for a global class. There were no parallel U.S. proceedings. The only avenues for recovery for non-Ontario resident shareholders of the defendant Solar were this action and individual lawsuits.

*Bayens v. Kinross Gold Corp*., [2014] O.J. No. 6070, 2014 ONCA 901, 61 C.P.C. (7th) 1, affg [2013] O.J. No. 5071, 2013 ONSC 6864, 45 C.P.C. (7th) 371 (S.C.J.); *Green v. CIBC* (2014), 118 O.R. (3d) 641, [2014] O.J. No. 419, 2014 ONCA 90, 314 O.A.C. 315, 370 D.L.R. (4th) 402,

50 C.P.C. (7th) 113, 237 A.C.W.S. (3d) 313, varg [2012] O.J. No. 3072, 2012 ONSC 3637, 29 C.P.C. (7th) 225, 219 A.C.W.S. (3d) 692 (S.C.J.), **apld** [page460]

*Dugal v. Manulife Financial Corp*., [2013] O.J. No. 3455, 2013 ONSC 4083, 44 C.P.C. (7th) 80, 230 A.C.W.S. (3d) 604 (S.C.J.); *Silver v. Imax Corp*., [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.), **consd**

**Other cases referred to**

*Abdula v. Canadian Solar Inc*., [2014] O.J. No. 4163, 2014 ONSC 5167 (S.C.J.); *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949, [2013] S.C.J. No. 69, 2013 SCC 69, 452 N.R. 80, 312 O.A.C. 128, 2013EXP-3985, J.E. 2013-2175, EYB 2013-230429, 366 D.L.R. (4th) 1, 45 C.P.C. (7th) 227; *Cannon v. Funds for Canada Foundation*, [2012] O.J. No. 168, 2012 ONSC 399, 13 C.P.C. (7th) 250, [2012] 3 C.T.C. 132 (S.C.J.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 135 A.C.W.S. (3d) 567 (C.A.); *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932, 2011 ONSC 25, 3 C.P.C. (7th) 261 (S.C.J.); *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 2001 SCC 68, 205 D.L.R. (4th) 19, 277 N.R. 51, J.E. 2001-1971, 153 O.A.C. 279, 42 C.E.L.R. (N.S.) 26, 13 C.P.C. (5th) 1, 24 M.P.L.R. (3d) 9, REJB 2001-26157, 108 A.C.W.S. (3d) 774; *Meeking v. Cash Store Inc*., [2013] M.J. No. 294, 2013 MBCA 81, 48 C.P.C. (7th) 41, 367 D.L.R. (4th) 684, 299 Man. R. (2d) 109, [2014] 3 W.W.R. 118, 230 A.C.W.S. (3d) 971; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc*., [2014] O.J. No. 744, 2014 ONSC 1057, 49 C.P.C. (7th) 12, 238 A.C.W.S. (3d) 28 (S.C.J.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 2001 SCC 69, 205 D.L.R. (4th) 39, 275 N.R. 342, [2001] 11 W.W.R. 207, J.E. 2001-1970, 157 B.C.A.C. 1, 95 B.C.L.R. (3d) 1, 10 C.C.L.T. (3d) 1, 9 C.P.C. (5th) 1, REJB 2001-26160, 108 A.C.W.S. (3d) 775

**Statutes referred to**

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 241, (3)(*j*)

*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1), (*d*), (*e*)

*Securities Act*, R.S.O. 1990, c. S.5, Part XXIII.1 [as am.]

MOTION to certify an action as a class proceeding.

*A. Dimitri Lascaris*, *Douglas Worndl* and *Anthony O'Brien*, for plaintiff.

*Michael Statham* and *Anastasija Sumakova*, for defendants.

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**G.E. TAYLOR J.**: —

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*Introduction*

[1] This is a motion for certification as a class proceeding of a number of claims arising out of alleged misrepresentations made by Canadian Solar Inc. contained in filings required by the Securities and Exchange Commission of the United States and in press releases that accompanied the filings. In a previous ruling, I granted leave to the plaintiff to commence an action pursuant to Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 in relation to some of the alleged misrepresentations. The plaintiff now seeks certification as a class proceeding of the claims contained in the statutory cause of action. In the fresh as [page461] amended statement of claim, the plaintiff has also pleaded that the misrepresentations, which include the alleged misrepresentations for which leave was granted, were made negligently and that the conduct of Canadian Solar and its officers and directors has been oppressive, and accordingly s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 is engaged. The plaintiff also seeks certification of the claims of for negligent misrepresentation and oppression.

*Evidentiary Background*

[2] At paras. 4 through 30 under the heading Evidentiary Background of my ruling dated September 9, 2014 (*Abdula v. Canadian Solar Inc.*, [2014] O.J. No. 4163, 2014 ONSC 5167 (S.C.J.)), I set out the factual background giving rise to the present action. I adopt those paragraphs for the purpose of this ruling.

[3] August 26, 2010 was the record date for Canadian Solar's 2010 annual meeting. As of that date, 1,236 Ontario residents held a total of 1,058,705 shares of Canadian Solar. Also, as of August 26, 2010, there were 22 Ontario residents who held a total of 6,954 shares of Canadian Solar through U.S. brokers. There were 42,995,097 issued and outstanding shares of Canadian Solar at August 26, 2010. This means that approximately 2.8 per cent of the total issued and outstanding shares of Canadian Solar were held beneficially by Ontario residents. When the number of shares held by excluded persons as that term is defined in the fresh as amended statement of claim is subtracted from the total of the issued and outstanding shares, there remains 29,728,097 shares of Canadian Solar that are beneficially owned by non-excluded persons. Ontario resident shareholders therefore make up approximately 3.6 per cent of this group.

[4] Canadian Solar has determined that as of August 26, 2010, there were shareholders from 82 countries who held their shares through U.S. investment dealers. There were an additional 34 shareholders from the remaining provinces and territories who held the shares in Canadian Solar through U.S. brokers.

[5] In the prospectus supplement dated October 15, 2009, under the heading Enforceability of Civil Liabilities, the following is stated:

> We were incorporated as an Ontario corporation in October 2001 and we were continued as a Canadian corporation under the Canadian federal corporate statute, the Canadian Business Corporations Act (the "CBCA"), in June 2006.

> Furthermore, it may not be possible for you to enforce against us or them, in the United States, judgments obtained in U.S. courts, because all or a substantial portion of our assets and the assets of those persons are located outside the United States. We have been advised by WeirFoulds LLP, our [page462] Canadian counsel, that a monetary judgment of a U.S. court predicated solely upon the civil liability provisions of the U.S. federal securities laws would likely be enforceable in Canada if the U.S. court in which the judgment was obtained had a basis for jurisdiction in the matter that was recognized by a Canadian court for such purposes. We cannot assure you that this will be the case. It is unlikely that an action could be brought in Canada in the first instance for civil liability under U.S. federal securities laws. Therefore, it may not be possible to enforce those actions against us, our directors and officers or the experts named in this prospectus.

[6] Also contained in the prospectus supplement is a description of the availability of the oppression remedy pursuant to the *CBCA*.

[7] In Canadian Solar's 2009 annual report, Robert McDermott is identified as "lead independent director of our company" and is said to be a partner in McMillan LLP, a law firm based in Canada. In the same annual report, Lars-Eric Johansson is identified as an independent director with significant connections to Canada.

[8] On December 20, 2013, a parallel action in the United States was dismissed by the United States Court of Appeal for the Second Circuit with no further right of appeal.

*The Class Proceedings Act, 1992*

[9] Section 5(1) of the *Class Proceedings Act, 1992* sets out the criteria to be established for certification of an action as a class proceeding as follows:

(a) the pleading discloses a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues;

(d) a class proceeding is the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, who has produced a suitable litigation plan and who does not have a conflict with the interests of the other class members.

[10] The defendants concede that the fresh as amended statement of claim discloses causes of action in relation to the claims of statutory misrepresentation, negligent misrepresentation and oppression.

[11] The defendants concede that there is an identifiable class but do not agree with the plaintiff as to the description of the class with respect to the statutory cause of action and the claim for negligent misrepresentation. The defendants concede that it [page463] is appropriate to certify a global class for the oppression claim except that when there is an overlap between the factual foundation for the statutory cause of action and the claim for oppression, the

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statutory claim is the preferable procedure, with the result that the oppression claim will be certified only for alleged conduct which is not embraced by the statutory claim.

[12] The defendants concede that 13 of the 17 proposed common issues are appropriate for certification. The defendants accept as appropriate all of the proposed common issues with respect to the statutory claim and the oppression claim. The defendants take issue with three of the six proposed common issues in relation to the claim of negligent misrepresentation.

[13] With respect to the claims of negligent misrepresentation, it is the position of the defendants that none of those claims should be certified. The defendants say that certification would be appropriate for the misrepresentations for which leave to commence the statutory cause of action has been granted except for the fact that leave was granted. The defendants submit that for the alleged misrepresentations for which leave was granted, the statutory regime is the preferable procedure and accordingly certification should be denied for the overlapping claims of negligent misrepresentation.

[14] The defendants concede that the plaintiff would fairly and adequately represent the interests of the class and does not have a conflict of interest with any member of the class. In their factum, the defendants took issue with two aspects of the proposed litigation plan. The defendants took issue with the proposed notice provisions to non-resident class members although no oral submissions were made on this point. The defendants also submitted that the proposed litigation plan failed to identify a mechanism for determining the governing law with respect to each individual class members' claims. During the course of the hearing of the present motion, the plaintiff produced a revised litigation plan which resolved this concern. I therefore take it that the defendants no longer raise objections to the proposed litigation plan.

[15] I propose to deal with the criteria for certification pursuant to s. 5(1) of the *Class Proceeding Act* in a slightly different order than they are set out in the section.

*The Disputed Common Issues*

*Was the misrepresentation a misrepresentation at common law?*

[16] In the reply factum, at para. 157, in relation to this proposed common issue the plaintiff says: [page464]

> It was only intended to encompass the question of whether the "Misrepresentation" was "untrue, inaccurate or misleading", which is one element of the negligent misrepresentation claim.

The defendants submit that this common issue ought to be amended to clarify the stated intention of the plaintiff. I agree.

[17] Therefore, common issue number 2 will be amended to read as follows: "Was the Misrepresentation untrue, inaccurate or misleading?"

*In the circumstances of this case, can each class member's reliance on the misrepresentation be inferred?*

[18] Paragraphs 72 and 73 of the fresh as amended statement of claim allege:

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> The Plaintiff and the Class Members relied upon the Misrepresentation.
> Alternatively, the Plaintiff and the other Class Members relied upon the Misrepresentation by the act of purchasing Canadian Solar securities in an efficient market that promptly incorporated into the price of those securities all publicly available material information regarding the securities of Canadian Solar. As a result, the repeated publication of the Misrepresentation in the documents described in paragraph 62 caused the price of Canadian Solar's shares to trade at inflated the prices during the Class Period, thus directly resulting in damage to the Plaintiff and the other Class Members.

[19] In *Cannon v. Funds for Canada Foundation*, [2012] O.J. No. 168, 2012 ONSC 399 (S.C.J.), Strathy J. (as he then was) concluded that in a negligent misrepresentation case, it is possible to infer individual reliance from the surrounding circumstances. *Cannon* involved claims arising out of scheme to reduce the income tax paid by persons who made charitable donations to certain Canadian charities. Canada Revenue Agency ultimately disallowed the claims for deduction. One of the issues was whether an opinion letter written by an experienced tax lawyer contained a material misrepresentation. There were one or two representations which were distilled down to [at para. 350]:

> This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation.

Strathy J. concluded that this was a case where reliance could be inferred and accordingly he certified as a common issue the claim of negligent misrepresentation against the promoters of the scheme and the lawyer who provided the opinion letter.

[20] Previous cases have approved similarly worded common issues to that proposed in the present case.

[21] In *Silver v. Imax Corp.*, [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.), two of the proposed common issues were as follows [at para. 171]: [page465]

> Did the traded price of IMAX shares during the Class Period incorporate and reflect the Representation?
> If the answer to [the previous question] is yes, did the acquisition of IMAX shares by the class members, on the TSX and NASDAQ, during the Class Period, constitute reliance upon the Representation?

[22] In addressing these two proposed common issues, van Rensburg J. (as she then was) stated, at para. 190:

> In the present case the plaintiffs have pleaded that the individual class members relied on the Representation through their conduct in purchasing shares. It should be open to the plaintiffs to attempt to establish in the common issues trial that, as a factual matter, reliance has been established for all members of the class through proof of the common action of purchasing shares. It may be that the defendants will persuade the court that at best any inference of reliance is rebuttable through evidence that is individual to each class member.

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> It may be that any inference of reliance is rebuttable through evidence applicable to the class at large. The question I need to determine is not whether the issues will be determined in the plaintiffs' favour, but whether they are "common" and not "individual" issues. I find that the issues as framed are common issues, and will be certified as such for the common issues trial.

[23] In *Dugal v. Manulife Financial Corp.*, [2013] O.J. No. 3455, 2013 ONSC 4083 (S.C.J.), it was proposed that one of the common issues be [in Appendix A]:

> If the answer to [proposed common the issue (6)] is yes, can each Class Member's reliance be inferred from the fact of the Class Member having acquired MFC's securities in an efficient market?

Belobaba J. amended the proposed common issue only slightly by deleting the opening words so that the certified common issue became [in Appendix B]:

> Can each Class Member's reliance be inferred from the fact of the Class Member having acquired MFC's securities in an efficient market?

In approving the common issue, Belobaba J. stated, at para. 93:

> The question asks whether "each Class Member's reliance" can be inferred from the fact that each Class Member acquired the MFC securities in an efficient market. Both the Court of Appeal and this court have held that individual reliance can indeed be inferred from the surrounding facts or circumstances. Given that this Proposed Common Issue only asks whether buying securities in an efficient market can provide the surrounding circumstances for inferring individual reliance and does not require individual assessments, it is a legitimate query and one that, in my view, will help advance the litigation.

[24] In *Green v. CIBC* (2014), 118 O.R. (3d) 641, [2014] O.J. No. 419 (C.A.), the Court of Appeal approved of the finding in *Cannon* that, in the circumstances of that case, inferred group reliance could be certified as a common issue (para. 100). [page466]

[25] In *Green v. CIBC*, [2012] O.J. No. 3072, 2012 ONSC 3637 (S.C.J.), Strathy J. declined to certify the proposed common issues relevant to the claim of negligent misrepresentation. There were seven proposed common issues of which the last two were [at para. 594]:

> Were the public markets on which CIBC securities traded during and immediately following the Class Period efficient markets? If so, did the trade prices of CIBC shares during the Class Period incorporate and reflect the misrepresentations?
> If the answer to [the previous question] is yes, did the purchase of CIBC shares by Class Members during the Class Period constitute reliance or inferred reliance upon the misrepresentations?

The Court of Appeal agreed with Strathy J. that the common issues set out above were not appropriate for certification although the court did conclude that the first five of the proposed common issues dealing with negligent misrepresentation should have been certified.

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Presumably, in coming to this conclusion, the Court of Appeal was not satisfied that reliance could be inferred based on the circumstances present in *Green*.

[26] In the recently released decision of *Bayens v. Kinross Gold Corp.*, [2014] O.J. No. 6070, 2014 ONCA 901, the Court of Appeal clearly articulated that for claims of common law misrepresentation reliance must be proven for each individual person and cannot be calculated on an aggregate basis. At para. 117, the court stated:

> The first exception concerns the issue of reliance. Reliance is a claimant-specific issue, requiring individualized evaluation and fact-finding. See *Green*, at paras. 100-103. In most cases of negligent misrepresentation, therefore, issues of individual reliance have been regarded by the courts as inherently unsuitable for certification. In this case, in my view, the question of reliance is not a common issue.

[27] Notwithstanding the decisions of *Silver v. Imax* and *Dugal*, I have come to the conclusion that I am bound by the clear direction from the Court of Appeal in *Green* and *Bayens* that it is not appropriate to certify as common issues for a claim of negligent misrepresentation questions of inferred reliance. I therefore find that proposed common issue number 6 is not an appropriate common issue in this case.

*Did the misrepresentation in the documents cause the price of Canadian Solar's securities to become or remain inflated during the class period? If so, what was the extent of that inflation?*

[28] This proposed common issue deals with assessing damages for negligent misrepresentation on an aggregate basis. This [page467] issue was also dealt with in the Court of Appeal decision in *Bayens*. At paras. 119 and 120, the Court of Appeal stated:

> Here, the motion judge disagreed with the notion that damages for negligent misrepresentation could be calculated on an aggregate basis in this case (at para. 242). I agree. As I have already said, the issue of reliance is not a common issue in this case. And, as I discuss later in these reasons, individual trials of some complexity will be required to determine the question of reliance and, hence, liability. In these circumstances, the associated issue of consequential damages, should liability be found, must be determined in those individual trials rather than on a global basis.

[29] For essentially the same reasons as I concluded that proposed common issue number 6 is not appropriate for certification, I conclude that proposed common issue number 5 is not an appropriate common issue in this case.

*Should the defendants pay the costs of administering and distributing the recovery? If so, which defendants should pay, and how much?*

[30] In support of its position that this ought to be a common issue, the plaintiff relies on *Silver v. Imax*, where van Rensburg J. stated, at para. 209:

> Issues 15 and 16 deal with the procedure for determining individual issues. Such issues have been certified recently in other cases as common issues, and in my view are proper common issues to be certified in this case.

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Issue 15 in *Silver v. Imax* was the equivalent to proposed common issue number 17 in the present case. The plaintiff also relies on *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932, 2011 ONSC 25 (S.C.J.), where a common issue virtually identical to the proposed common issue in this case was conceded by the defendants as appropriate. The plaintiff submits that there is no harm by giving the common issues trial judge specific authority to address the issue of costs of administering and distributing the recovery.

[31] In opposing common issue number 17, the defendants rely on the decision of Belobaba J. in *Dugal*, where he stated, at para. 95, in reference to a proposed common issue identical to that being proposed in this case:

> Whether the defendants should be required to pay for the costs of administering and distributing the recovery and if so how much should be paid, are not common issues that will advance this litigation. They are self-evident "ex post" questions that will be ably determined by the trial judge as and when needed. At this point, the questions are premature. [page468]

[32] I prefer the view expressed by Belobaba J. Therefore, proposed common issue number 17 will not be certified as a common issue in this case.

*Preferable Procedure*

[33] In *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, the court stated, at para. 31:

> I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": see *Report of the Attorney General's Advisory Committee on Class Action Reform*, *supra*, at p. 32; see also Cochrane, *supra*, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (loose-leaf), at para. 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

[34] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), the Ontario Court of Appeal after referring to *Hollick* stated, at para. 73:

> . . . the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.

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[35] Recently, the Supreme Court of Canada returned to the preferable procedure issue in *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949, [2013] S.C.J. No. 69. At paras. 24 and 25, the court stated:

> There is no doubt that access to justice is an important goal of class proceedings. But what is access to justice in this context? It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance -- the results to be obtained -- and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. They are interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process.
> . . . The correct approach, however, must include both substantive and procedural aspects in assessing whether a class action is the preferable procedure. The focus cannot be exclusively on process: a process may be fair but nonetheless not offer a real opportunity to recover compensation for all of [page469] the losses suffered. In other words, in some cases even if the process is fair, there will remain significant obstacles to recovery. In addition, an absence of a fair process may also heighten concerns about whether substantive justice has or will be done. Of course, as we shall see, consideration of these aspects must respect the limited scope of the certification process.

[36] It is the position of the defendants that in the circumstances of this case, where similar if not identical claims are advanced under the headings of negligent misrepresentation, oppression and Part XXIII.1 of the Ontario *Securities Act*, the preferable procedure is that pursuant to Part XXIII.1. In support of this position, the defendants rely on *Millwright Regional Council of Ontario Pension Fund (Trustees of) v. Celestica Inc.*, [2014] O.J. No. 744, 2014 ONSC 1057 (S.C.J.). In this decision, Perell J. wrote, at paras. 183 to 185:

> The Defendants argue, and I agree, that where there is a statutory misrepresentation claim and also a common law misrepresentation claim for the same misrepresentation, the statutory claim is the preferable way to resolve the Class Members' claims; indeed, the statutory claim was introduced precisely to overcome the difficulties of a class action for negligent misrepresentation with respect to the distribution of debt and equity instruments in the primary and secondary market for securities.
>
> Part XXIII.1 of the Ontario *Securities Act* was designed to be the preferable procedure for misrepresentation claims in the marketplace for shares.
> A common law misrepresentation class action with respect to the sale of securities, unless it settles, may lead to economically unfeasible or non-viable individual issues trials where the Class Members are confronted with the enormous difficulty of proving reliance, (the surrogate of causation) and damages.

[37] However, in *Bayens v. Kinross Gold Corp.*, [2013] O.J. No. 5071, 2013 ONSC 6864 (S.C.J.), Perell J. stated, at para. 210:

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> To oversimplify if leave is granted under Part XXIII.1 of the Ontario *Securities Act*, it follows that the court should certify a class action for both the statutory and common law negligent misrepresentation claim.

[38] In *Green v. CIBC*, at paras. 102 and 103, Court of Appeal approved of parallel claims of common law misrepresentation and the statutory cause of action being certified. At para. 103, the court stated:

> However, if the motion judge intended to say that no issues in the entire common law misrepresentation claim can be certified alongside the statutory claim, that suggestion conflicts with s. 138.13 of the *Securities Act*, which provides:
>
> > The right of action for damages and the defences to an action under s. 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part. [page470]

[39] In *Bayens*, the Court of Appeal noted that the conclusion of Perell J. that certification of the negligent misrepresentation claim would follow automatically certification of the statutory claim was not one of the issues on appeal. However, it is apparent that the Court of Appeal agreed with Perell J. on that particular point.

[40] The Court of Appeal in *Bayens* concluded that a denial of leave to proceed with a statutory claim does not necessarily mean a claim for negligent misrepresentation should not be certified. However, the Court of Appeal did conclude that denial of leave with respect to the statutory claim is a relevant factor in the preferability analysis with respect to the claim of negligent misrepresentation. In the final analysis, the Court of Appeal concluded that because the negligent misrepresentation claim would require a vast number of individual trials on issues of reliance, causation and damages two of the main objectives of a class proceeding; namely, judicial economy and access to justice would not be achieved because the process would be unmanageable, inefficient and unfair to the parties and the court. Accordingly, certification was refused for the negligent misrepresentation claim.

[41] I am of the view that the procedure contemplated in s. 5(1)(*d*) of the *Class Proceedings Act* is an alternate method of obtaining recourse for the class members. To my mind, this follows from the description in *Hollick* [at para. 243] of "other procedures such as joinder, test cases, consolidation and so on". The preferable procedure inquiry should not become an analysis, in cases such as the present where there are parallel claims, as to which one of two or more causes of action has the greatest chance of success for the plaintiff and certifying that cause of action to the exclusion of all others.

[42] In *Cloud*, there was an alternative dispute resolution tribunal, created to deal with claims of aboriginal Canadians who had attended residential schools. In *AIC*, there were proceedings conducted by the Ontario Securities Commission which had resulted in settlements being reached with the defendants, and payments made it to at least some of the proposed class members, arising out of the same basis as it was proposed to certify the class proceeding. In both cases, a class proceeding was held to be the preferable procedure.

[43] In *AIC* and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, one of the considerations with respect to the issue of the preferable procedure was the fact that there were caps on the recovery amounts available through the alternative compensation procedures.

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That concern is a factor if the statutory cause of action is an alternative procedure to the claim [page471] for common law misrepresentation because of the liability limits imposed for damages pursuant to Part XXIII.1.

[44] In my view, it is not necessary to choose as between claims for negligent misrepresentation, oppression or arising out of the statutory cause of action. The preferable procedure is a class proceeding in which all three causes of action can be asserted. I am guided, however, by the Court of Appeal decision in *Bayens*, where in a claim for negligent misrepresentation was found not to meet the preferable procedure requirement when leave to commence an action pursuant to Part XXIII.1 of the Ontario *Securities Act* was denied. I therefore conclude that I must limit the claim for negligent misrepresentation to the same factual claims as will be asserted in the statutory claim.

*An Identifiable Class*

[45] The plaintiff proposes in the fresh as amended statement of claim that the class be defined for each of the claims of negligent misrepresentation, oppression and the statutory cause of action as:

> All persons, wherever they may reside or be domiciled, who acquired securities of Canadian Solar in the secondary market during the Class Period [the opening of trading on May 26, 2009 to the close of trading on June 1, 2010], other than Excluded Persons.

[46] The defendants do not object to a global class being certified for the oppression remedy claim. In fact, the defendants propose that the class definition for the oppression claim include all persons who owned securities of Canadian Solar during the class period. The defendants also assert that the class for each of the claims be worded so as to exclude early sellers. I agree. Therefore, for the oppression remedy claim, the class will be defined as:

> All persons, wherever they may reside or be domiciled, who were registered or beneficial security holders of Canadian Solar at any time during the Class Period [May 26, 2009 to the close of trading on June 1, 2010] and who continued to hold securities of Canadian Solar at the close of trading on the NASDAQ on June 1, 2010, other than Excluded Persons.

[47] The defendants submit that the class for the claims of negligent misrepresentation and the statutory cause of action ought to be restricted to Ontario residents.

[48] It has been conclusively decided by the Court of Appeal in this case that Canadian Solar has a real and substantial connection to Ontario. At para. 9, the Court of Appeal stated:

> The motion judge found that Canadian Solar has a "real and substantial connection to Ontario" and that finding, with which we agree, is not in [page472] issue. In addition to having its registered office and principal executive office in Ontario, Canadian Solar has held its annual meeting in Ontario. The alleged misrepresentations were contained in documents that were released or presented in Ontario. While Canadian Solar's principal place of business is in the People's Republic of China, directly and through its subsidiaries, it has undertaken or engaged in numerous solar projects in Ontario. Canadian Solar has also raised capital from Ontario investors through private placements and has made filings with

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> the Ontario Securities Commission confirming this activity as required by Ontario securities laws. Mr. Abdula placed orders for shares of Canadian Solar through his online discount brokerage, Bank of Montreal InvestorOnline, using the computer at his home in Markham, Ontario. As of August 26, 2010, Canadian Solar had 1253 shareholders in Ontario, who held in the aggregate over one million shares.

[49] In addition to the factors referred to in the above passage from the judgment of the Court of Appeal, there are a number of additional factors which connect Canadian Solar to Ontario.

[50] Although the prospectus supplement dated October 15, 2009 advises that there might be difficulty encountered in recovering any judgment obtained in a U.S. court, there is no mention in the document of the possibility of an action being brought in Canada for breach of Canadian securities laws. The prospectus supplement, at least implicitly, provides that a claim for an oppression remedy would be by way of an action in Canada. As was set out in the ruling granting leave to commence the statutory action, the press releases that accompanied the financial statements which are alleged to contain the misrepresentation were released in Ontario. The press release dated June 1, 2010 advising that a revision of 2009 net revenues might be necessary was released in Ontario. Robert McDermott and Lars-Eric Johansson are identified in the 2009 annual report as Canadian directors.

[51] In *Silver v. Imax*, van Rensburg J. stated, at para. 129:

> There is accordingly no doubt that this court has the authority to certify an international class if there is a "real and substantial connection" between the claims asserted on behalf of the foreign class members and this jurisdiction.

As I have just indicated, the Court of Appeal has held that there is a real and substantial connection between Canadian Solar and Ontario. In my view, there is also a real and substantial connection between Ontario and the claims asserted on behalf of the foreign class members. This point is conceded as it relates to the oppression remedy. I see no difference in substance between the oppression remedy which is a creature of statute and the statutory cause of action pursuant to Part XXIII.1 of the *Securities Act*.

[52] With respect to the claim for negligent misrepresentation, the defendants submit that a global class would be unworkable [page473] because of the need to apply foreign law from numerous jurisdictions to that issue. As noted in *Silver v. Imax*, foreign law must be pleaded and proved. At the present time, with no statement of defence having been delivered, it is uncertain if the defendants intend to plead foreign law.

[53] There have been a number of cases in which a global class including class members residing elsewhere in Canada and in other countries has been certified in the context of securities litigation. However, in each of those cases, the securities of the corporate defendant traded on a Canadian exchange. (See *Silver v. Imax*, *Dobbie v. Arctic Glacier*, *Green v. CIBC* and *Celestica*.) This is the first case in which it is sought to certify a global class action which includes all shareholders of a corporation regardless of their residency who purchased their shares on a foreign exchange.

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[54] I find the development of the *Silver v. Imax* case to be instructive. On certification, a global class was certified. The class was defined as [at para. 98]:

> . . . all persons, other than Excluded Persons, who acquired securities of Imax during the Class Period on the TSX and on NASDAQ and held some or all of those securities of the close of trading on August 9, 2006.

At the time of certification, there was a parallel proceeding in the United States. In that proceeding, certification was sought for a class including purchasers on both the NASDAQ and TSX. At the time of the Ontario certification hearing, certification of the U.S. class action had been denied without prejudice to a further motion for certification to be brought. It was therefore not known at the time of certification of the Ontario class proceeding if the parallel action in the United States would be certified.

[55] The U.S. action was eventually certified. In early 2012, the parties to the U.S. proceeding reached a settlement. The settlement was approved subject to an order being obtained in the Canadian action to amend the class definition to exclude all persons to be bound by the settlement of the U.S. action. Those persons would be all who acquired their shares on the NASDAQ which would include Canadian residents. Van Rensburg J. granted the requested amendment to the class description in order to permit the U.S. settlement to go forward.

[56] It seems to me that the original decision to certify a global class arose out of a concern to protect persons who acquired Imax shares during the class period regardless of their place of residency. At the time of certification of the Canadian class proceeding, that was a concern because the U.S. action had not been certified and indeed certification had been rejected on at least one occasion. However, once the U.S. class action was certified and the settlement was achieved, this concern evaporated. [page474] Accordingly, it was appropriate to amend the global class in the Canadian proceeding which, although somewhat of an oversimplification, resulted in the Canadian class being only those persons who acquired that their shares on the TSX. One of the considerations in approving the amendment to the Canadian class was the ability of Canadians who had purchased their shares on the NASDAQ to opt out of the U.S. settlement.

[57] It seems to me that similar concerns are present in this case. There is no parallel proceeding in the United States. That action has been finally dismissed. In my view, this is an important factor in determining the appropriate description of the class for the claims of negligent misrepresentation and the statutory cause of action. At the present time, the only avenues for recovery for non-Ontario resident shareholders of Canadian Solar are the current proceeding or individual lawsuits. Therefore, if the defendants' submission is correct, the only shareholders who will be entitled to compensation in the event that a misrepresentation, negligent or statutory, is proved will be the Ontario shareholders.

[58] In *Meeking v. Cash Store Inc.*, [2013] M.J. No. 294, 2013 MBCA 81, the Manitoba Court of Appeal dealt with the issue of the appropriateness of an Ontario court certifying a class action and approving a corresponding settlement purporting to be binding on Manitoba residents for transactions that occurred wholly within the Province of Manitoba. The court found there to be a real and substantial connection between the Ontario action and the Manitoba resident. In

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coming to that conclusion, the court stated, at para. 93:

> The Canadian jurisprudence to which I have referred that would allow for common issues to be considered as a presumptive connecting factor in the real and substantial connection test is persuasive. Fairness to non-resident plaintiffs is achieved through the notification process and opt-out provisions, while, at the same time, the policy considerations favouring class actions described by McLachlin C.J.C. in *Western Canadian Shopping* are fulfilled. Further, the constitutional principle of federalism is respected.

And further, at para. 97:

> Therefore, I would conclude that, in circumstances where the court has territorial jurisdiction over both the defendant and the representative plaintiff in a class action proceeding, common issues between the claim of the representative plaintiff and that of non-resident plaintiffs is a presumptive connecting factor, sufficient to give the court jurisdiction over non-resident plaintiffs.

[59] In the present case, this court has territorial jurisdiction over both the plaintiff and Canadian Solar. Therefore, a presumptive connecting factor to Ontario for the purpose of [page475] determining the jurisdiction of this court to the non-resident class members is the existence of common issues as between the representative plaintiff and the non-resident class members. Based on my review of the approved common issues, it appears to me that all of them are equally applicable to residents and non-resident class members. This therefore strengthens the real and substantial connection of this litigation to Ontario.

[60] Canadian Solar chose to incorporate, originally as an Ontario corporation, and subsequently as a Canadian corporation. Canadian Solar chose to carry on business in Ontario, have an executive office in Ontario, and disseminate information from Ontario to all of its shareholders and prospective shareholders. This is not a case of a defendant being forced to defend a lawsuit in a jurisdiction to which it has no connection. On the other side of the coin, the certification of a global class provides an opportunity to Canadian Solar's shareholders to obtain compensation for damages, if they wish to participate in the action, when no other avenue of recourse is available, other than individual lawsuits. The certification of a global class, in my view, achieves the objectives of the *Class Proceedings Act* by providing access to justice to those class members who would otherwise have no practical way to obtain compensation for losses suffered, by promoting judicial economy and avoiding multiple individual lawsuits and by encouraging behaviour modification by requiring Canadian Solar to face a proceeding involving all of its shareholders.

[61] I therefore conclude that a global class is appropriate for the statutory claim and the claim for negligent misrepresentation. But because in my earlier ruling I determined that the earliest date from which it could be concluded that the statutory cause of action arose was the date of issuance of the prospectus supplement on October 15, 2009, I find that the class period for the statutory claim and the claim of negligent misrepresentation commences on October 15, 2009.

[62] The Court of Appeal in *Bayens* made it clear that, generally speaking, a claim for negligent misrepresentation is ill-suited to resolution in a class action because of the need to prove individual reliance and individual damages. On the other hand, the Court of Appeal

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approved parallel proceedings based on negligent misrepresentation and the statutory claim pursuant to the *Securities Act*. Therefore, I feel I must reach the conclusion that the claims for negligent misrepresentation which are unrelated to the statutory claim must fail for the same reasons as they did in *Bayens*. [page476]

[63] Therefore, for the claims of negligent misrepresentation and the statutory cause of action, the class will be defined as:

> All persons wherever they may reside or be domiciled, who acquired securities of Canadian Solar in the secondary market during the Class Period [the opening of trading on October 15, 2009 to the close of trading on June 1, 2010], and who continued to hold some or all of those securities at the close of trading on the NASDAQ, on June 1, 2010, other than Excluded Persons.

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*Litigation Plan*

[64] The defendants in their factum take issue with the notice provisions of the litigation plan. Oral submissions were not made on this issue. I am satisfied that the notice provisions to notify all class members of the certification of this class action and the opt-out procedure are adequate.

[65] The defendants also criticized the litigation plan for its failure to include a provision with respect to conflict of laws. That issue was addressed during the course of the certification hearing by the addition of what is now para. 20 of the litigation plan. I am therefore satisfied that the plaintiff has produced a satisfactory litigation plan as contemplated by s. 5(1)(*e*) of the *Class Proceedings Act*.

*Conclusion*

[66] For the foregoing reasons, there will be an order certifying as a class proceeding, the claims for statutory misrepresentation pursuant to Part XXIII.1 of the *Securities Act* and for negligent misrepresentation for a global class and for a class period defined as follows:

> All persons wherever they may reside or be domiciled, who acquired securities of Canadian Solar in the secondary market during the Class Period [the opening of trading on October 15, 2009 to the close of trading on June 1, 2010], and who continued to hold some or all of those securities at the close of trading on the NASDAQ, on June 1, 2010, other than Excluded Persons.

[67] There will be an order certifying as a class proceeding the oppression claim pursuant to the *Canadian Business Corporations Act* for a global class and for a class period defined as follows:

> All persons, wherever they may reside or be domiciled, who were registered or beneficial security holders of Canadian Solar at any time during the Class Period [May 26, 2009 to the close of trading on June 1, 2010] and who continued to hold securities of Canadian Solar at the close of trading on the NASDAQ, on June 1, 2010, other than Excluded Persons.

[68] I have concluded, on the authority of *Bayens*, that the common law misrepresentation claim should be limited to the alleged misrepresentations for which leave was granted pursuant to [page477] Part XXIII.1 of the *Securities Act*. The class period for the claims of misrepresentation is from October 15, 2009 to June 1, 2010. This period covers alleged misrepresentations in the prospectus supplement and the financial statements for Q4 2009, which were released on March 3, 2010. Therefore, to be consistent, I have deleted from the certified common issues those which were proposed as numbers 1 (a), (b), (c) and (e). These are the common issues with respect to the claims of negligent misrepresentation which are also the misrepresentations for which leave to proceed with the statutory claim was not granted.

[69] The common issues which I have certified are attached as Appendix A to this ruling.

*Amendment to the Statement of Claim*

[70] Because of the changes I have made with respect to the class definitions and the differing class periods for the oppression claim and that the misrepresentation claims, the plaintiff may wish to amend the fresh as amended statement of claim. Should the plaintiff wish to do so, an amended fresh as amended statement of claim is to be delivered within 30 days of the release of this ruling.

*Costs*

[71] If counsel are unable to agree on the appropriate disposition as to costs for the leave motion and the certification motion, they may make written submissions. The written submissions on behalf of the plaintiff are to be delivered to my office within 14 days of the release of this ruling, not to exceed three pages in length exclusive of a bill of costs and costs outline. Responding submissions are to be delivered to my office within 28 days of the release of this ruling, not to exceed three pages in length.

*Motion granted in part.*

APPENDIX A

Common Issues

*Negligent Misrepresentation*

(1) Did any or all of the following documents issued by Canadian Solar during the class period contain the misrepresentation? [page478]

(a) Canadian Solar's prospectus supplement dated October 15, 2009;

(b) Canadian Solar's financial statements for Q4 2010, which were released on March 3, 2010.

(2) Was the misrepresentation untrue, inaccurate or misleading?

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(3) If the answer to each of (1) and (2) is yes, did the defendants, or any of them, owe the class members a duty of care to ensure that the documents did not contain a misrepresentation? If so, which defendants owed that duty?

(4) If the answer to (3) is yes, did any or all of the defendants breach their duty of care? If so, which defendants breached their duty and how?

*Oppression*

(5) During the class period, did any act or omission of Canadian Solar effect a result, or were the business or affairs of Canadian Solar carried on or conducted in a manner, or were the powers of the directors of Canadian Solar exercised in a manner that was oppressively or unfairly prejudicial to order that unfairly disregarded the interests of the class members, within the meaning of s. 241 of the *CBCA*?

(6) If the answer to (5) is yes, should the court make an order that the defendants, or any of them, compensate the class members pursuant to s. 241(3)(*j*) of the *CBCA*?

(7) If the answer to (6) is yes, on what basis should the amount of compensation payable to the class members be determined?

(8) If the answer to (5) is yes, are there other remedies that should be ordered by the court to rectify the harm caused by the defendants, or any of them, to the class members as a result of the conduct of the defendants, or any of them, which was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the class members?

*Statutory secondary market liability*

(9) Did documents issued by Canadian Solar during the class period or public oral statements made on behalf of Canadian Solar during the class period, in respect of which leave has been granted under s. 138.8(1) of the *OSA*, contain a misrepresentation within the meaning of the *OSA*? [page479]

(10) If the answer to (9) is yes, then when and by what means were the misrepresentations contained in each such document and/or public oral statement corrected?

(11) If the answer to (9) is yes with respect to a document, and such document is not a "core document" within the meaning of the *OSA*, then in respect of each such "non-core document":

(a) did the defendants, or any of them, know that the document contain the misrepresentation at the time the document was released;

(b) at or before the time the document was released, did the defendants, or any of them, deliberately avoid acquiring knowledge that the document contain the misrepresentation; or

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(c) were the defendants, or any of them, through action or failure to act, guilty of gross misconduct in connection with the release of the document that contained the misrepresentation?

(12) If the answer to (9) is yes with respect to a public oral statement, then in respect of each such public oral statement:

(a) did Qu or Chien, or either of them, make the public oral statement or authorize, permit or acquiesce in the making of the public oral statement; and

(b) did or were the defendants, or any of them:

(i) know that the public oral statement contained a misrepresentation at the time such public oral statement was made;

(ii) at or before the time the public oral statement was made, deliberately avoid acquiring knowledge that the public oral statement contained a misrepresentation; or

(iii) through action or failure to act, guilty of gross misconduct in connection with the making of the public oral statement that contained a misrepresentation?

(13) What is the specific formula by which the damages payable by each of the defendants to the class members is determined? [page480]

*Vicarious liability*

(14) Is Canadian Solar vicariously liable or otherwise responsible for the acts of either or both of the individual defendants?

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End of Document

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# Tab 2

**AIC Limited** *Appellant*

*v.*

**Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba** *Respondents*

- and -

**CI Mutual Funds Inc.** *Appellant*

*v.*

**Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba** *Respondents*

**AIC Limitée** *Appelante*

*c.*

**Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar et Wayne Dzeoba** *Intimés*

- et -

**CI Mutual Funds Inc.** *Appelante*

*c.*

**Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar et Wayne Dzeoba** *Intimés*

**Indexed as: AIC Limited *v.* Fischer**

**2013 SCC 69**

File No.: 34738.

2013: April 18; 2013: December 12.

Present: McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Répertorié : AIC Limitée *c.* Fischer**

**2013 CSC 69**

N° du greffe : 34738.

2013 : 18 avril; 2013 : 12 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Civil procedure — Class actions — Certification — Market timing — Investors suing mutual fund managers for breaching fiduciary duties to investors and negligence for failing to curb market timing activities — Investors seeking certification of action as class proceeding under provincial class action legislation — Whether proposed investor class action meets preferability requirement for certification given settlement payments made to investors following proceedings conducted by Ontario Securities Commission — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1)(d).*

*Procédure civile — Recours collectifs — Certification — Arbitrage sur la valeur liquidative — Action intentée par des investisseurs contre des gestionnaires de fonds pour manquement à leurs obligations fiduciaires envers les investisseurs et négligence pour avoir omis de prendre des mesures en vue de restreindre les arbitrages — Motion en vue de faire certifier que l'instance est un recours collectif présentée par les investisseurs en vertu de la loi provinciale sur les recours collectifs — Le recours collectif projeté satisfait-il au critère de certification du meilleur moyen, compte tenu de l'indemnité versée aux investisseurs par suite de l'instance intentée par la Commission des valeurs mobilières de l'Ontario? — Loi de 1992 sur les recours collectifs, L.O. 1992, ch. 6, art. 5(1)d).*

A group of mutual fund managers were the subject of an investigation conducted by the Ontario Securities Commission ("OSC") into "market timing", a practice which was alleged to have caused long-term investors

Un groupe de gestionnaires de fonds mutuels étaient visés par une enquête menée par la Commission des valeurs mobilières de l'Ontario (« CVMO ») sur l'« arbitrage sur la valeur liquidative », une pratique

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to suffer losses in the value of their investments. The fund managers ultimately entered into agreements with the OSC that paid investors millions in settlement. The settlement agreements anticipated and did not preclude the possibility of civil proceedings against the mutual fund managers. Following the settlement agreements, the investors applied to certify a class action against the fund managers relating to the same market timing conduct. The motion judge found that a class action was not a preferable procedure and denied certification. The Divisional Court reversed the motion judge and granted certification. The Court of Appeal upheld the Divisional Court's result.

*Held*: The appeal should be dismissed.

The appeal focuses on one branch of the statutory requirement for certification, the requirement that "a class proceeding would be the preferable procedure for the resolution of the common issues": *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(d). The question is whether the proposed class proceeding, as compared to the non-litigation OSC proceedings, is preferable from the point of view of providing access to justice. It is clear that the preferability requirement is broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions. In assessing preferability, the court must look at the common issues in the context of the action as a whole. However, the court cannot engage in a detailed assessment of the merits or likely outcome of the class action or any alternatives to it. The party seeking certification of a class action must show some basis in fact for each of the certification requirements.

The preferability inquiry has to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. Access to justice is an important goal of class proceedings. Within the proper scope of the certification process, both substantive and procedural aspects must be assessed in determining whether a class action is the preferable procedure. A class action will serve the goal of access to justice if: (1) there are access to justice

qui aurait fait baisser la valeur des placements d'investisseurs à long terme. Les gestionnaires de fonds ont fini par conclure des ententes de règlement avec la CVMO en exécution desquelles ils ont versé des millions de dollars aux investisseurs. Les ententes envisageaient la possibilité de poursuites civiles contre les gestionnaires de fonds mutuels; elles n'y faisaient pas obstacle. Postérieurement aux ententes de règlement, les investisseurs ont demandé la certification d'un recours collectif visant les gestionnaires de fonds et reposant sur les mêmes actes d'arbitrage sur la valeur liquidative. Le juge saisi de la motion a conclu que le recours collectif n'était pas le meilleur moyen et a refusé de le certifier. La Cour divisionnaire a infirmé cette décision et accordé la certification. La Cour d'appel a confirmé la conclusion de la Cour divisionnaire.

*Arrêt* : Le pourvoi est rejeté.

Le pourvoi porte sur l'un des critères de certification établis par la loi, à savoir « le recours collectif est le meilleur moyen de régler les questions communes » (*Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6, art. 5(1)d)). La question est celle de savoir si le recours collectif projeté constitue un meilleur moyen de régler les questions en cause, dans l'optique de l'accès à la justice, que l'instance non judiciaire devant la CVMO. Il est clair que le critère du meilleur moyen est assez large pour englober tous les moyens raisonnables offerts pour régler les demandes des membres du groupe, notamment les voies de droit autres que les poursuites judiciaires. Dans l'analyse relative au meilleur moyen, le tribunal doit considérer les questions communes dans le contexte général de l'action. Or, le tribunal ne saurait à cette étape procéder à l'appréciation détaillée du bien-fondé du recours collectif ou des autres voies de droit ou de leur issue probable. Il incombe à la partie qui cherche à faire certifier un recours collectif d'établir un certain fondement factuel pour chacune des conditions de certification.

L'analyse relative au meilleur moyen s'effectue à la lumière des trois principaux objectifs du recours collectif : l'économie des ressources judiciaires, la modification des comportements et l'accès à la justice, mais la question à laquelle il faut ultimement répondre est celle de savoir s'il existe des moyens préférables de régler les demandes, non pas si le recours collectif projeté réalisera pleinement ces objectifs. L'accès à la justice est assurément un objectif important du recours collectif. Dans la mesure permise à l'étape de la certification, l'analyse servant à déterminer si le recours collectif est le meilleur moyen doit porter à la fois sur le fond et sur la

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concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered. To determine whether both of these elements are present, it may be helpful to address a series of questions. These questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis.

The first question is: what are the barriers to access to justice? There are two potential barriers to access to justice in this case. First, an economic barrier arises from the nature of the claim. The individual claims are not large enough to support viable individual actions. The second barrier is related to the first. As a result of the nature of the claim, there is potentially no access to a fair process, geared towards protecting the rights of class members, to seek a resolution of the common issues for what could potentially be a class of over a million members. Thus, traditional litigation cannot achieve either the substantive or the procedural dimensions of access to justice in a case such as this. Although generally the most common barrier to access to justice is an economic one; they can also be psychological or social in nature. A common procedural barrier is that there is no other procedure available to afford meaningful redress.

The second question is: what is the potential of the class proceedings to address those barriers? This analysis is not made in isolation, but within the comparative analysis, for the purpose of assessing the class proceedings' potential to address the access to justice concerns in comparison to the alternative procedure's ability to do so. Even though a class action is a procedural tool, achieving substantive results is one of its underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice. In this case, the proposed class action addresses both barriers. It has the potential to make it economically feasible to advance on behalf of the class a group of individual claims that would otherwise not be economically feasible to pursue in the courts and it provides class members with a fair process to resolve their claims.

The third question is: what are the alternatives to class proceedings? The motions court must look at all

forme. Le recours collectif permet de réaliser l'objectif d'accès à la justice si (1) il existe des préoccupations à ce sujet auxquelles ce type d'action peut remédier et (2) ces préoccupations subsistent lorsque d'autres voies de droit sont envisagées. Pour établir si ces deux conditions sont remplies, il peut être utile de poser une série de questions. Elles ne sauraient être examinées isolément, ni dans un certain ordre, mais elles devraient éclairer une analyse comparative globale.

La première question est la suivante : quels sont les obstacles à l'accès à la justice? Deux obstacles potentiels à l'accès à la justice se dressent en l'espèce. Le premier, d'ordre financier, est lié à la nature de la demande. Le montant des demandes individuelles est trop modeste pour qu'un recours individuel soit viable. Le deuxième obstacle est lié au premier. La nature de la demande est telle qu'il n'existe peut-être pas d'autre moyen équitable de permettre aux membres du groupe d'exercer leurs droits et de mener au règlement des questions communes d'un groupe pouvant compter plus d'un million de membres. Ainsi, dans un tel cas, l'action en justice classique ne sert pas l'accès à la justice, ni du point de vue substantiel, ni du point de vue procédural. Si, en règle générale, l'obstacle à l'accès à la justice le plus fréquent est d'ordre financier, il peut également être d'ordre psychologique ou social. L'impossibilité d'exercer tout autre recours qui permettrait d'obtenir une véritable réparation constitue un obstacle d'ordre procédural fréquent.

La deuxième question est la suivante : dans quelle mesure le recours collectif permet-il d'éliminer ces obstacles? Cette analyse ne s'effectue pas en vase clos, mais s'inscrit dans l'analyse comparative et vise à confronter le recours collectif aux autres moyens, eu égard à leur capacité respective de répondre aux préoccupations en matière d'accès à la justice. Bien qu'il s'agisse d'un instrument de procédure, le recours collectif a, entre autres, pour objet sous-jacent de procurer des résultats positifs quant au fond. Dans l'évaluation de la capacité de ce type de recours d'aplanir les obstacles à l'accès à la justice, il faut prendre en compte la dimension procédurale et la dimension substantielle de la notion d'accès. En l'espèce, le recours collectif proposé élimine ces deux obstacles. Il permet à un groupe de faire valoir un ensemble de demandes individuelles qu'il serait autrement impossible pour des raisons d'ordre financier de soumettre aux tribunaux et il fournit aux membres du groupe une voie de droit équitable.

La troisième question est la suivante : quels autres moyens y a-t-il? Le tribunal saisi de la motion doit

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the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim. There is no realistic litigation alternative in this case. The only alternative procedure that was advanced is the OSC proceedings and settlement agreements, the results of which are already known.

The fourth question is: to what extent do the alternatives address the relevant barriers to access to justice? The question is whether the alternative has the potential to provide effective redress for the substance of the claims and to do so in a manner that accords suitable procedural rights.

The last question is: how do the two proceedings compare? In comparing the two proceedings, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. The court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.

In answering the last two questions in this case, investor participation in the process leading to compensation is an important factor to consider and one that weighs heavily in favour of finding that the class proceeding meets the preferability requirement in this case. The regulatory nature of, and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address. Moreover, the focus and nature of the OSC process reinforce the concerns about whether substantial access to justice was achieved. The substantive outcome of the OSC proceedings cannot be dismissed as irrelevant to the question of whether the OSC proceedings addressed the access to justice barrier that is present in this case or whether the way in which it did so suggests that the class proceeding is not the preferred alternative.

However, the substantive outcome of the OSC proceedings and their impact on the preferability analysis must be examined through the appropriate evidentiary lens. In the rather unusual circumstances of this case, where the OSC proceedings have run their course and the results of those proceedings are known, the comparative analysis cannot ignore the question of whether a cost-benefit analysis supports the contention that the proposed

examiner de façon globale les autres moyens et déterminer s'ils permettent d'éliminer les obstacles à l'accès à la justice que soulève la demande. Il n'existe pas d'autre solution judiciaire réaliste en l'espèce. La seule autre voie de droit évoquée est l'instance devant la CVMO et les règlements intervenus, dont l'issue est connue.

La quatrième question est la suivante : dans quelle mesure les autres moyens permettent-ils d'aplanir les obstacles à l'accès à la justice? Il s'agit de déterminer si l'autre moyen permettra de régler utilement les demandes quant au fond tout en assurant la possibilité d'exercer des droits procéduraux adéquats.

La dernière question est la suivante : quel est le résultat de la comparaison des deux instances? Dans l'exercice de comparaison, le tribunal saisi de la motion doit déterminer, au vu de la preuve, s'il a été démontré que le recours collectif est le meilleur moyen de régler les préoccupations relatives à l'accès à la justice, sur le plan de la procédure et sur le plan du fond. Il doit aussi, sans outrepasser le cadre de l'audience sur la certification, comparer les coûts et les avantages du recours collectif projeté à ceux de l'autre moyen proposé.

En réponse aux deux dernières questions en l'espèce, il faut mentionner que la participation des investisseurs à la procédure menant à l'indemnisation constitue un facteur important, qui milite fortement en faveur de la conclusion que le recours collectif satisfait au critère du meilleur moyen en l'espèce. La nature réglementaire de l'instance devant la CVMO et les droits de participation limités qu'elle offrait aux investisseurs, conjugués à l'absence d'information sur les calculs effectués par son personnel en vue de l'indemnisation des investisseurs, étayent la conclusion qu'il subsiste d'importants obstacles à l'accès à la justice sur le plan procédural auxquels le recours collectif peut remédier. Par ailleurs, l'objet et la nature de la procédure devant la CVMO accentuent les préoccupations en matière d'accès à la justice sur le plan du fond. On ne peut conclure que l'issue concrète de cette instance ne joue pas pour déterminer si cette voie de droit a permis de lever l'obstacle à l'accès à la justice en l'espèce ou s'il en ressort que le recours collectif n'est pas le meilleur moyen.

Toutefois, l'issue concrète de l'instance devant la CVMO et son effet sur l'analyse relative au meilleur moyen doivent être examinés à la lumière des normes de preuve applicables. Les circonstances de l'espèce sont plutôt inhabituelles, car l'issue de l'instance devant la CVMO est connue. L'analyse comparative doit donc aborder la question de savoir si l'examen des coûts et des avantages étaye la thèse selon laquelle le recours

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class proceeding is the preferable way to address the claims here. The record in this case, which shows in detail the results of the completed proposed alternative proceedings, also shows that substantive access to justice concerns still remain. Further, there is no reason to believe that potential additional recovery would be consumed by the costs of the proceedings. The investors provided an appropriate basis to support the view that the class action proceeding would overcome access to justice barriers that subsisted after the completion of the OSC proceedings and that a cost-benefit analysis supported the conclusion that the class proceedings were the preferable proceeding for the investors to pursue their claims. The motion judge in this case erred in principle in his analysis and this justified appellate intervention in his exercise of discretion to refuse certification. The correct legal principles support the decision to certify the proposed class action.

**Cases Cited**

**Applied:** *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; **referred to:** *Klay v. Humana, Inc.*, 382 F.3d 1241 (2004); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641; *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358; *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, aff'd (2004), 70 O.R. (3d) 182; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22, leave to appeal refused, [2003] 2 S.C.R. vi; *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, leave to appeal refused, [2008] 1 S.C.R. xiv.

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*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1).
*Federal Rules of Civil Procedure*, 28 U.S.C. app., r. 23(b)(3).

collectif est le meilleur moyen de régler les réclamations. La preuve présente l'issue de l'autre voie de droit en détail et révèle qu'il subsiste des préoccupations relatives à l'accès à la justice quant au fond. En outre, il n'y a aucune raison de croire que les coûts du recours annuleraient le montant des dommages-intérêts susceptibles d'être accordés. Les investisseurs ont bien étayé l'opinion que le recours collectif permettrait d'écarter les obstacles à l'accès à la justice subsistant après l'instance devant la CVMO et qu'à la lumière d'un examen des coûts et des avantages, il s'agit du meilleur moyen de faire valoir les demandes des investisseurs. L'analyse du juge saisi de la motion est entachée d'erreurs de principe. En conséquence, la révision en appel de l'exercice de son pouvoir discrétionnaire de refuser la certification est justifiée. Les bons principes juridiques applicables étayent la décision de certifier le recours collectif projeté.

**Jurisprudence**

**Arrêt appliqué :** *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; **arrêts mentionnés :** *Klay c. Humana, Inc.*, 382 F.3d 1241 (2004); *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; *Rumley c. Colombie-Britannique*, 2001 CSC 69, [2001] 3 R.C.S. 184; *Webb c. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389; *Pearson c. Inco Ltd.* (2006), 78 O.R. (3d) 641; *Halabi c. Becker Milk Co.* (1998), 39 O.R. (3d) 153; *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477; *Irving Paper Ltd. c. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358; *Hague c. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1; *McCracken c. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745; *1176560 Ontario Ltd. c. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, conf. par (2004), 70 O.R. (3d) 182; *Chadha c. Bayer Inc.* (2003), 63 O.R. (3d) 22, autorisation d'appel refusée, [2003] 2 R.C.S. vi; *Caputo c. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132; *Markson c. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano c. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, autorisation d'appel refusée, [2008] 1 R.C.S. xiv.

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*James D. G. Douglas*, *David Di Paolo* and *Margot Finley*, for the appellant AIC Limited.

*Benjamin Zarnett*, *Jessica Kimmel* and *Melanie Ouanounou*, for the appellant CI Mutual Funds Inc.

*Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6, art. 5(1).

*Loi sur les valeurs mobilières*, L.R.O. 1990, ch. S.5, art. 127.

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*James D. G. Douglas*, *David Di Paolo* et *Margot Finley*, pour l'appelante AIC Limitée.

*Benjamin Zarnett*, *Jessica Kimmel* et *Melanie Ouanounou*, pour l'appelante CI Mutual Funds Inc.

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*Allan C. Hutchinson*, *Peter R. Jervis*, *Joel P. Rochon* and *Remissa Hirji*, for the respondents.

The judgment of the Court was delivered by

CROMWELL J. —

I. Overview

[1] In order to have a proposed class action certified, the plaintiff must show that there is some basis in fact to conclude that a class proceeding would be the preferable procedure for resolution of the common issues raised in the action: *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), s. 5(1)(d). The main question on appeal in this proposed investor class action is whether it meets this preferability requirement given that settlement payments were made to investors following proceedings conducted by the Ontario Securities Commission ("OSC").

[2] The issue is a thorny one: each of the three levels of court in the proceedings leading to this appeal adopted significantly different approaches. The motion judge found that a class action was not a preferable procedure and denied certification. Given the OSC's restitutionary mandate, he held that it was not for the court to second-guess the access to justice provided to investors through the settlements or to give much weight to the difference between the mandate and processes of the OSC compared to the courts. The Divisional Court reversed the motion judge and granted certification. Its analysis focused on the level of recovery in the regulatory proceeding as compared to the quantum of damages claimed in the class action. The comparison led the court to conclude that substantial recovery could still be achieved by way of the class action. The OSC proceedings could therefore not be preferable to the proposed class action. The Court of Appeal upheld the Divisional Court's result, but for substantially different reasons. The Court of Appeal focused on comparing the class members' procedural rights in class proceedings with the regulatory nature and limited participatory rights of investors in the OSC proceedings. As the Court of Appeal put it, the

*Allan C. Hutchinson*, *Peter R. Jervis*, *Joel P. Rochon* et *Remissa Hirji*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Aperçu

[1] Pour faire certifier un recours collectif, le demandeur doit établir un certain fondement factuel permettant de conclure qu'il s'agit du meilleur moyen de régler les questions communes en cause (*Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6 (« *LRC* »), al. 5(1)d)). La principale question que pose le présent pourvoi est celle de savoir si, compte tenu de l'indemnité versée aux investisseurs par suite de l'instance introduite devant la Commission des valeurs mobilières de l'Ontario (« CVMO »), le recours collectif projeté satisfait au critère du meilleur moyen.

[2] La question est épineuse; les trois juridictions qui se sont prononcées ont tenu des raisonnements très différents. Le juge saisi de la motion a conclu que le recours collectif n'était pas le meilleur moyen de régler les questions communes et il a refusé de le certifier. Selon lui, vu le mandat de la CVMO en matière de restitution, il n'était pas loisible au tribunal de remettre en question l'accès à la justice que représentent pour les investisseurs les règlements intervenus ou d'attacher beaucoup d'importance aux éléments qui distinguent le mandat et la procédure de la CVMO de ceux d'une cour de justice. La Cour divisionnaire a infirmé cette décision et accordé la certification. Son analyse a comparé le montant de l'indemnité versée à l'issue de la procédure réglementaire à celui des dommages-intérêts réclamés dans le cadre du recours collectif. Cette comparaison l'a amenée à conclure que ce dernier pouvait encore permettre le recouvrement d'une somme substantielle. Par conséquent, l'instance devant la CVMO ne pouvait se révéler préférable au recours collectif projeté. La Cour d'appel a confirmé cette conclusion, mais pour des motifs sensiblement différents. Son raisonnement procédait d'une comparaison entre les

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preferable procedure inquiry must "focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding. . . . The *CPA* mandates that this must be a procedural discussion": 2012 ONCA 47, 109 O.R. (3d) 498, at para. 79.

[3] The focus of this appeal is on the question of whether the proposed class proceeding, as compared to the OSC proceedings, is preferable from the point of view of providing access to justice. The case provides an opportunity for this Court to elaborate the analytical approach to this question under the *CPA*, building on the Court's judgment in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158.

[4] I agree with the Divisional Court and the Court of Appeal that the motion judge erred in principle in his analysis and that this justified appellate intervention in his exercise of discretion to refuse certification. As I see it, the correct legal principles support those courts' decision to certify the proposed class action. I would therefore dismiss the appeal. However, for reasons that I will develop, I also conclude that the preferability analysis is not solely focused on procedural considerations but must, within the proper scope of the certification process, consider both substantive and procedural aspects.

## II. Facts and Proceedings

### A. *Overview of the Facts*

[5] The appellants are two of the mutual fund managers who were the subject of an investigation conducted by the OSC into "market timing", a practice which was alleged to have caused long-term investors to suffer losses in the value of their

droits procéduraux dont jouissent les membres d'un groupe ayant intenté un recours collectif, d'une part, et la nature réglementaire d'une instance devant la CVMO ainsi que les droits de participation limités qu'elle offre aux investisseurs, d'autre part. Comme la Cour d'appel l'indique, l'analyse visant à déterminer le meilleur moyen doit [TRADUCTION] « s'attacher à la nature et à l'objectif sous-jacents de l'autre voie de droit et les comparer à ceux du recours collectif. [. . .] La *LRC* exige qu'un tel examen englobe l'aspect procédural » (2012 ONCA 47, 109 O.R. (3d) 498, par. 79).

[3] La principale question qui se pose en l'espèce est de savoir si le recours collectif projeté constitue un meilleur moyen de régler les questions en cause, dans l'optique de l'accès à la justice, que l'instance devant la CVMO. Le présent pourvoi fournit à notre Cour l'occasion d'approfondir la démarche analytique que commande cette question intéressant la *LRC* et qu'elle a empruntée dans l'arrêt *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158.

[4] Je conviens avec la Cour divisionnaire et la Cour d'appel que l'analyse du juge saisi de la motion est entachée d'erreurs de principe. En conséquence, la révision en appel de l'exercice de son pouvoir discrétionnaire de refuser la certification est justifiée. À mon avis, les bons principes juridiques applicables étayent la décision de ces cours de certifier le recours collectif projeté. Je suis donc d'avis de rejeter le pourvoi. Toutefois, pour les motifs que j'expose plus loin, je suis également d'avis que l'analyse relative au meilleur moyen ne saurait être uniquement axée sur des considérations d'ordre procédural et qu'elle doit tenir compte également de considérations de fond, dans la mesure permise à l'étape de la certification.

## II. Faits et historique judiciaire

### A. *Aperçu des faits*

[5] Les appelantes sont deux gestionnaires de fonds mutuels visés par l'enquête de la CVMO sur l'« arbitrage sur la valeur liquidative », une pratique qui aurait fait baisser la valeur des placements d'investisseurs à long terme. L'enquête de la

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investments. The OSC probe focused on whether the fund managers had taken reasonable steps to protect the funds from harm that could arise from frequent trading market timing, rather than on the "market timers" whose activities directly caused harm to the fund. The fund managers ultimately entered into settlement agreements with the OSC. The appellants AIC Limited and CI Mutual Funds Inc. paid respectively $58.8 million and $49.3 million to their investors as a result of those agreements: motion decision, at para. 94. The settlement agreements anticipated and did not preclude the possibility of civil proceedings against the appellants. The investors who received payments from the appellants are more or less the same people who would ultimately form the class in this proposed class action against the appellants.

[6] Following the settlement agreements, the respondents applied to certify a class action against the fund managers relating to the same market timing conduct. The action alleged, among other things, that the managers had breached their fiduciary duty to investors and had been negligent by failing to take steps to curb market timing activities. (Although the proposed class action originally named five fund managers as defendants, the claims against three of them have settled so that the appellants in this Court are the only remaining defendants.)

B. *Decision on Certification Motion: Ontario Superior Court of Justice, 2010 ONSC 296, 89 C.P.C. (6th) 205 (Perell J.)*

[7] The judge identified the common issues raised by the proposed class proceeding as being whether the defendants (including the appellants in this Court) had fiduciary duties or duties of care to the proposed class members, and if so whether they had breached those duties. It was common ground on the certification motion that the OSC proceedings and settlement agreements did not bar the claims advanced in the action.

CVMO cherchait à déterminer si les gestionnaires de fonds avaient pris des mesures raisonnables contre le préjudice pouvant résulter de fréquents arbitrages sur la valeur liquidative. Elle ne portait pas sur les auteurs des opérations, dont les actions avaient directement causé le préjudice aux fonds. Les gestionnaires de fonds ont fini par conclure des ententes de règlement avec la CVMO. En exécution de ces ententes, les appelantes, AIC Limitée et CI Mutual Funds Inc. ont respectivement versé 58,8 et 49,3 millions de dollars à leurs investisseurs (décision relative à la motion, par. 94). Les ententes envisageaient la possibilité de poursuites civiles contre les appelantes; elles n'y faisaient pas obstacle. Le groupe de demandeurs participant au recours collectif projeté contre les appelantes serait en gros formé des investisseurs à qui une indemnité avait été versée.

[6] Postérieurement aux ententes de règlement, les intimés ont demandé la certification d'un recours collectif visant les gestionnaires de fonds et reposant sur les mêmes actes d'arbitrage sur la valeur liquidative. Dans le cadre du recours, les intimés avançaient notamment que les gestionnaires avaient manqué à leur obligation fiduciaire envers les investisseurs et avaient fait preuve de négligence en ne prenant pas de mesure pour restreindre les arbitrages. (Le recours collectif projeté visait initialement cinq gestionnaires de fonds, mais trois d'entre eux ont conclu un règlement de sorte que les appelantes demeurent les seules défenderesses.)

B. *Décision relative à la motion en vue de la certification (Cour supérieure de justice de l'Ontario, 2010 ONSC 296, 89 C.P.C. (6th)* 205 *(le juge Perell))*

[7] Selon le juge saisi de la motion, les questions communes consistaient à savoir si les défenderesses (dont les appelantes devant la Cour) avaient une obligation fiduciaire ou une obligation de diligence envers les membres du groupe projeté et, dans l'affirmative, si elles y avaient manqué. Il n'était pas contesté que l'instance devant la CVMO et les ententes de règlement ne faisaient pas obstacle aux demandes formulées dans le recours.

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[8] The main contested issue in the motion was whether the proposed action would be the preferable procedure to resolve the common issues having regard to the purposes of class proceedings: judicial economy, behaviour modification and access to justice. The judge noted that if the class action were the preferable procedure, it should be certified conditional on the court approving a litigation plan.

[9] The judge focused his preferability analysis on access to justice. There was no dispute that the OSC proceedings and settlement agreements had achieved the goal of behaviour modification, and the judge concluded that if they had achieved access to justice, then they had also served the goal of judicial economy. The motion judge based his conclusion that the proposed class action was not the preferable procedure solely on the existence of the OSC proceedings and settlement agreements. This conclusion followed from two key findings: first, that the OSC proceedings and settlement agreements were properly part of the preferable procedure analysis; and second, that the OSC proceedings were a "genuine alternative that serve[d] the purposes of a class proceeding; namely, access to justice, behaviour modification, and judicial economy" (para. 234). The judge accepted the defendants' submission that the court "should not second-guess the access to justice provided by the OSC once the court was satisfied that the OSC's purpose was to obtain restitutionary compensation for the harm suffered by the investors and the process to do so was adequate" (para. 256). He reached these conclusions in spite of his finding "that there [was] some basis in fact for the Plaintiffs' submission that the investors may not have been fully compensated as a result of the OSC settlement agreements" (para. 101).

[10] The motion judge therefore denied certification.

[8] À l'étape de la motion, le débat a principalement porté sur la question de savoir si, au regard des objectifs que vise le recours collectif, soit l'économie des ressources judiciaires, la modification des comportements et l'accès à la justice, il s'agissait du meilleur moyen de régler les questions communes. Selon le juge, si c'était le cas, il fallait certifier le recours, sous réserve de l'approbation d'un plan pour l'instance par le tribunal.

[9] C'est dans l'optique de l'accès à la justice que le juge a procédé à l'analyse relative au meilleur moyen. Il n'était pas contesté que l'instance devant la CVMO et les ententes de règlement avaient permis d'atteindre l'objectif de modification comportementale, et le juge a considéré que si elles avaient également permis de favoriser l'accès à la justice, elles auraient du même coup servi l'objectif d'économie des ressources judiciaires. En tenant compte uniquement de l'existence de l'instance devant la CVMO et des ententes de règlement, il a jugé que le recours collectif projeté n'était pas le meilleur moyen. Ce raisonnement découlait de deux conclusions importantes. Suivant la première, l'instance devant la CVMO et les ententes de règlement devaient entrer en ligne de compte dans l'analyse relative au meilleur moyen. Suivant la seconde, l'instance devant la CVMO avait offert [TRADUCTION] « une véritable autre voie de droit qui permet[tait] d'atteindre les objectifs d'un recours collectif, à savoir l'accès à la justice, la modification des comportements et l'économie des ressources judiciaires » (par. 234). Il a retenu l'argument des défenderesses selon lequel le tribunal, « dès lors qu'il est convaincu que la CVMO cherchait à obtenir la réparation du préjudice subi par les investisseurs et que la procédure était adéquate, ne devrait pas remettre en question l'accès à la justice qu'offre l'instance devant la CVMO » (par. 256). Et ce, même s'il avait par ailleurs conclu « que l'argument des demandeurs selon lequel les ententes de règlement n'ont peut-être pas indemnisé intégralement les investisseurs repos[ait] sur un certain fondement factuel » (par. 101).

[10] Le juge saisi de la motion a donc refusé de certifier le recours collectif.

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C. *Ontario Superior Court of Justice, Divisional Court, 2011 ONSC 292, 104 O.R. (3d) 615 (Molloy J., Swinton and Herman JJ. Concurring)*

[11] The Divisional Court found the motion judge's analysis of the preferability requirement to be in error in three respects: "(1) he failed to apply the proper low evidentiary burden on the plaintiffs at [the certification] stage; (2) he improperly found that the already completed OSC proceeding was a preferable proceeding for the remaining portion of the plaintiffs' claims going forward; and (3) he erred in law by considering criteria for approval of a settlement at the certification stage" (para. 33). The court therefore allowed the appeal and certified the class action.

D. *Court of Appeal for Ontario, 2012 ONCA 47, 109 O.R. (3d) 498 (Winkler C.J.O., Epstein J.A. and Pardu J. (ad hoc) Concurring)*

[12] The Court of Appeal dismissed the appeal. It found that although the Divisional Court had not asked itself the right questions, it nonetheless came to the right result. In its view, the Divisional Court should not have focused on whether the OSC settlements provided investors with all or substantially all of the monetary relief they sought: this was an error because, at the certification stage, the amount that would be recoverable in the proposed class proceeding remains unknown, and thus there is no way of determining if the compensation was "substantial" (para. 77). Further, such a determination would be tantamount to making a finding on the merits of the case, which would be a marked departure from the evidentiary burden that applies on a motion for certification. The court was rather of the view that the preferable procedure inquiry had to focus on the purpose and nature of the alternative proceedings as compared with the class proceedings.

[13] The Court of Appeal thought that important procedural distinctions between the OSC proceedings and the proposed class proceeding supported the conclusion that a class proceeding was preferable for resolving the class members' claims in this case. First, the OSC's jurisdiction under

C. *Cour supérieure de justice de l'Ontario, Cour divisionnaire, 2011 ONSC 292, 104 O.R. (3d) 615 (la juge Molloy, avec l'accord des juges Swinton et Herman)*

[11] La Cour divisionnaire a relevé trois erreurs dans l'analyse du juge saisi de la motion : [TRADUCTION] « (1) il n'a pas appliqué la norme de preuve peu exigeante à laquelle les demandeurs doivent satisfaire à [l']étape [de la certification]; (2) il a conclu à tort que l'instance devant la CVMO, qui avait pris fin, était le meilleur moyen de régler le reste des revendications des demandeurs; et (3) il a commis une erreur de droit en prenant en compte les critères d'approbation d'un règlement à l'étape de la certification » (par. 33). La cour a donc accueilli l'appel et certifié le recours collectif.

D. *Cour d'appel de l'Ontario, 2012 ONCA 47, 109 O.R. (3d) 498 (le juge en chef Winkler avec l'accord des juges Epstein et Pardu (ad hoc))*

[12] La Cour d'appel a rejeté l'appel, estimant que la Cour divisionnaire était parvenue au bon résultat sans toutefois poser les bonnes questions. Selon la première, la seconde avait fait erreur en s'attachant à savoir si les ententes de règlement conclues par la CVMO représentaient la totalité ou la quasi-totalité du montant de la mesure du redressement pécuniaire réclamée par les investisseurs. À l'étape de la certification, la somme qu'il sera possible de recouvrer étant inconnue, il n'est par conséquent pas possible de déterminer si l'indemnisation était [TRADUCTION] « quasi totale » (par. 77). En outre, tirer pareille conclusion équivaudrait à statuer sur le fond du litige, ce qui constituerait un écart marqué par rapport au fardeau de preuve applicable en matière de certification. La cour a plutôt jugé que, dans le cadre de l'analyse relative au meilleur moyen, il fallait comparer les objectifs et la nature des autres voies de droit et du recours collectif.

[13] La Cour d'appel était d'avis que les différences procédurales importantes entre l'instance devant la CVMO et le recours collectif projeté permettaient de conclure que ce dernier constituait le meilleur moyen de régler les demandes des membres du groupe. Premièrement, l'art. 127 de la *Loi*

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s. 127 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, was regulatory, not compensatory and, as a result, the remedial powers available to the OSC were insufficient to enable it to fully address the class members' claims. Second, the OSC proceedings did not provide comparable rights of participation to the affected investors, which was an important access to justice consideration.

*sur les valeurs mobilières* de l'Ontario, L.R.O. 1990, ch. S.5, confère à la CVMO une compétence d'ordre réglementaire, et non pas une compétence en matière d'indemnisation, de sorte qu'elle ne dispose pas de pouvoirs de redressement suffisants pour lui permettre de faire droit à la totalité des demandes des membres du groupe. Deuxièmement, l'instance devant la CVMO n'accorde pas aux investisseurs de droits de participation comparables à ceux que leur permettrait d'exercer un recours collectif, une importante considération d'accès à la justice.

III. Brief Summary of the Positions of the Parties

III. Résumé des positions des parties

[14] The appellants complain that the Court of Appeal wrongly equated access to justice with access to court-like procedures to the neglect of other important considerations and that it erroneously focused on theoretical considerations rather than the actual results achieved by the OSC proceedings. These fundamental flaws, the appellants say, led the Court of Appeal into a number of other errors. It wrongly focused on the fact that the OSC jurisdiction is regulatory and not compensatory. It erred in its assessment of investor participation in the OSC proceedings. It failed to take into account the no-fault, timely and no-cost aspects of the OSC process, and the impartiality and independence of the OSC. The appellants also argue that the Court of Appeal simply substituted its own discretion for that of the motion judge, contrary to the applicable standard of review.

[14] Les appelantes reprochent à la Cour d'appel d'avoir confondu accès à la justice avec accès à une instance quasi judiciaire au détriment d'autres éléments importants. Elles prétendent aussi qu'elle se serait attachée à tort à des questions théoriques plutôt qu'aux résultats concrets de l'instance devant la CVMO. Selon les appelantes, de ces vices fondamentaux auraient découlé d'autres erreurs. Ainsi, la Cour aurait trop insisté sur le fait que la CVMO exerce des pouvoirs d'ordre réglementaire, non pas des pouvoirs d'indemnisation. Elle aurait mal apprécié la participation des investisseurs à l'instance devant la CVMO. Elle n'aurait tenu compte ni du fait que le régime offert par la CVMO est rapide et sans frais et n'exige pas que la faute soit démontrée, ni de l'impartialité et de l'indépendance de cet organisme. Les appelantes soutiennent en outre que la Cour d'appel a simplement substitué son propre pouvoir discrétionnaire à celui du juge saisi de la motion, en contravention à la norme de contrôle applicable.

[15] The respondents submit that the Court of Appeal appropriately focused its analysis on the importance of participatory rights coupled with the limited scope and nature of the OSC's jurisdiction and remedial powers, rather than the outcome of the OSC proceedings. The respondents contend that participation is at the heart of the concept of access to justice. They submit that given the lack of basic procedural rights to investors in the OSC proceedings, the non-binding nature of the settlements, as well as the non-disclosure of how the

[15] Pour leur part, les intimés font valoir que la Cour d'appel a axé à juste titre son analyse sur l'importance des droits de participation et sur la portée et la nature limitées de la compétence et des pouvoirs de redressement de la CVMO, plutôt que sur le résultat de l'instance devant cet organisme. Ils soutiennent que la participation est au cœur de la notion d'accès à la justice. Étant donné que les investisseurs ne jouissent d'aucun droit procédural fondamental devant la CVMO, que les ententes de règlement n'ont pas force exécutoire et que les

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settlement agreements were achieved, the compensation received by investors was arbitrary and partial and was in no way preferable to a class action.

IV. Analysis

A. *Introduction*

[16] The appeal focuses on one branch of the statutory requirement for certification, the requirement that "a class proceeding would be the preferable procedure for the resolution of the common issues": *CPA*, s. 5(1)(d). In the circumstances of this case, the question of preferability boils down to quite a narrow issue because there is substantial agreement on a number of points. There is no longer any dispute that the proposed class action meets all of the requirements for certification except for the disputed element of whether it is the preferable procedure. With regard to that requirement, it is no longer disputed that the class action would be a fair, efficient and manageable proceeding or that it would be preferable to any litigation alternatives. It is also common ground that to assess whether the class action would be preferable to any other alternative method of resolving the class members' claims, the court compares the competing possibilities through the lens of the goals of behaviour modification, judicial economy and access to justice, bearing in mind, of course, that the ultimate question is whether the statutory requirement of preferability has been established. There is also no dispute that the appeal turns on how well the two proceedings can provide access to justice for the investors. This is so because the parties acknowledge that there is no other litigation alternative, that the OSC proceedings accomplished the purpose of behaviour modification, and the motion judge found that either proceeding would serve the goal of judicial economy, a finding that is not contested before this Court.

[17] While in general all three goals of class action procedures must be weighed in the balance, in the specific circumstances of this case, the question is

pourparlers qui les ont précédées sont demeurés secrets, l'indemnité versée aux investisseurs est arbitraire et partiale et ne saurait être préférable au recours collectif.

IV. Analyse

A. *Introduction*

[16] Le pourvoi porte sur l'un des critères de certification établis par la loi, à savoir « le recours collectif est le meilleur moyen de régler les questions communes » (*LRC*, al. 5(1)d)). Dans les circonstances de l'espèce, la question de savoir s'il s'agit du meilleur moyen est assez précise, vu que les parties s'entendent dans une large mesure sur plusieurs points. Il est à présent admis que le recours collectif projeté satisfait aux autres critères de certification. Quant au critère du meilleur moyen, qui fait l'objet du litige, nul ne conteste plus que le recours collectif constituerait une procédure juste, efficace et pratique ni qu'il serait préférable à toute autre voie de droit judiciaire. Les parties s'entendent également pour dire que le tribunal chargé de déterminer si le recours collectif serait préférable à toute autre voie extrajudiciaire pour régler les demandes des membres du groupe doit passer les possibilités au crible des objectifs que sont la modification des comportements, l'économie des ressources judiciaires et l'accès à la justice. Ce faisant, le tribunal doit, bien sûr, garder à l'esprit que la question fondamentale est de savoir s'il a été satisfait au critère légal du meilleur moyen. Il n'est en outre pas contesté que le pourvoi vise à déterminer lequel des deux moyens favorise le plus l'accès à la justice des investisseurs. Telle est la question parce que les parties reconnaissent que le recours collectif est la seule voie judiciaire possible, que l'instance devant la CVMO a permis d'atteindre l'objectif de modification des comportements et que le juge saisi de la motion a conclu que l'une ou l'autre option servirait l'objectif d'économie des ressources judiciaires. Cette conclusion n'est pas contestée dans le présent pourvoi.

[17] En général, les trois objectifs du recours collectif doivent être soupesés. Or, dans les circonstances particulières de l'espèce, il s'agit de

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whether, from an access to justice perspective, certification should be denied on account of results already obtained in a non-litigation proceeding before the OSC.

[18] I will begin my analysis by outlining the main threads of the jurisprudence dealing with the preferability requirement with particular reference to cases in which it has been argued that some form of non-court, alternative dispute resolution was a preferable procedure to a proposed class action. I will then develop what, in my opinion, is the correct analytical approach to this issue and apply it to this case.

B. *The Preferability Requirement — Overview of the Principles*

(1) Statutory Provision

[19] The starting point is the relevant statutory provision. Section 5(1)(d) of the *CPA* requires the court to conclude that "a class proceeding would be the preferable procedure for the resolution of the common issues". (See the attached Appendix for s. 5(1) *CPA* reproduced in full.) Although this provision could be read as requiring a procedure that is capable of producing a formal resolution of the common issues, that reading was rejected by the Court in *Hollick*. McLachlin C.J., writing for the Court, made clear that the preferability requirement is broad enough to take into account "all reasonably available means of resolving the class members' claims" including avenues of redress other than court actions (para. 31). An alternative process need not necessarily decide the precise legal and/or factual questions raised by the common issues provided that it effectively resolves the class members' claims. This broad understanding of the preferability requirement is critical in cases like this one in which individual court actions are not a viable option.

[20] This understanding of the role of non-litigation alternatives in the comparative analysis under the *CPA*'s preferable procedure criterion is different from its American counterpart under the

déterminer, dans une perspective d'accès à la justice, s'il y a lieu de refuser la certification par suite de l'issue de l'instance extrajudiciaire devant la CVMO.

[18] J'expose d'abord les grandes lignes que trace la jurisprudence relative au critère du meilleur moyen, en m'attardant tout particulièrement aux affaires où un mode de règlement extrajudiciaire des différends était présenté comme étant préférable à un recours collectif. J'explique ensuite la démarche analytique à suivre en l'espèce selon moi et l'applique aux faits de l'espèce.

B. *Le critère du meilleur moyen — survol des principes*

(1) Disposition législative

[19] Commençons par la disposition législative applicable. L'alinéa 5(1)d) de la *LRC* requiert que le tribunal conclue que « le recours collectif est le meilleur moyen de régler les questions communes ». (Le paragraphe 5(1) est reproduit intégralement à l'annexe.) Bien que cette disposition puisse sembler exiger un moyen susceptible de mener au règlement formel des questions communes, la Cour rejette à l'unanimité cette interprétation dans *Hollick*. La juge en chef McLachlin y indique clairement que le critère du meilleur moyen est assez large pour englober « tous les moyens raisonnables offerts pour régler les demandes des membres du groupe », notamment les voies de droit autres que les poursuites judiciaires (par. 31). Dans la mesure où l'autre moyen permet de régler les demandes des membres du groupe, il n'est pas nécessaire qu'il tranche les aspects juridiques ou factuels précis des questions communes. Cette conception large du critère du meilleur moyen revêt une importance capitale dans les affaires où, comme en l'espèce, l'action en justice individuelle ne constitue pas une solution viable.

[20] Cette manière d'envisager le rôle des voies extrajudiciaires dans l'analyse comparative que requiert le critère du meilleur moyen prévu à la *LRC* diffère de celle que prévoient les dispositions

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U.S. federal class action regime. The language of Rule 23 of the U.S. *Federal Rules of Civil Procedure* provides that the court must, among other things, satisfy itself "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy": 28 U.S.C. app., r. 23(b)(3). This wording invites a comparison between the class action and other forms of court action, and has tended to limit reliance on comparison with non-judicial alternatives: see W. B. Rubenstein, *Newberg on Class Actions* (5th ed. 2011) (WL), at § 4:86.

(2) In Assessing Preferability, the Court Looks at the Common Issues in the Context of the Action as a Whole

[21] In order to determine whether a class proceeding would be the preferable procedure for the "resolution of the common issues", those common issues must be considered in the context of the action as a whole and "must take into account the importance of the common issues in relation to the claims as a whole": *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court": para. 29, citing W. K. Branch, *Class Actions in Canada* (loose-leaf 1998, release 4), at para. 4.690.

(3) The Preferable Procedure Analysis Considers the Extent to Which the Proposed Class Action Serves the Goals of Class Proceedings

[22] In *Hollick*, McLachlin C.J. indicated that the preferability inquiry had to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice (para. 27). This should not be construed as creating a requirement to prove that the proposed class action will *actually* achieve those goals in a specific case. Thus, when

fédérales américaines en matière de recours collectif. Aux termes de la règle 23 des *Federal Rules of Civil Procedure* des États-Unis, le tribunal doit notamment être convaincu que [TRADUCTION] « le recours collectif est supérieur à toute autre méthode pour trancher le litige de façon juste et efficace » (28 U.S.C. app., r. 23(b)(3)). Cette formulation invite à confronter le recours collectif à d'autres types de recours judiciaires et a généralement eu pour effet de limiter les comparaisons avec des voies de droit extrajudiciaires (voir W. B. Rubenstein, *Newberg on Class Actions* (5e éd. 2011) (WL), § 4:86).

(2) Dans l'analyse relative au meilleur moyen, le tribunal examine les questions communes dans le contexte de l'action dans son ensemble

[21] Pour déterminer si le recours collectif est le meilleur moyen de « régler les questions communes », il faut considérer ces dernières dans le contexte général de l'action et en « examiner l'importance [. . .] par rapport à l'ensemble des revendications » (*Hollick*, par. 30). Dans *Hollick*, la juge en chef McLachlin approuve le commentaire d'un observateur affirmant que, dans la comparaison du recours collectif avec d'autres voies de droit possibles, [TRADUCTION] « il importe de recourir à une analyse pratique tenant compte des coûts et des avantages et de prendre en considération l'incidence d'un recours collectif sur les membres du groupe, les défendeurs et le tribunal » (par. 29, citant W. K. Branch, *Class Actions in Canada* (feuilles mobiles 1998, envoi no 4), par. 4.690).

(3) L'analyse relative au meilleur moyen détermine dans quelle mesure le recours collectif projeté permet la réalisation des objectifs de ce type de recours

[22] Dans *Hollick*, la juge en chef McLachlin indique que l'analyse relative au meilleur moyen s'effectue à la lumière des trois principaux objectifs du recours collectif : l'économie des ressources judiciaires, la modification des comportements et l'accès à la justice (par. 27). On n'entend pas par là qu'il faille prouver que le recours collectif projeté réalisera *effectivement* ces objectifs dans

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undertaking the comparative analysis, courts must focus on the statutory requirement of preferabilty and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized.

[23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs": *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), at p. 1269, cited in Rubenstein, at § 4:85, fn. 2.

C. *Access to Justice as a Goal of Class Proceedings*

[24] There is no doubt that access to justice is an important goal of class proceedings. But what is access to justice in this context? It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. They are interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process. As the Honourable Frank Iacobucci put it, "access to justice must contain both a procedural and a substantive component. I find it difficult to accept that providing injured parties with a process to pursue their claims can be

un cas donné. En conséquence, dans son analyse comparative, le tribunal doit s'en tenir au critère légal du meilleur moyen et s'abstenir d'imposer au représentant des demandeurs le fardeau de prouver que tous les avantages du recours collectif se matérialiseront dans les faits.

[23] Il s'agit d'un exercice comparatif. Le tribunal doit certes examiner dans quelle mesure le recours collectif projeté permet la réalisation des trois objectifs de la *LRC*, mais la question à laquelle il doit ultimement répondre est celle de savoir s'il existe des moyens préférables de régler les demandes, non pas si le recours collectif projeté réalisera pleinement ces objectifs. Un arrêt de la Cour d'appel fédérale des États-Unis exprime bien cette nuance, qui vaut également pour la *LRC* : [TRADUCTION] « L'analyse ne porte pas sur les avantages ou les difficultés du recours collectif en soi, mais sur les avantages relatifs d'un tel recours par rapport aux autres types de recours judiciaires [et j'ajouterais : de règlement des différends] dont les demandeurs peuvent réellement se prévaloir en pratique » (*Klay c. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), p. 1269, cité dans Rubenstein, § 4:85, note de bas de page 2).

C. *L'accès à la justice comme objectif du recours collectif*

[24] L'accès à la justice est assurément un objectif important du recours collectif. Mais en quoi consiste-t-il dans le contexte qui nous occupe? Il comporte deux dimensions interreliées. L'une intéresse la procédure et la question de savoir si les demandeurs disposent d'une voie équitable de règlement de leurs réclamations. L'autre intéresse le droit substantiel — l'issue recherchée — et la question de savoir s'ils obtiendront une réparation juste et adéquate si le bien-fondé des réclamations est établi. Ces deux dimensions sont interreliées, car, dans bien des cas, des vices de forme soulèvent des doutes sur l'issue quant au fond et des vices de fond peuvent susciter des questions à propos de la procédure. Comme l'explique l'honorable Frank Iacobucci : [TRADUCTION] « . . . l'accès à la justice doit comporter un aspect procédural et un aspect substantiel. Je conçois mal qu'on puisse mettre à

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divorced from ensuring that the ultimate remedy arising from the process provides substantive justice where warranted": "What Is Access to Justice in the Context of Class Actions?", in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, at p. 20. While it may be analytically convenient to look at process and substance considerations separately, this must not be done at the expense of an overall assessment of the access to justice implications of the proposed class action.

[25] The Divisional Court focused its access to justice analysis on substance, relying heavily on its conclusion that there was some basis in fact to believe that the investors were entitled to significantly more than they had received from the OSC proceedings (paras. 4 and 8). The Court of Appeal, on the other hand, focused mainly on process, relying heavily on considerations such as participation rights and remedial jurisdiction. The correct approach, however, must include both substantive and procedural aspects in assessing whether a class action is the preferable procedure. The focus cannot be exclusively on process: a process may be fair but nonetheless not offer a real opportunity to recover compensation for all of the losses suffered. In other words, in some cases even if the process is fair, there will remain significant obstacles to recovery. In addition, an absence of a fair process may also heighten concerns about whether substantive justice has or will be done. Of course, as we shall see, consideration of these aspects must respect the limited scope of the certification process.

[26] A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Hollick*, at para. 33. To determine whether both of these elements are present, it may be helpful to address a series of questions. These

la disposition de parties lésées une procédure leur permettant de faire valoir leurs prétentions sans veiller à ce qu'elle débouche sur une juste réparation au fond si celle-ci est justifiée » (« What Is Access to Justice in the Context of Class Actions? », dans J. Kalajdzic, dir., *Accessing Justice : Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, p. 20). Bien qu'il soit peut-être commode sur le plan analytique d'étudier séparément la procédure et le fond, on ne doit pas le faire au détriment d'une évaluation globale des répercussions du recours collectif projeté sur le plan de l'accès à la justice.

[25] La Cour divisionnaire a axé son analyse relative à l'accès à la justice sur l'aspect substantiel. Elle s'est fondée dans une large mesure sur sa conclusion selon laquelle un certain fondement factuel permettait de croire que les investisseurs avaient droit à une réparation considérablement supérieure à ce qu'ils avaient obtenu devant la CVMO (par. 4 et 8). La Cour d'appel, quant à elle, a plutôt mis l'accent sur l'aspect procédural, son analyse faisant principalement intervenir des facteurs comme les droits de participation et les pouvoirs de réparation. Or, la démarche à suivre pour déterminer si le recours collectif est le meilleur moyen doit porter à la fois sur le fond et sur la forme. On ne saurait s'attacher exclusivement à la procédure : une voie de droit peut être équitable sans néanmoins permettre véritablement au demandeur d'être indemnisé de toutes les pertes subies. Autrement dit, il arrive parfois que subsistent des obstacles importants à l'indemnisation malgré une voie de droit équitable. Qui plus est, l'absence d'une voie de droit équitable risque de faire douter que justice a été rendue ou le sera au fond. Bien sûr, ainsi que nous le verrons, l'analyse de ces éléments doit respecter la portée restreinte du processus de certification.

[26] Le recours collectif permet de réaliser l'objectif d'accès à la justice si (1) il existe des préoccupations à ce sujet auxquelles ce type d'action peut répondre et (2) ces préoccupations subsistent lorsque d'autres voies de droit sont envisagées (*Hollick*, par. 33). Pour établir si ces deux conditions sont remplies, il peut être utile de se

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questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis. I will set out the questions and comment briefly on each.

(1) What Are the Barriers to Access to Justice?

[27] The sorts of barriers to access to justice may vary according to the nature of the claim and the make-up of the proposed class. They may relate to either or both of the procedural and substantive aspects of access to justice. The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature. They may arise from such factors as the ignorance of the availability of substantive legal rights (Ontario Law Reform Commission, *Report on Class Actions*, vol. I (1982) ("OLRC Report"), at p. 127), ignorance of the fact that significant injuries have occurred (OLRC Report, at pp. 127-28), limited language skills (see e.g. Rubenstein, at § 4:65), elderly age of the claimants (see e.g. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)), frail emotional or physical state of the claimants (see e.g. *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184), fear of reprisals by the defendant (OLRC Report, at p. 128; see e.g. *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.)), or alienation from the legal system as a result of negative experiences with it (OLRC Report, at pp. 128-29). A common procedural barrier is that there is no other procedure available to afford meaningful redress.

(2) What Is the Potential of the Class Proceedings to Address Those Barriers?

[28] The next question concerns the potential of the proposed class action to address the barriers to access to justice which have been identified in the particular case. This analysis is not made in

poser une série de questions. Elles ne sauraient être examinées isolément, ni dans un certain ordre, mais elles devraient éclairer une analyse comparative globale. Un bref commentaire accompagne l'énoncé de chacune d'elles.

(1) Quels sont les obstacles à l'accès à la justice?

[27] Le type d'obstacles varie selon la nature de la demande et la composition du groupe projeté. Ils peuvent intéresser l'aspect procédural ou l'aspect substantiel de l'accès à la justice ou les deux. L'obstacle le plus fréquent est d'ordre financier. Il surgit lorsque les frais élevés d'une action en justice et les sommes modestes en jeu empêchent de s'adresser aux tribunaux. Toutefois, les obstacles ne sont pas que financiers; ils peuvent également être d'ordre psychologique ou social et découler de facteurs comme l'ignorance des droits substantiels susceptibles d'être exercés (Commission de réforme du droit de l'Ontario, *Report on Class Actions*, vol. I (1982) (« Rapport de la CRDO »), p. 127), l'ignorance de l'existence d'un préjudice important (Rapport de la CRDO, p. 127-128), des compétences linguistiques limitées (voir, p. ex., Rubenstein, § 4:65), l'âge avancé des demandeurs (voir, p. ex., *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)), une santé psychologique ou physique fragile (voir, p. ex., *Rumley c. Colombie-Britannique*, 2001 CSC 69, [2001] 3 R.C.S. 184), la crainte de représailles de la part du défendeur (Rapport de la CRDO, p. 128; voir, p. ex., *Webb c. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (C.S.J.)), et l'aliénation découlant de démêlés avec la justice (Rapport de la CRDO, p. 128-129). L'impossibilité d'intenter tout autre recours qui permettrait d'obtenir une véritable réparation constitue un obstacle d'ordre procédural fréquent.

(2) Dans quelle mesure le recours collectif permet-il d'éliminer ces obstacles?

[28] La question suivante intéresse la capacité du recours collectif d'éliminer les obstacles à l'accès à la justice dans une affaire donnée. L'analyse qu'elle commande ne s'effectue pas en vase clos,

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isolation, but within the comparative analysis, for the purpose of assessing the class proceedings' potential to address the access to justice concerns in comparison to the alternative procedure's ability to do so.

[29] A class action may allow class members to overcome economic barriers "by distributing fixed litigation costs amongst a large number of class members . . . [and thus] making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own": *Hollick*, at para. 15. It may also allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf.

[30] Through these procedural mechanisms, a class action provides access to the courts for class members. Thus, it is a "procedural tool" (*Hollick*, at para. 15): it does not guaranty results for class members.

[31] That being said, class proceedings exist not only to provide access to a procedure, but also to substantive results. The OLRC Report considered the various barriers to litigation and how class actions could play a role in overcoming those barriers. There is no doubt that achieving results for class members was at the heart of these discussions:

> In the preceding sections, the Commission has examined the importance of providing increased access to the courts for persons who wish to pursue existing remedies but are unable to do so. The Commission is of the view that many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.
>
> Moreover, empirical evidence indicates that class actions do, in fact, provide access to justice for a broader

mais s'inscrit dans l'analyse comparative et vise à confronter le recours collectif aux autres moyens, eu égard à leur capacité respective de répondre aux préoccupations en matière d'accès à la justice.

[29] Le recours collectif peut permettre aux membres du groupe de surmonter l'obstacle d'ordre financier « en répartissant les frais fixes de justice entre les nombreux membres du groupe [. . .] [et ainsi] en rendant économiques des poursuites que les membres du groupe auraient jugées trop coûteuses pour les intenter individuellement » (*Hollick*, par. 15). Il peut aussi permettre de surmonter les obstacles d'ordre psychologique ou social par le truchement du représentant, qui informe les membres du groupe et dirige le recours pour leur compte.

[30] Par ces mécanismes procéduraux, le recours collectif donne aux membres du groupe accès aux tribunaux. En cela, il s'agit d'un « instrument de procédure » (*Hollick*, par. 15) : il ne leur garantit pas le résultat escompté.

[31] Cela dit, le recours collectif a pour objet d'offrir non seulement une voie de droit, mais également un résultat positif quant au fond. Le rapport de la CRDO abordait les divers obstacles à l'action en justice ainsi que la solution que le recours collectif pourrait représenter. Il ne fait aucun doute qu'une issue positive pour les membres tenait une large place dans l'analyse :

> [TRADUCTION] Dans les sections précédentes, on a vu qu'il importe de faciliter l'accès aux tribunaux aux justiciables qui voudraient exercer un recours qui leur est reconnu mais qui ne sont pas en mesure de le faire. La Commission estime que nombre d'actions individuelles ne sont pas intentées, non pas qu'elles ne soient pas fondées ou ne revêtent pas d'importance aux yeux du demandeur, mais en raison d'obstacles d'ordre financier, social ou psychologique. Nous croyons que le recours collectif peut aider à lever ces obstacles et, en améliorant l'accès aux tribunaux, remplir une fonction sociale importante. De toute évidence, un accès réel à la justice est préalable à l'exercice de tout autre droit juridique.
>
> En outre, il est empiriquement établi que le recours collectif rend effectivement la justice accessible à un

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range of persons. The evidence suggests that individuals are interested in pursuing their claims by means of a class action. In addition, class actions seeking damages do confer a significant monetary benefit, notwithstanding the deduction of lawyers' fees and administrative costs. [Reference omitted; p. 139.]

[32] The *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990) ("*Report of the Attorney General*") also acknowledged the underlying goal of class proceedings of providing redress for class members in its opening lines:

> A class action is . . . a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many. [p. 15]

[33] The *Report of the Attorney General* also highlighted the substantive component of access to justice:

> Ontarians also live in a society that strives to maximize access to justice for its citizens. Sophisticated and highly evolved rights and obligations are of little value if they cannot be asserted or enforced effectively and economically. Of what value is a right or obligation, or the judicial system itself, if its users must be told that the right is "too small" or "too complex" or "too risky" to justify its enforcement?
>
> A class action can provide the means by which such claims can be asserted and given access to justice. A meaningful procedure can achieve economies in the use of judicial and court resources and provide widespread redress to many individuals who have suffered a loss or injury. [pp. 16-17]

[34] Thus, class actions overcome barriers to litigation by providing a procedural means to a substantive end. As one author put it in a memorable phrase, a class procedure has the potential to "breath[e] new life into substantive rights": M. Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009), 47 *Alta. L. Rev.* 185, at p. 188. Even though a class action is

grand nombre de personnes. La preuve révèle un intérêt individuel à faire valoir des revendications au moyen du recours collectif. De plus, les recours collectifs en dommages-intérêts procurent un avantage pécuniaire important, même après déduction des honoraires des avocats et frais d'administration. [Renvoi omis; p. 139.]

[32] Le *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990) (« rapport du procureur général ») reconnaît aussi, dans son entrée en matière, l'objectif sous-jacent du recours collectif qui consiste à offrir une réparation aux membres du groupe :

> [TRADUCTION] Un recours collectif est [. . .] un mécanisme procédural ayant pour objet de fournir un moyen efficace d'obtenir la réparation d'un préjudice subi par un grand nombre de personnes, en permettant à une personne ou plus d'intenter une action pour le compte de nombreuses autres. [p. 15]

[33] Le rapport du procureur général souligne également l'aspect substantiel de l'accès à la justice :

> [TRADUCTION] Les Ontariens vivent également dans une société qui s'efforce de favoriser le plus possible l'accès à la justice. Des droits et obligations complexes et très développés ont peu de valeur s'il est impossible de s'en prévaloir de façon efficace et économique. Que vaut un droit ou une obligation, voire le système judiciaire lui-même, si le justiciable reçoit comme message que son droit est « trop insignifiant », « trop complexe » ou « trop risqué » pour être exercé?
>
> Un recours collectif peut fournir le moyen de faire valoir de telles demandes et de donner accès à la justice. Une voie procédurale utile est susceptible de favoriser l'économie des ressources judiciaires et de procurer une réparation à grande échelle aux nombreuses victimes de perte ou de préjudice. [p. 16-17]

[34] Ainsi, le recours collectif permet de surmonter les obstacles aux litiges en fournissant un moyen procédural d'arriver à une fin substantielle. Comme un auteur l'a exprimé de façon mémorable, le recours collectif pourrait avoir l'effet d'[TRADUCTION] « insuffle[r] un nouvel élan aux droits substantiels » (M. Good, « Access to Justice, Judicial Economy, and Behaviour Modification : Exploring the Goals of Canadian Class Actions »

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a procedural tool, achieving substantive results is one of its underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice.

(3) What Are the Alternatives to Class Proceedings?

[35] The motions court must identify alternatives to the proposed class proceedings. As McLachlin C.J. held in *Hollick*, "the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions": para. 31 (emphasis added). Here, the court considers both other potential court procedures (such as joinder, test cases, consolidation and so on: *Hollick*, at para. 28) and non-court proceedings.

[36] The motions court must look at all the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim: *Hollick*, at para. 30. In some cases, non-litigation means of redress will be considered in conjunction with individual actions: see e.g. *Hollick*, *Cloud* and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.). In other cases, for example where there is no viable litigation alternative to a class action, the non-litigation means of redress will have to be considered on its own as a potential alternative to the class action: see e.g. *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Gen. Div.). The nature of the comparison analysis will vary, depending on the nature of the alternatives available for consideration.

(4) To What Extent Do the Alternatives Address the Relevant Barriers?

[37] Once the alternative or alternatives to class proceedings have been identified, the court must

(2009), 47 *Alta. L. Rev.* 185, p. 188). Bien qu'il s'agisse d'un instrument de procédure, il a, entre autres, pour objet sous-jacent de procurer des résultats positifs quant au fond. Dans l'évaluation de la capacité de ce type de recours d'aplanir les obstacles à l'accès à la justice, il faut prendre en compte la dimension procédurale et la dimension substantielle de la notion d'accès.

(3) Quels autres moyens y a-t-il?

[35] Le tribunal saisi de la motion en certification doit examiner les autres voies de droit possibles. Pour reprendre les propos de la juge en chef McLachlin dans *Hollick*, le tribunal, « dans l'analyse du meilleur moyen, doit examiner tous les moyens raisonnables offerts pour régler les demandes des membres du groupe, et non seulement la possibilité de recours individuels » (par. 31 (je souligne)). En l'espèce, le tribunal a examiné d'autres recours judiciaires possibles (comme la jonction ou la réunion d'instances, la cause type, etc. (*Hollick*, par. 28)) ainsi que des voies de droit extrajudiciaires.

[36] Le tribunal saisi de la motion doit examiner de façon globale les autres moyens et déterminer s'ils permettent d'éliminer les obstacles à l'accès à la justice que soulève la demande (*Hollick*, par. 30). Dans certains cas, une voie de droit extrajudiciaire peut être envisagée en plus des recours individuels (voir, p. ex., *Hollick*, *Cloud* et *Pearson c. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.)). Dans d'autres cas, par exemple lorsqu'il n'existe pas d'autre action en justice viable que le recours collectif, il faut envisager la possibilité d'une voie de droit extrajudiciaire au lieu de ce dernier (voir, p. ex., *Halabi c. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Div. gén.)). La nature des autres moyens possibles influera sur la nature de l'analyse comparative.

(4) Dans quelle mesure les autres moyens permettent-ils d'aplanir les obstacles?

[37] Après le recensement des autres voies de droit possibles, il faut évaluer la mesure dans laquelle

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assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The court should consider both the substantive and procedural aspects of access to justice recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. This comparison, of course, must take place within the proper evidentiary framework that applies at the certification stage. I will return to that point in a moment.

(5) How Do the Two Proceedings Compare?

[38] The focus at this stage of the analysis is on whether, if the alternative or alternatives were to be pursued, some or all of the access to justice barriers that would be addressed by means of a class action would be left in place: *Hollick*, at para. 33. At the end of the day, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. As set out in *Hollick*, the court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.

D. *Evidentiary Considerations*

(1) What Is the Evidentiary Burden With Regard to the Preferability Requirement on a Motion for Certification?

[39] The questions I have just outlined are addressed within the confines of the certification process; the court cannot engage in a detailed assessment of the merits or likely outcome of the class action or any alternatives to it. In *Hollick*, McLachlin C.J. explained that the evidentiary burden applicable on a motion for certification was low:

elles résolvent les problèmes particuliers d'accès à la justice qui se posent dans les circonstances. Le tribunal doit examiner les aspects procéduraux et substantiels de la notion d'accès en gardant à l'esprit que la voie judiciaire n'est pas nécessairement la modalité idéale de règlement équitable et efficace des différends. Il doit se demander si l'autre moyen permettra de régler utilement les demandes quant au fond tout en assurant aux demandeurs la possibilité d'exercer des droits procéduraux adéquats. Il faut, bien sûr, procéder à cette analyse comparative en fonction des normes de preuve applicables à l'étape de la certification, point que j'aborde plus loin.

(5) Bilan de la comparaison

[38] À cette étape, il s'agit de décider si l'autre moyen laisserait en totalité ou en partie subsister des obstacles à l'accès à la justice que le recours collectif permettrait d'aplanir (*Hollick*, par. 33). En fin de compte, le tribunal saisi de la motion doit déterminer, au vu de la preuve, s'il a été démontré que le recours collectif est le meilleur moyen de régler les préoccupations relatives à l'accès à la justice, sur le plan de la procédure et sur le plan du fond. Comme la Cour le mentionne dans *Hollick*, il doit aussi, sans outrepasser le cadre de l'audience sur la certification, comparer les coûts et les avantages du recours collectif projeté à ceux des autres moyens proposés.

D. *Les questions de preuve*

(1) Fardeau de preuve applicable au critère du meilleur moyen à l'étape de la motion en vue de la certification

[39] L'examen des questions susmentionnées doit respecter le cadre de la certification; le tribunal ne saurait à cette étape procéder à l'appréciation détaillée du bien-fondé du recours collectif ou des autres voies de droit ou de leur issue probable. Dans l'arrêt *Hollick*, la juge en chef McLachlin explique que le fardeau de preuve applicable à l'étape de la motion en vue de la certification n'est pas élevé :

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I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* [*v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.)] held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at para. 4.60. [Emphasis added; para. 25.]

Je conviens que le représentant du groupe défini doit établir un certain fondement factuel pour la demande de certification. Comme le dit la cour dans *Taub* [*c. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Div. gén.)], cela ne signifie pas qu'il faut des affidavits des membres du groupe ou qu'il faut un examen au fond des demandes d'autres membres du groupe. Cependant, le rapport précité du comité consultatif du procureur général envisageait manifestement que le représentant du groupe serait tenu d'étayer sa demande de certification (à la p. 31) : ([TRADUCTION] « la preuve à l'appui de la demande devrait se limiter aux critères [de certification] »). De toute évidence, c'est ce que prévoit la Loi au par. 5(4) (« [l]e tribunal peut ajourner la motion en vue de faire certifier le recours collectif afin de permettre aux parties de modifier leurs documents ou leurs actes de procédure ou d'autoriser la présentation d'éléments de preuve supplémentaires »). À mon sens, le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions énumérées à l'art. 5 de la Loi, autre que l'exigence que les actes de procédure révèlent une cause d'action. Cette dernière exigence est régie bien sûr par la règle qu'un acte de procédure ne devrait pas être radié parce qu'il ne révèle pas de cause d'action à moins qu'il soit [TRADUCTION] « manifeste et évident » qu'il n'y a lieu à aucune réclamation : voir Branch, *op. cit.*, par. 4.60. [Je souligne; par. 25.]

[40] This Court recently reaffirmed these principles in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, in the context of the similar British Columbia class actions regime. In his discussion of the standard of proof with regard to the commonality and preferability requirements (para. 101), Rothstein J. indicated that the "'some basis in fact' standard does not require that the court resolve conflicting facts and evidence at the certification stage" (para. 102). This reflects the fact that a certification court "is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight": *Pro-Sys*, at para. 102, citing *Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.). Further, the "some basis in fact" standard cannot be assessed in a vacuum. As Rothstein J. puts it: ". . . there is limited utility in attempting to define 'some basis

[40] La Cour a récemment confirmé ces principes dans *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, dans le contexte du régime similaire de recours collectif établi en Colombie-Britannique. Dans son analyse de la norme de preuve applicable aux critères des questions communes et du meilleur moyen (par. 101), le juge Rothstein indique que la norme d'« "un certain fondement factuel" n'exige pas que le tribunal se prononce sur les éléments de fait et les éléments de preuve contradictoires à l'étape de la certification » (par. 102), reconnaissant par là le fait que le tribunal saisi de la motion « n'est pas en mesure de statuer sur les éléments contradictoires de la preuve non plus que de déterminer sa valeur probante à l'issue d'une analyse nuancée » (*Pro-Sys*, par. 102, citant *Cloud*, par. 50; *Irving Paper Ltd. c. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (C.S.J.), par. 119, citant *Hague c. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (C.S.J. Ont.)). En outre, cette norme ne peut s'appliquer dans

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in fact' in the abstract. Each case must be decided on its own facts" (para. 104).

[41] Helpful elaboration of the "some basis in fact" standard may be found in the reasons of Winkler C.J.O. in *McCracken v. Canadian National Railway Co*., 2012 ONCA 445, 111 O.R. (3d) 745:

> The "some basis in fact" principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.
>
> Second, in keeping with the procedural scheme of the *CPA*, the use of the word "some" conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued. This legislative intention is reflected in s. 2(3)(*a*) of the *CPA*, which — although honoured more often in the breach — requires the proposed representative plaintiff to bring a motion for certification within 90 days of the filing of, or the expiry of the time for filing of, a statement of defence or notice of intent. Thereafter, leave of the court is required to bring the motion: see s. 2(3)(*b*). [Emphasis added; paras. 75-76.]

[42] The jurisprudence emphasizes the importance of not allowing the requirement to establish "some basis in fact" to lead to a more fulsome assessment of contested facts going to the merits of the case. For example, in *Cloud*, the Ontario Court of Appeal indicated that the some basis in fact standard "does not entail any assessment of the merits at the certification stage" (para. 50). Similarly, in *Pearson*, the Ontario Court of Appeal, having concluded that the representative plaintiff had adduced evidence to show a negative impact on property values concluded that the "some basis in fact" standard with regard to the commonality of the issues had been met. The court pointed out that while the defendant disputed the plaintiff's evidence, "the certification motion is not the place for resolving that controversy" (para. 76). These evidentiary principles equally apply to the preferability criterion: see e.g. *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002),

l'absolu. Comme le juge Rothstein le signale, « il serait peu utile de tenter de définir "un certain fondement" dans l'abstrait. L'issue d'une affaire dépend des faits qui lui sont propres » (par. 104).

[41] Les motifs du juge en chef Winkler à propos de cette norme dans *McCracken c. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, apportent des précisions utiles :

> [TRADUCTION] Le principe posant qu'il faut établir un « certain fondement factuel » répond à deux préoccupations. Premièrement, tous les critères, hormis celui de la cause d'action, étayant l'ordonnance de certification doivent reposer sur une preuve.
>
> Deuxièmement, dans l'esprit du régime procédural établi par la *LRC*, l'emploi du mot « certain » indique que la preuve n'a pas à être exhaustive et qu'il ne s'agit certainement pas d'une preuve propre à présider au débat sur le fond. Cette intention du législateur est exprimée à l'al. 2(3)*a*) de la *LRC* — qu'on honore le plus souvent en l'enfreignant — lequel exige du représentant des demandeurs qu'il présente la motion en vue de la certification dans les 90 jours suivant le dépôt de la défense ou de l'avis d'intention d'en présenter une ou de l'expiration du délai prescrit pour ce faire. Passé ce délai, il faut obtenir l'autorisation du tribunal (voir l'al. 2(3)*b*)). [Je souligne; par. 75-76.]

[42] La jurisprudence souligne qu'il importe de ne pas laisser l'exigence du « certain fondement factuel » mener à une appréciation poussée des faits litigieux qui toucherait au bien-fondé du recours. Dans *Cloud*, par exemple, la Cour d'appel de l'Ontario a indiqué que cette norme [TRADUCTION] « n'entraîne pas d'évaluation au fond à l'étape de la certification » (par. 50). Dans *Pearson*, elle a pareillement conclu, après avoir constaté que le représentant des demandeurs avait produit une preuve visant à établir la dépréciation d'immeubles, que celui-ci avait satisfait à la norme du « certain fondement factuel » à l'égard du critère des questions communes. Selon elle, bien que la défenderesse ait contesté cette preuve, [TRADUCTION] « il n'y a pas lieu de régler ce débat à l'audition de la motion en vue de la certification » (par. 76). Ces règles de preuve s'appliquent tout autant au critère du meilleur moyen (voir, p. ex., *1176560 Ontario Ltd. c. Great Atlantic & Pacific Co. of Canada Ltd.*

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62 O.R. (3d) 535 (S.C.J.), at para. 27, aff'd (2004), 70 O.R. (3d) 182 (S.C.J. (Div. Ct.)).

[43] The standard of proof on a motion for certification was at the heart of the appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused, [2003] 2 S.C.R. vi. The decision makes clear that at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements. In *Chadha*, the court denied certification on the basis that there was *no* evidence that the loss component of liability could be proved on a class-wide basis (and thus that there was no common issue). It was not necessary to establish that there was a compelling method to prove such loss, but it was necessary to provide some basis in fact to think that there was *some* method to do so. The plaintiffs had failed to provide that basis. This Court reached the opposite conclusion in *Pro-Sys* with regard to the commonality of the issues, because there was "an expert methodology that ha[d] been found to have a realistic prospect of establishing loss on a class-wide basis" (para. 140).

[44] The limited scope of the factual inquiry on the certification motion means that the motions court will often not be able to compare the potential recoveries in the class action and in the alternative or alternatives to it. For example, in *Pro-Sys* it was argued that the class proceeding did not meaningfully further the objective of access to justice because the award would likely be distributed *cy-près* and not to individual class members. Rothstein J., however, rejected this argument noting that it was "premature to assume that the award . . . [would] result in *cy-près* distribution or that the objective of access to justice [would] be frustrated on this account" (para. 141).

[45] The limitations imposed by the nature of the certification process are directly relevant in this

(2002), 62 O.R. (3d) 535 (C.S.J.), par. 27, conf. par (2004), 70 O.R. (3d) 182 (C.S.J. (C. div.))).

[43] La norme de preuve applicable à l'examen d'une motion en vue de la certification était au cœur de l'appel dans *Chadha c. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), autorisation d'appel refusée, [2003] 2 R.C.S. vi. La cour a statué clairement qu'à cette étape le tribunal ne peut procéder à une appréciation détaillée de la preuve et doit plutôt se borner à vérifier si les critères de certification reposent sur un certain fondement factuel. Dans *Chadha*, la cour n'a pas certifié le recours parce qu'*aucun* élément de preuve ne permettait d'établir l'un des préalables à une déclaration de responsabilité, soit la perte à l'échelle du groupe, de sorte qu'il n'y avait pas de question commune. Il n'était pas nécessaire de démontrer l'existence d'une méthode convaincante qui prouverait une telle perte, mais il fallait établir un certain fondement factuel permettant de penser qu'*une quelconque* méthode existait. Or, les demandeurs n'y sont pas arrivés. Notre Cour dans *Pro-Sys* tire la conclusion opposée quant à l'existence d'une question commune parce qu'il existait « une méthode proposée par un expert [qui] permettrait assez certainement d'établir la perte à l'échelle du groupe » (par. 140).

[44] La portée restreinte de l'examen factuel à l'étape de la certification fait en sorte que le tribunal saisi d'une telle motion n'est souvent pas en mesure de confronter les fonds que le recours collectif et les autres moyens permettraient de recouvrer. Dans *Pro-Sys*, par exemple, on a fait valoir que le recours collectif ne favorisait pas vraiment l'objectif d'accès à la justice parce que l'indemnité accordée serait probablement distribuée selon le principe de l'aussi-près et non pas versée aux membres individuels. Le juge Rothstein n'a pas retenu cet argument, indiquant qu'il était « trop tôt pour présumer que la réparation accordée [. . .] donnera[it] lieu à des versements selon le principe de l'aussi-près ou que, le cas échéant, l'objectif de favoriser l'accès à la justice sera[it] compromis » (par. 141).

[45] Les restrictions qu'emporte par sa nature la procédure de certification sont directement en

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case. Somewhat unusually, a potential alternative procedure — the OSC proceeding — has run its course and the results of it are known with certainty. This might be seen, as it was by the Divisional Court in this case, as inviting a comparison of those known results with the likely outcome of the proposed class action. Simply put, is there enough left on the table to justify the time and expense of the proposed class proceeding? Viewed from this perspective, "[u]nless it can be said that the plaintiffs have achieved full, or at the very least substantially full, recovery", they would be entitled to maintain a class action (Divisional Court decision, at para. 8). Based on the record in this case, the Divisional Court concluded that "the plaintiffs' current claim against AIC and CI, over and above the OSC settlement, [was] $333.8 million" (para. 4). The court qualified this as a "significant amount of money" (para. 8) which entitled the plaintiffs to maintain a class action.

[46] Although at first glance such an approach would seem to have something to commend it, its allure quickly fades when due attention is given to the nature and limitations of the certification process. The certification process is not the occasion for a searching examination of whether the "plaintiffs have achieved full, or . . . substantially full, recovery" (Divisional Court decision, at para. 8) in comparison to the likely outcome of the class proceeding on its merits. Without that sort of examination, the most that can be done is to assess on the appropriately limited evidentiary record whether the access to justice barriers that may be addressed by a class proceeding remain even after the alternative process has run its course.

[47] Nevertheless, when the results or the limits on recovery of an alternative procedure are known at the time of the certification motion, those uncontested facts cannot be ignored. For example, in *Rumley*, McLachlin C.J. observed that the alternative procedure was not preferable because, among other things, it limited recovery of any complainant to $60,000 (para. 38). (Although the Court was dealing with the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50, in that case,

cause en l'espèce. Fait assez inhabituel, une voie de droit possible — l'instance devant la CVMO — a déjà été menée à terme, et son issue est connue. On pourrait, à l'instar de la Cour divisionnaire, être tenté de comparer ce résultat avec l'issue probable du recours collectif projeté, c'est-à-dire se demander si les fonds qui restent à recouvrer valent l'investissement en temps et en argent que requiert le recours collectif. Dans cette perspective, [TRADUCTION] « [à] moins qu'on puisse affirmer que les demandeurs ont obtenu la totalité — ou à tout le moins la quasi-totalité — de ce qu'ils réclamaient », ils sont autorisés à exercer un recours collectif (jugement de la Cour divisionnaire, par. 8). Compte tenu du dossier, la Cour divisionnaire a conclu que « la demande actuelle contre AIC et CI se chiffre à 333,8 millions de dollars outre le montant visé dans le règlement conclu par la CVMO » (par. 4). Selon la cour, il s'agit d'une « somme considérable » (par. 8) autorisant les demandeurs à exercer un recours collectif.

[46] Bien que ce raisonnement puisse séduire au premier abord, il perd rapidement de son lustre dès lors que la nature et les limites de la procédure de certification sont dûment considérées. Il n'y a pas lieu à cette étape de déterminer si [TRADUCTION] « les demandeurs ont obtenu la totalité — ou [. . .] la quasi-totalité — de ce qu'ils réclamaient » (jugement de la Cour divisionnaire, par. 8) et de comparer avec l'issue probable du recours collectif quant au fond. Le mieux que l'on peut faire, à défaut d'un tel examen, est de déterminer au vu de la preuve évidemment limitée si les obstacles à l'accès à la justice auxquels le recours collectif peut remédier subsistent une fois que l'autre moyen a suivi son cours.

[47] Quoi qu'il en soit, lorsque l'issue de l'autre moyen ou les plafonds qu'il impose sont connus lors de l'examen de la motion en vue de la certification, on ne peut faire abstraction de ces faits incontestables. Dans l'arrêt *Rumley*, par exemple, la juge en chef McLachlin indique que l'autre voie de droit ne constitue pas le meilleur moyen notamment parce qu'elle plafonne à 60 000 $ l'indemnité qu'un plaignant peut recevoir (par. 38). (Bien que cet arrêt porte sur la *Class Proceedings Act*, R.S.B.C. 1996,

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an analogous approach is implicit in the *CPA*.) In a case involving similar facts and dealing with the *CPA*, the Ontario Court of Appeal made similar comments with regard to the fact that the alternative procedure capped recovery: *Cloud*, at para. 92. The fact that the court considered the limits on recovery in the alternative procedure implies that it took into account the fact that the class action could address the full range of the class members' claims. Thus, the results and limits may be considered, but within the constraints of the evidentiary basis that is appropriate on a certification motion. In a case where the results of neither the alternative nor the class proceedings are known, the comparative exercise with regard to the substantive access to justice barriers will in general be very limited.

(2) Who Assumes the Burden?

[48] The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.

[49] With regard to the second aspect of the preferability requirement — that is, the comparative analysis — the representative plaintiff will necessarily have to show some basis in fact for concluding that a class action would be preferable to other litigation options. However, the representative plaintiff cannot be expected to address every conceivable non-litigation option in order to establish that there is some basis in fact to think

ch. 50, de la Colombie-Britannique, la *LRC* permet implicitement le même raisonnement.) Dans une affaire présentant des faits similaires et intéressant la *LRC*, la Cour d'appel de l'Ontario a elle aussi fait remarquer que l'autre moyen permettait le recouvrement d'une indemnité limitée (*Cloud*, par. 92). On peut supposer que, si la cour a tenu compte du plafond prévu par l'autre moyen, elle estimait que le recours collectif permettait de régler l'ensemble des demandes des membres du groupe. L'issue et les plafonds peuvent donc entrer en ligne de compte, mais uniquement dans le cadre de preuve limité applicable à l'étape de la certification. Dans une affaire où tant l'issue du recours collectif que celle de l'autre voie de droit sont inconnues, l'exercice de comparaison, eu égard aux obstacles à l'accès à la justice sur le plan du fond, sera généralement très limité.

(2) À qui incombe le fardeau de preuve?

[48] Il incombe à la partie qui cherche à faire certifier un recours collectif d'établir un certain fondement factuel pour chacune des conditions de certification (*Hollick*, par. 25). S'agissant du critère du meilleur moyen, le représentant des demandeurs doit démontrer (1) que le recours collectif serait un moyen juste, efficace et pratique de faire progresser l'instance et (2) qu'il serait préférable à tous les moyens raisonnables offerts pour régler les demandes des membres du groupe (*Hollick*, par. 28 et 31). Le défendeur peut présenter des éléments afin de [TRADUCTION] « réfuter l'existence du certain fondement factuel pouvant s'inférer de la preuve présentée par le demandeur » (M. Cullity, « Certification in Class Proceedings — The Curious Requirement of "Some Basis in Fact" » (2011), 51 *Rev. can. dr. comm.* 407, p. 417).

[49] Pour ce qui est du deuxième aspect du critère du meilleur moyen — c'est-à-dire l'analyse comparative — le représentant des demandeurs devra nécessairement établir un certain fondement factuel permettant de conclure que le recours collectif serait préférable aux autres voies judiciaires. On ne saurait toutefois exiger qu'il passe en revue toutes les voies de droit extrajudiciaires possibles pour faire cette preuve. Le défendeur qui

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that a class action would be preferable. Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. As Winkler J. (as he then was) put it in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.): ". . . the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis . . . . It must be supported by some evidence" (para. 67). However, once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff.

E. *Application*

[50] There are two potential barriers to access to justice in this case. First, an economic barrier arises from the nature of the claim. The claim advanced here may be referred to as a small claims class action. As the motion judge found, the individual claims are not large enough to support viable individual actions (para. 62). The economic barrier to access to justice, therefore, is that individual claims are not viable to litigate individually. In the context of a small claims class action such as this one, access to justice requires access to a process that has the potential to provide in an economically feasible manner just compensation for the class members' individual economic claims should they be established. The second barrier is related to the first. As a result of the nature of the claim, there is potentially no access to a fair process, geared towards protecting the rights of class members, to seek a resolution of the common issues for what could potentially be a class of over a million members. Thus, traditional litigation cannot achieve either the substantive or the procedural dimensions of access to justice in a case such as this.

[51] The proposed class action addresses both of these barriers. It has the potential to make it economically feasible to advance on behalf of the class a group of individual claims that would otherwise not be economically feasible to pursue in the courts and it provides class members with a fair process to resolve their claims. The class action process is

invoque l'existence d'une solution extrajudiciaire est tenu d'étayer son affirmation. Pour reprendre les propos du juge Winkler (plus tard juge en chef) dans *Caputo c. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (C.S.J. Ont.) : [TRADUCTION] « . . . les défenderesses ne peuvent se contenter d'affirmer que d'autres moyens sont préférables sans fondement probatoire [. . .] Leur affirmation doit être appuyée par des éléments de preuve » (par. 67). Toutefois, dès lors que la preuve relative à un autre moyen est produite, le fardeau de prouver qu'il est satisfait au critère du meilleur moyen repose à nouveau sur le demandeur.

E. *Application*

[50] En l'espèce, deux obstacles potentiels à l'accès à la justice se dressent. Le premier, d'ordre financier, est lié à la nature de la demande. Il s'agit d'un recours collectif portant sur de petites créances. Le juge saisi de la motion a estimé que le montant des demandes individuelles était trop modeste pour qu'un recours individuel soit viable (par. 62). Cet obstacle réside donc dans la non-viabilité des recours individuels. Dans un cas comme celui qui nous occupe, l'accès à la justice commande l'accès à une voie de droit susceptible de permettre l'indemnisation équitable — et possible sur le plan financier — des membres du groupe quant à leurs demandes pécuniaires individuelles, si elles sont établies. Le deuxième obstacle est lié au premier. La nature de la demande est telle qu'il n'existe peut-être pas d'autre moyen équitable de permettre aux membres du groupe d'exercer leurs droits et de mener au règlement des questions communes d'un groupe pouvant compter plus d'un million de membres. Ainsi, dans un tel cas, l'action en justice classique ne sert pas l'accès à la justice, ni du point de vue substantiel, ni du point de vue procédural.

[51] Or, le recours collectif proposé élimine ces obstacles. Il permet à un groupe de faire valoir un ensemble de demandes individuelles qu'il serait autrement impossible pour des raisons d'ordre financier de soumettre aux tribunaux et il fournit aux membres du groupe une voie de droit équitable. Le recours collectif assure une ample protection de

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geared to protecting the class members' rights to a significant extent through such mechanisms as the requirement for a representative plaintiff who must "fairly and adequately represent the interests of the class", produce a workable litigation plan to advance the proceeding on behalf of the class and have no conflict of interests with other class members: *CPA*, s. 5(1)(e).

[52] As I have already noted, there is no realistic litigation alternative in this case. The only alternative procedure that was advanced is the OSC proceedings and settlement agreements, the results of which are already known. Thus, the question is to what extent this alternative has addressed the barriers to access to justice and whether those barriers remain now that those proceedings have been completed. This analysis has both a procedural and a substantive component.

[53] With respect to the procedural component, the appellants submit that the Court of Appeal wrongly focused on the fact that the OSC's jurisdiction is regulatory and not compensatory and erred in its assessment of investor participation in the OSC proceedings. I do not accept these submissions.

[54] The main jurisdiction of the OSC under s. 127 of the *Securities Act* — under which the OSC conducted the probe — is regulatory. Thus, it "is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets": *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at para. 42, quoting (1999), 43 O.R. (3d) 257, at p. 272, *per* Laskin J.A. There is no question in this case that the OSC had jurisdiction to approve the settlement agreements or, as the motion judge found, that Commission staff in this case sought to determine the extent of investor losses and to achieve compensation for them through the settlement agreements. Nevertheless, compensation of investors is not the primary focus of the OSC under its s. 127 jurisdiction. Further, there is no

leurs droits par le truchement de certains mécanismes, dont le critère qui exige la nomination d'un représentant qui « représenterait de façon équitable et appropriée les intérêts du groupe », a préparé un plan efficace pour faire avancer l'instance au nom du groupe et n'a aucun conflit d'intérêts avec d'autres membres du groupe (*LRC*, al. 5(1)e)).

[52] Comme je l'ai déjà indiqué, il n'existe pas d'autre solution judiciaire réaliste en l'espèce. La seule autre voie de droit évoquée est l'instance devant la CVMO et les règlements intervenus, dont l'issue est connue. Par conséquent, la question qu'il faut poser est celle de savoir si cette instance a permis d'éliminer les obstacles à l'accès à la justice ou s'il en subsiste. Cette analyse comporte un aspect procédural et un aspect substantiel.

[53] S'agissant de l'aspect procédural, les appelantes soutiennent que la Cour d'appel a attaché trop d'importance au fait que la CVMO exerce une compétence d'ordre réglementaire et ne dispose pas de pouvoirs d'indemnisation. Selon elles, la cour a mal apprécié la participation des investisseurs à l'instance devant cet organisme. Je ne puis leur donner raison.

[54] La principale compétence que confère à la CVMO l'art. 127 de la *Loi sur les valeurs mobilières* — en vertu duquel l'organisme a procédé à l'enquête — est de nature réglementaire. En conséquence, elle « n'est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d'un éventuel préjudice aux marchés financiers en Ontario » (*Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132, par. 42, citant (1999), 43 O.R. (3d) 257, p. 272, le juge Laskin). En l'espèce, il ne fait aucun doute que la CVMO était habilitée à approuver les ententes de règlement ou, comme l'a conclu le juge saisi de la motion, que son personnel a voulu déterminer l'ampleur des pertes subies par les investisseurs et à faire en sorte qu'ils soient indemnisés par le

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way to know how the OSC arrived at the settlement agreements; the details of the methodology used to calculate the amounts having remained confidential throughout. As the motion judge found, "how the OSC came to its calculation is not actually known" (para. 99).

[55] With regard to investor participation in the OSC proceedings, my view is that the respondents and the Court of Appeal are somewhat off the mark by placing virtually exclusive weight on this consideration in rejecting the OSC proceedings as a preferable alternative. Nevertheless, I agree that investor participation in the process leading to compensation is an important factor to consider and one that weighs heavily in favour of finding that the class proceeding meets the preferability requirement in this case. As the Court of Appeal noted, the OSC proceedings and the procedure by which the settlement agreements were arrived at in this case "provided little to no basis for investor participation" (paras. 58 and 60), whereas class proceedings "allow for the appointment of a representative plaintiff who shares a sufficient common interest with members of the class [and] conducts the litigation on behalf of class members under court supervision and within the presumptive principle of an open court" (para. 61). Moreover, as the motion judge found, nothing was known about how the OSC came to its assessment of compensation. In summary, the regulatory nature of and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation, support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address. Moreover, the focus and nature of the OSC process reinforce the concerns which I will turn to next about whether substantial access to justice was achieved.

truchement des ententes de règlement. Cependant, l'indemnisation des investisseurs ne constitue pas la raison d'être du pouvoir dévolu à la CVMO par l'art. 127. De plus, il n'existe aucun moyen de savoir comment la CVMO est parvenue aux ententes de règlement, puisque la méthode employée pour en fixer les montants n'a jamais été divulguée. Comme l'a indiqué le juge saisi de la motion, [TRADUCTION] « on ignore en fait comment la CVMO a effectué ses calculs » (par. 99).

[55] Quant à la participation des investisseurs à l'instance devant la CVMO, les intimés et la Cour d'appel s'égarent à mon avis quelque peu en fondant presque exclusivement sur ce point leur conclusion que cette instance n'est pas le meilleur moyen. J'estime néanmoins que la participation des investisseurs à la procédure menant à l'indemnisation constitue un facteur important, qui milite fortement en faveur de la conclusion que le recours collectif satisfait au critère du meilleur moyen en l'espèce. Selon la Cour d'appel, l'instance devant la CVMO et la procédure dont découlent les ententes de règlement [TRADUCTION] « laissai[en]t peu ou pas de place à la participation des investisseurs » (par. 58 et 60), tandis que le recours collectif « permet la nomination d'un représentant ayant en commun avec les membres du groupe suffisamment d'intérêts [et qui] voit au déroulement du recours pour le compte de ces derniers sous la supervision du tribunal et dans le respect du principe de publicité des débats judiciaires » (par. 61). En outre, ainsi que l'a conclu le juge saisi de la motion, on ne sait rien sur la façon dont la CVMO a fixé l'indemnité. Pour résumer, la nature réglementaire de l'instance devant la CVMO et les droits de participation limités qu'elle offrait aux investisseurs, conjugués à l'absence d'information sur les calculs effectués par son personnel en vue de l'indemnisation des investisseurs, étayent la conclusion qu'il subsistait d'importants obstacles à l'accès à la justice sur le plan procédural auxquels le recours collectif pouvait remédier. Par ailleurs, l'objet et la nature de la procédure devant la CVMO accentuent les préoccupations, que j'aborde dans les paragraphes suivants, en matière d'accès à la justice sur le plan du fond.

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[56] Turning to the substantive aspect of access to justice, the Court of Appeal found that the motion judge and the Divisional Court had erred by focusing on the substantive outcome of the OSC proceedings, commenting that this "is not a relevant factor in the comparative analysis under s. 5(1)(*d*) of the *CPA*" (para. 10). In my view, the Court of Appeal took too categorical an approach to this issue in the circumstances of this case. While of course any consideration of the substantive outcome must take place within the evidentiary framework that applies on a certification motion, access to justice as explained earlier is not a purely procedural concept. Access to justice requires access to just results, not simply to process for its own sake. However, I conclude that giving this substantive element the considerable weight that it deserves in this case reinforces the Court of Appeal's conclusion that this class action should be certified.

[57] One of the barriers to access to justice in this small claims investor class action is that traditional litigation provides no economically feasible way to recover the investors' claimed losses. The appellants' position is that the OSC regulatory proceedings effected significant recovery for the investors at no cost to them. In these circumstances, the substantive outcome of the OSC proceedings cannot, in my view, be dismissed as irrelevant to the question of whether the OSC proceedings addressed the access to justice barrier that is present in this case or whether the way in which it did so suggests that the class proceeding is not the preferred alternative.

[58] That said, however, the substantive outcome of the OSC proceedings and their impact on the preferability analysis must be examined through the appropriate evidentiary lens. As I have explained, the plaintiffs' burden is to provide "some basis in fact" to think that the class proceedings are preferable to the alternative. In the rather unusual circumstances of this case, where the OSC proceedings have run their course and the results of those proceedings are known, it seems to me that the comparative analysis cannot ignore the question of whether a cost-benefit analysis supports the respondents' contention that

[56] Passons à l'aspect substantiel de l'accès à la justice. La Cour d'appel a estimé que le juge saisi de la motion et la Cour divisionnaire avaient eu tort de s'attacher à l'issue concrète de l'instance devant la CVMO qui, selon elle, [TRADUCTION] « ne constitue pas un facteur pertinent dans l'analyse comparative que commande l'al. 5(1)*d*) de la *LRC* » (par. 10). À mon avis, la Cour d'appel s'est montrée trop catégorique sur ce point dans les circonstances. Tout examen de l'issue concrète doit évidemment s'en tenir à la norme de preuve applicable à une motion en vue de la certification. Or, comme je l'explique, l'accès à la justice ne ressortit pas seulement à la procédure. L'accès à la justice suppose une issue juste, et non pas une procédure engagée pour la forme. J'estime toutefois que le poids considérable que mérite cet élément se rattachant au fond renforce la conclusion de la Cour d'appel selon laquelle la certification de ce recours collectif s'impose.

[57] L'un des obstacles à l'accès à la justice dans ce recours collectif mettant en cause de petites créances provient de ce que l'action en justice classique n'offre pas aux investisseurs un moyen viable sur le plan financier de récupérer leurs pertes. Les appelantes font valoir que l'instance réglementaire devant la CVMO a permis à ces derniers de toucher une indemnité appréciable sans engager de frais. Dans ces circonstances, j'estime qu'on ne peut conclure que l'issue concrète de cette instance ne joue pas pour déterminer si cette voie de droit a permis de lever l'obstacle à l'accès à la justice en l'espèce ou s'il en ressort que le recours collectif n'est pas le meilleur moyen.

[58] Cela dit, l'issue concrète de l'instance devant la CVMO et son effet sur l'analyse relative au meilleur moyen doivent être examinés à la lumière des normes de preuve applicables. Je le répète, les demandeurs ont à démontrer l'existence d'un « certain fondement factuel » permettant de penser que le recours collectif est préférable aux autres moyens. Les circonstances de l'espèce sont plutôt inhabituelles, car l'issue de l'instance devant la CVMO est connue. À mon sens, l'analyse comparative doit aborder la question de savoir si l'examen des coûts et des avantages étaye la thèse des intimés,

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the proposed class proceeding is the preferable way to address their claims.

[59] The answer to this question, as I see it, is quite straightforward in this case. The respondents have pleaded viable causes of action, the OSC proceedings and settlement agreements were without prejudice to those claims, and the motion judge was satisfied "that there [was] some basis in fact for the Plaintiffs' submission that the investors may not have been fully compensated as a result of the OSC settlement agreements" (para. 101). The motion judge also found that the class members were not trying to "have their cake and eat it too":

> I do not agree with any arguments that suggest that the Plaintiffs [respondents in this Court] and the investors are being unfair, or perhaps piggish, in eating the cake of the OSC compensation and also having a class action. The investors are not playing "heads I win, tails you lose." They did not ask the OSC to be their champion, and they did not do anything wrong in accepting the spoils secured by the OSC's campaign. The putative representative plaintiffs do no wrong in attempting to certify their action as a class proceeding, and I have no reason to believe that they do not genuinely believe that they were undercompensated. [para. 218]

[60] The motion judge estimated the size of the proposed class against AIC at 264,036 members and 803,903 members against CI. These represent the numbers of settlement payments issued by each appellant pursuant to the OSC settlements: motion decision, at para. 56. AIC's and CI's OSC settlement payments were respectively $58.8 million and $49.3 million. The plaintiffs presented expert evidence which estimated that AIC's investors' losses could be as low as $6.5 million or as high as $251.0 million, and that CI's investors' losses could be as low as $72.1 million or as high as $349.3 million, depending on the method of calculation used. Based on an expert's preferred method of calculation (he submitted a total of five), losses were estimated at $192.6 million for AIC's investors and $349.3 million for CI's investors: motion decision, at para. 94. Thus, in the plaintiffs' expert's view, AIC's investors have received only 31% of

selon qui le recours collectif est le meilleur moyen de régler leurs réclamations.

[59] La réponse à cette question me paraît assez simple en l'espèce. Les intimés ont invoqué des causes d'action valables. L'instance devant la CVMO et les ententes de règlement en découlant ne portent pas atteinte à de telles demandes. Le juge saisi de la motion s'est dit convaincu de l'existence [TRADUCTION] « d'un certain fondement factuel étayant l'affirmation des demandeurs selon laquelle les ententes de règlement conclues par la CVMO n'ont peut-être pas indemnisé totalement les investisseurs » (par. 101). Il a également conclu que les membres du groupe ne cherchaient pas à « avoir le beurre et l'argent du beurre » :

> [TRADUCTION] Je ne saurais admettre l'argument que les demandeurs [intimés devant la Cour] et les investisseurs se montrent déraisonnables, voire âpres au gain, en touchant l'indemnité obtenue par la CVMO et en intentant en plus un recours collectif. Les investisseurs ne jouent pas sur les deux tableaux. Ils n'ont pas demandé à la CVMO de prendre leur défense et de mener l'enquête en leur nom. Ils n'ont rien fait de mal en acceptant une part de ce gâteau. Les représentants proposés n'ont pas mal agi en tentant de faire certifier un recours collectif et je n'ai aucune raison de douter qu'ils estiment vraiment ne pas avoir été pleinement indemnisés. [par. 218]

[60] Selon l'estimation du juge saisi de la motion, le groupe partie au recours collectif compte 264 036 membres dans le cas d'AIC et 803 903 membres dans le cas de CI. Il s'agit du nombre de versements faits par chacune en exécution des ententes de règlement avec la CVMO (décision relative à la motion, par. 56). AIC et CI ont respectivement versé 58,8 et 49,3 millions de dollars en exécution de ces ententes. Les demandeurs ont soumis une preuve d'expert révélant des pertes, pour les investisseurs d'AIC, entre 6,5 et 251 millions de dollars, et pour les investisseurs de CI, entre 72,1 et 349,3 millions de dollars, en fonction de la méthode de calcul employée. La méthode préconisée par un expert (qui en avait présenté cinq en tout) permettait d'arriver à des pertes estimatives de 192,6 millions de dollars dans le cas des investisseurs d'AIC et de 349,3 millions de dollars dans le cas de ceux de CI (décision relative à la motion, par. 94). D'après

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the compensation they are entitled to through the settlement agreements, and CI's investors have received only 14%: motion decision, at para. 94.

[61] Of course, the certification motion is not the proper setting to delve into the likely success of these claims or to debate the merits of these approaches to calculating the investors' losses. The record in this case, which shows in detail the results of the proposed alternative proceedings which have run their course, also shows that substantive access to justice concerns still remain. Further, there is no reason to believe that potential additional recovery would be consumed by the costs of the proceedings. In fact, the motion judge found that since the defendants were able to distribute the OSC settlement payments "by reviewing their own records to make decisions about entitlement, causation, and quantification", that "there is at least a realistic possibility that acceptable procedures could be fashioned by the common issues trial judge to address quantification and distribution issues in a fair, manageable and efficient manner" (para. 208). Accordingly, in my view, the plaintiffs (now respondents) provided an appropriate basis to support the view that the class action proceeding would overcome access to justice barriers that subsisted after the completion of the OSC proceedings and that a cost-benefit analysis supported the conclusion that the class proceedings were the preferable proceeding for the investors to pursue their claims.

[62] To conclude, I am of the view that the motion judge erred in principle in the preferability analysis. Respectfully, he erred by agreeing with the defendants' (now appellants') submission that he should not "second-guess the access to justice provided by the OSC once [he] was satisfied that the OSC's purpose was to obtain restitutionary compensation for the harm suffered by the investors and the process to do so was adequate" (paras. 256-57). On the contrary, it was precisely his role to compare and evaluate, within the limited scope of the

l'expert engagé par les demandeurs, l'indemnité versée en exécution de l'entente de règlement correspondait, dans le cas des investisseurs d'AIC, à seulement 31 % de la somme intégrale, et dans le cas des investisseurs de CI, à seulement 14 % (décision relative à la motion, par. 94).

[61] Naturellement, l'audience sur la motion en vue de la certification n'est pas le moment d'évaluer les chances de succès de ces demandes ou de débattre le bien-fondé des méthodes employées pour calculer les pertes des investisseurs. Or, la preuve présente l'issue de l'autre voie de droit en détail et révèle qu'il subsiste des préoccupations relatives à l'accès à la justice quant au fond. En outre, il n'y a aucune raison de croire que les coûts du recours annuleraient le montant des dommages-intérêts susceptibles d'être accordés. D'ailleurs, le juge saisi de la motion a indiqué que, puisque les défenderesses avaient été en mesure de verser les indemnités en exécution des ententes [TRADUCTION] « en s'appuyant sur leurs propres dossiers pour déterminer l'admissibilité, le lien de causalité et le montant », « il est à tout le moins envisageable que le juge qui procédera à l'examen des questions communes au procès puisse établir des modalités acceptables pour régler les questions de calcul et de distribution de façon juste, pratique et efficace » (par. 208). J'estime par conséquent que les demandeurs (intimés devant la Cour) ont bien étayé l'opinion que le recours collectif permettrait d'écarter les obstacles à l'accès à la justice subsistant après l'instance devant la CVMO et qu'à la lumière d'un examen des coûts et des avantages, il s'agit du meilleur moyen de faire valoir les demandes des investisseurs.

[62] En conclusion, l'analyse relative au meilleur moyen faite par le juge des motions était entachée d'une erreur de principe. J'estime qu'il a retenu à tort l'argument des défenderesses (appelantes devant la Cour) selon lequel il ne devrait pas [TRADUCTION] « dès lors qu'il est convaincu que la CVMO cherchait à obtenir la réparation du préjudice subi par les investisseurs et que la procédure était adéquate, [. . .] remettre en question l'accès à la justice assuré par cet organisme » (par. 256-257). Au contraire, son rôle consistait

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certification motion, the access to justice provided by the two proceedings, both in the substantive and procedural dimensions of the term as part of his overall assessment of whether the plaintiffs had established the preferability requirement on the appropriate evidentiary standard. The fact that the results of the OSC process were known in this case added an element that would often not be present at the certification stage.

[63] I agree with the Court of Appeal that the motion judge erred in principle by "treating the negotiated payments that were made to investors in the OSC settlements as somehow eliminating the need to compare the purely regulatory function served by the OSC proceedings with the private remedial function to be played by the proposed class action" (para. 80). This led the motion judge to wrongly dismiss as irrelevant important access to justice considerations relating to the regulatory focus, absence of investor participation and the absence of information about how the investor losses were assessed in the OSC process. The process limitations of the OSC proceedings reinforce the concern that access to substantive justice will be better served by the proposed class action.

[64] I also agree with the Divisional Court and the Court of Appeal that the motion judge erred in principle by relying on the sorts of considerations that would be relevant to approving a settlement of a class action. The certification application, and particularly the preferability aspect of it, is not an appropriate point in the proceedings to engage in any in-depth analysis of either the merits of the plaintiffs' claims or the likely quantum of recovery. As the Court of Appeal put it, at the certification stage, in most instances, "no reliable yardstick is available because the amount recoverable in the proposed class proceeding would be as yet unknown. Put another way, the preferability analysis should not be reduced to an *ex post facto* assessment of the adequacy of the award arrived at through the alternative procedure" (para. 77).

justement à comparer et à évaluer, dans le cadre limité de la certification, l'accès à la justice procuré par les deux voies de droit, au point de vue tant substantiel que procédural, dans son examen global de la question de savoir si les demandeurs avaient démontré qu'il était satisfait au critère du meilleur moyen selon la norme de preuve applicable. Le fait que l'issue de l'instance devant la CVMO est connue en l'espèce ajoute un élément qui joue rarement dans l'évaluation au stade de la certification.

[63] Je partage l'avis de la Cour d'appel selon qui le juge saisi de la motion a commis une erreur de principe en [TRADUCTION] « considérant que les ententes de règlement conclues par la CVMO éclipsaient en quelque sorte toute comparaison entre l'objet purement réglementaire de cette instance et l'objet du recours collectif qui est d'offrir une réparation de droit privé » (par. 80). Cette opinion l'a amené à négliger à tort d'importantes considérations d'accès à la justice ayant trait à cette instance : nature réglementaire, non-participation des investisseurs et absence d'information sur la méthode d'évaluation des pertes de ces derniers. Il ressort de ces limites procédurales que l'accès à la justice quant au fond est mieux servi par le recours collectif projeté.

[64] Je conviens aussi avec la Cour divisionnaire et la Cour d'appel que le juge saisi de la motion a commis une erreur de principe en s'attachant à des considérations qui jouent au moment de l'approbation du règlement d'un recours collectif. L'examen en profondeur du bien-fondé des demandes ou du montant éventuel des dommages-intérêts ne s'effectue pas à l'étape de la certification et encore moins lors de l'analyse relative au meilleur moyen. À ce stade, comme la Cour d'appel l'a indiqué, le plus souvent [TRADUCTION] « on ne peut utiliser de point de référence sûr parce qu'on ignore encore le montant recouvrable à l'issue du recours collectif projeté. Autrement dit, l'analyse relative au meilleur moyen ne doit pas se réduire à une évaluation après coup visant à déterminer si l'indemnité versée par suite de l'autre voie de droit est adéquate » (par. 77).

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[65] I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. *Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to preferable procedure is . . . entitled to special deference because it involves weighing and balancing a number of factors": *Pearson*, at para. 43. However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.

V. Disposition

[66] I would dismiss the appeal with costs.

**APPENDIX**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

**5.** — (1) [Certification] 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,

[65] Je reconnais que la décision en matière de certification appelle une grande déférence (voir, p. ex., *Pearson*, par. 43; *Markson c. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, par. 33). Plus particulièrement, [TRADUCTION] « [l]a décision sur le meilleur moyen commande [. . .] une déférence spéciale parce qu'elle suppose l'appréciation et la mise en balance de plusieurs facteurs » (*Pearson*, par. 43). Je considère toutefois que la déférence ne saurait mettre une décision à l'abri d'une révision si elle est entachée d'erreurs de principe touchant directement la conclusion tirée, comme c'est le cas en l'espèce (voir, p. ex., *Cassano c. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, par. 23, autorisation d'appel refusée, [2008] 1 R.C.S. xiv; *Markson*, par. 33; *Cloud*, par. 39).

V. Dispositif

[66] Je suis d'avis de rejeter le pourvoi avec dépens.

**ANNEXE**

*Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6

**5** (1) [Recours collectif certifié par le tribunal] Le tribunal saisi d'une motion visée à l'article 2, 3 ou 4 certifie qu'il s'agit d'un recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure ou l'avis de requête révèlent une cause d'action;

b) il existe un groupe identifiable de deux personnes ou plus qui se ferait représenter par le représentant des demandeurs ou des défendeurs;

c) les demandes ou les défenses des membres du groupe soulèvent des questions communes;

d) le recours collectif est le meilleur moyen de régler les questions communes;

e) il y a un représentant des demandeurs ou des défendeurs qui :

(i) représenterait de façon équitable et appropriée les intérêts du groupe,

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(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.

*Appeal dismissed with costs.*

*Solicitors for the appellant AIC Limited: Borden Ladner Gervais, Toronto.*

*Solicitors for the appellant CI Mutual Funds Inc.: Goodmans, Toronto.*

*Solicitors for the respondents: Rochon Genova, Toronto.*

(ii) a préparé un plan pour l'instance qui propose une méthode efficace de faire avancer l'instance au nom du groupe et d'aviser les membres du groupe de l'instance,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe, en ce qui concerne les questions communes du groupe.

*Pourvoi rejeté avec dépens.*

*Procureurs de l'appelante AIC Limitée : Borden Ladner Gervais, Toronto.*

*Procureurs de l'appelante CI Mutual Funds Inc. : Goodmans, Toronto.*

*Procureurs des intimés : Rochon Genova, Toronto.*

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# Tab 3

# COURT OF APPEAL FOR ONTARIO

CITATION: Badesha v. Cronos Group Inc., 2022 ONCA 663
DATE: 20220926
DOCKET: C69722

2022 ONCA 663 (CanLII)

Feldman, Roberts and Favreau JJ.A.

BETWEEN

Harpreet Badesha

Plaintiff (Appellant)

and

Cronos Group Inc., Michael Gorenstein, William Hilson, Jerry Barbato, Kevin C. Crostwaite Jr., Bronwen Evans, Murray R. Garnick, Bruce A. Gates. Jason Adler, James Rudyk, Jody Begley, Alan Friedman and Michael Coates

Defendants (Respondents)

Paul Bates, Garth Myers and Paul Guy, for the appellant

James Doris, Michael O'Brien and Alexandria Matic, for the respondents

Heard: March 17, 2022 by video conference

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated June 28, 2021, with reasons reported at 2021 ONSC 4346.

**Favreau J.A.:**

[1] The appellant, Harpreet Badesha, seeks to bring a class action on behalf of the shareholders of the respondent Cronos Group Inc. (“Cronos”). The claim alleges that there were misrepresentations in Cronos’s public filings in 2019. In order to proceed with the proposed action, the appellant requires leave of the court pursuant to s. 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5 and certification of the action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] The motion judge heard the leave motion and the certification motion together. The motion judge characterized the appellant’s proposed claim as an action alleging that the defendants made 7,449 separate misrepresentations. He dismissed the motion for leave under the *Securities Act* on the basis that the appellant failed to put forward any evidence that each of the alleged misrepresentations materially contributed to the drop in the price of Cronos’s shares at the relevant time. The motion judge also dismissed the motion for certification on the same basis.

[3] In my view, the motion judge erred in his characterization of the claim, which led to an erroneous application of the test for leave under s. 138.8 of the *Securities Act*. Read generously, the statement of claim does not allege 7,449 discrete misrepresentations. Rather, it alleges that Cronos misrepresented its revenues for two quarters in 2019; these were material misrepresentations that were corrected in March 2020 and that affected share prices at that time. Viewing the claim from

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this perspective, in combination with the parties' evidence, the motion judge ought to have found that there is a reasonable possibility that the action will be resolved in favour of the appellant at trial.

[4] I would allow the appeal and order that the appellant be granted leave to proceed with the action under s. 138.3 of the *Securities Act*. I would remit the issue of whether the action should be certified as a class proceeding, including as a global class proceeding, back to the Superior Court for determination.

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## A. BACKGROUND

### (1) Cronos and the events of 2019

[5] Cronos is a company based in Canada. Its primary business is the cultivation, manufacturing and marketing of cannabis and cannabis-derived products for medical and recreational purposes. Cronos sells its products in Canada and in other parts of the world where use of the products is legal.

[6] The appellant's claim against Cronos and the other respondents arises from statements made in documents announcing the company's activities and results in 2019, and corrections to those statements in 2020.

[7] In March 2019, Cronos completed two transactions involving the exchange of cannabis dry flower for cannabis resin with a third party. On May 9, 2019, Cronos released its first quarter results for 2019 in interim unaudited financial statements for the three-month period ending on March 31, 2019 ("2019 Q1 interim financial

statements”). At the same time, Cronos released a Management Discussion and Analysis covering the same time period (“2019 Q1 MD&A”). The documents attributed revenue to Cronos for the first quarter of 2019 from the March 2019 dry flower/resin exchange transactions.

[8] On August 8, 2019, Cronos released its 2019 Q2 interim financial statements and 2019 Q2 MD&A. These documents included results for the first quarter of 2019 and again reported revenue for the Q1 dry flower/resin exchange transactions.

[9] In September 2019, Cronos entered another set of transactions exchanging cannabis dry flower for cannabis resin with a third party. On November 12, 2019, Cronos released its 2019 Q3 interim financial statements and 2019 Q3 MD&A. In these documents, Cronos reported revenue for the 2019 Q3 dry flower/resin exchange transactions and again reported revenue for the Q1 dry flower/resin exchange transactions.

[10] In early 2020, Cronos made a number of public disclosures addressing its reporting on the exchange transactions.

[11] On February 24, 2020, Cronos issued a press release announcing that it was delaying the completion of its 2019 Q4 interim financial statements and its 2019 audited annual financial statements.

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[12] On March 2, 2020, Cronos issued a press release announcing that it filed a notice with the United States Securities and Exchange Commission, seeking a 15-day extension for its annual report. The press release stated that Cronos was unable to complete the report on time due to "several bulk resin purchases and sales of products through the wholesale channel and the appropriateness of revenue from those transactions."

[13] On March 17, 2020, Cronos issued a press release and a material change report, advising that its 2019 Q1, Q2 and Q3 unaudited financial statements would be reissued and restated. Cronos disclosed that the revenue reported for 2019 Q1 would be reduced by $2.5 million and for 2019 Q3 by $5.1 million. Cronos also disclosed that it anticipated reporting one or more material weaknesses in its internal controls.

[14] On March 30, 2020, Cronos released a series of documents, including restated interim financial statements and MD&As for 2019 Q1, Q2 and Q3, 2019 audited annual financial statements and a 2019 MD&A. In addition, the MD&A described the weaknesses in Cronos's internal controls over financial reporting and the measures it intended to adopt to remediate those weaknesses.

**(2) The statement of claim**

[15] The appellant, Badesha Harpreet, who owned shares in Cronos during the relevant time period, commenced an action against Cronos and a group of

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individual defendants. By the time of the motion before the motion judge, the appellant had amended his statement of claim. (Accordingly, all references to the "statement of claim" or the "claim" hereafter refer to the amended statement of claim.)

[16] In his claim, the appellant seeks to bring a class action on behalf of all Cronos shareholders who held shares between August 14, 2018 and March 30, 2020. The pleaded causes of action are misrepresentation under s. 138.3 of the *Securities Act*, negligent misrepresentation at common law and oppression under the *Business Corporations Act*, R.S.O. 1990, c. B.16.

[17] Given the motion judge's decision and the issues on appeal, it is necessary to review the specific manner in which the allegations of misrepresentation are pleaded.

[18] In the overview section of the claim, the appellant alleges that, during the class period, Cronos and other public cannabis issuers were under pressure to show increasing revenues and sustainable growth. Faced with that pressure, Cronos allegedly "orchestrated a scheme to inflate its reported revenue figures" by entering "into simultaneous transactions with third parties to both sell to them cannabis dry flower and to purchase back cannabis resign and tinctures, transactions that were concluded in contemplation of one another." The claim alleges that Cronos then improperly "booked these sales as revenue" rather than

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"properly accounting for these transactions at the carrying value of inventory transferred by Cronos". These improper transactions represented 35% of Cronos's reported revenue for 2019 Q1 and 38% of its revenue for 2019 Q3.

[19] After describing the parties and the exchange transactions in more detail, paragraph 53 of the claim sets out six categories of alleged misrepresentations as follows:

> 53. During the Class Period, Cronos and the Individual Defendants made the following categories of misrepresentations:
>
> (a) misrepresentations regarding revenue and consequential misstatements of its financial results ("**Revenue Representations**");
>
> (b) misrepresentations that Cronos's financial statements were compiled in accordance with IAS and IFRS ("**IAS Representation**");
>
> (c) misrepresentations in the disclosures of risk encountered by Cronos ("**Risk Representations**");
>
> (d) misrepresentations regarding Cronos's compliance with its Code of Conduct ("**Code Representations**");
>
> (e) misrepresentations regarding the effectiveness of Cronos's DC&P and IFCR ("**Controls Representation**"); and
>
> (f) omissions regarding the nature of Cronos's agreements with third parties ("**Third Party Agreement Representations**").

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[20] The claim is then broken into a series of subsections, each of which deals with the six categories of misrepresentations.[1]

[21] In the section dealing with the Revenue Representations, the claim describes the Q1 2019 and Q3 2019 transactions, and how these were misreported as revenue in Q1, Q2 and Q3 disclosures. The claim includes a Schedule “A”, which sets out what is described as a “comprehensive list of misrepresentations arising from Cronos’s improper revenue recognition for Q1, Q2 and Q3 2019”. Schedule “A” sets out a long list of line items from the 2019 Q1, Q2 and Q3 interim financial statements, such as accounts receivable, inventory and total assets. The Revenue Representations subsection also refers to other documents and oral statements in which Cronos allegedly repeated its misrepresentations about its revenues for 2019 Q1 and Q3.

[22] Following the section of the claim that particularizes the six categories of misrepresentations, the claim goes on to describe the various corrections to the misrepresentations. This includes Schedule “B” to the claim, which lists the corrections to line items in Schedule “A” of the claim.

[23] Paragraph 1 of the claim sets out the relief the appellant seeks in the action, which includes compensation for the misrepresentations and a series of

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[1] By the time of the motion, the appellant only sought to pursue four categories of misrepresentations, namely the Revenue Misrepresentations, IAS Misrepresentations, Controls Misrepresentations and Risk Misrepresentations.

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declarations. One of the declarations sought by the appellant is that the misrepresentations in paragraph 53 of the claim not be treated as a single misrepresentation for the purpose of calculating liability limits.

**(3) Expert evidence on the motion**

[24] Each side put forward expert evidence on the motion.

[25] The appellant's evidence included a report by Dr. Douglas J. Cumming, who is a professor of Finance and Entrepreneurship at the College of Business, Florida Atlantic University, and a Chartered Financial Analyst. Dr. Cumming provided an opinion on whether the alleged misrepresentations in the statement of claim "were material, in the sense that they would reasonably be expected to have a significant effect on the market price of [Cronos's] shares." Dr. Cumming conducted an "event study", and concluded that Cronos's disclosures in 2020 led to the following statistically significant share price reductions:

> (a) after the March 2, 2020 disclosure, there was a statistically significant price reaction of -8.10%;
>
> (b) after the March 19, 2020 disclosure, there was a statistically significant price reaction of -8.40%, and an additional statistically significant share price reaction of -13.46% on March 23; and
>
> (c) after the March 30, 2020 disclosure, there was a statistically significant share price reaction of -10.24%.

[26] Dr. Cumming concluded that the misrepresentations regarding Cronos's revenues for 2019 Q1 and Q3 and subsequent corrections in March 2020 caused

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the statistically significant drop in prices. He based this conclusion on a review of the trading on the relevant dates and on academic studies regarding the significance of these types of disclosures. He explained his conclusion as follows:

> [Cronos's] large stock price decline and negative excess returns net of market and industry changes after the disclosures on March 2, March 19, and March 30, 2020 are directly attributable to new information correcting [Cronos's] alleged misrepresentations. These misrepresentations were material to investors, as evidenced by the fall in prices, large negative excess returns, and substantial trading volume for [Cronos's] common stock subsequent to their correction. [Cronos's] average daily trading volume was 1.85 million shares (11.05 million shares) on the TSX (NASDAK) during the Class Period prior to the February 24, 2020 disclosure, and averaged 6,77 million shares (28.95 million shares) on March 3, March 20, March 23, and March 31, 2020 in the days following the corrective disclosure on March 2, 19, and 30, 2020, which is a 366% increase in average daily trading volume (Appendix 4). [Cronos's] price decline and trading volume cannot be explained by confounding news on these days.
>
> Finally, in my opinion, the statistical and economic significance of [Cronos's] improper revenue recognition and internal controls on its share price is consistent with academic studies on these topics which show similar negative impacts on share prices from misrepresentations relating to revenue recognition and internal controls. Leading academic studies show that investors consistently take into account improper internal controls in their investment decisions, and revelation of internal control failures and misreporting result in material share price declines. [Footnotes omitted.]

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[27] The respondent's expert evidence included a report by Dr. Douglas Skinner, who responded to Dr. Cumming's report. In his report, Dr. Skinner took issue with Dr. Cumming's conclusions, including the following:

a. Dr. Skinner stated that Dr. Cumming's event study did not accord with the well-accepted methodology for event studies. For example, he stated that Dr. Cumming's event study did not consider the impact of the COVID-19 pandemic on global market prices.

b. Dr. Skinner opined that the March 2, 2020 disclosures did not have any statistically significant market impact, when the intraday stock prices were taken into consideration. Specifically, while stock prices dropped overnight after the March 2, 2020 disclosure, the prices had stabilized shortly after the reopening of markets on March 3, 2020.

c. Dr. Skinner disputed that the March 19, 2020 disclosure led to any statistically significant decline in share prices. Again, Dr. Skinner based this view on an analysis of the intraday impact on share prices. He also stated that, by this point, the corrective information was "stale", as it had previously been disclosed, and therefore any drop in share prices could not be attributed to the disclosure.

d. With respect to the drop in share prices resulting from the March 30, 2020 disclosure, Dr. Skinner accepted that it was statistically significant. However, in his view, it was caused by factors other than the corrected

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> results for 2019. For example, it was likely caused by factors such as Cronos's announcement that it was delaying distribution of a new product, referred to as PEACE+, to the United States. In part, Dr. Skinner based this conclusion on a review of contemporaneous commentary on the disclosure of Cronos's results at the relevant time.

[28] Dr. Cumming replied to Dr. Skinner's opinion evidence. In his reply, Dr. Cumming pointed out that both experts agree that there were drops in the share prices after announcements on March 2, 19 and 30, 2020, and that they both agreed that the drop in shares prices on March 30, 2020 was statistically significant. Dr. Cumming explained the basis on which he disagreed with Dr. Skinner's methodology and his view that contemporaneous public statements supported his conclusion that the disclosures affected Cronos's share prices. Dr. Cumming also explained that his event study took the impact of the COVID-19 pandemic into consideration.

[29] Besides the expert evidence, the parties also produced documents referred to by the experts that provided contemporaneous commentary on Cronos's March 2020 disclosure and restated financial statements.

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**(4) The motion judge's decision**

[30] In his decision, the motion judge dismissed the motion for leave to proceed with the s. 138.3 claim under the *Securities Act* and denied the motion for certification.

[31] At the outset, the motion judge characterized the appellant's claim as alleging that the defendants to the action made close to 8,000 separate misrepresentations, which he later specifically calculated as 7,449 misrepresentations. He explained the basis for this characterization as follows:

> [20] At the hearing of the motion, Mr. Myers, for the Plaintiff, set out a litany of what he characterized as separately and independently actionable misrepresentations committed by Cronos and the individual Defendants during 2019. In all, the Plaintiff claims that there were over 570 individual misrepresentations in Cronos' 2019 first, second and third quarter Interim Financial Statements and MD&As. These are alleged to have been reiterated or augmented or supplemented and added to in various statements and certification by individual Defendants. When one tallies it all up, there are allegations of just under 8,000 misrepresentations covered by the Plaintiff's pleading.
>
> [21] The accounting misrepresentations are listed in lengthy schedules to the Amended Statement of Claim. Each alleged misrepresentation relates to purportedly improper revenue recognition for the Q1 and Q3 2019 exchange transactions described above. Thus, any one adjustment made by KPMG is characterized as a multiple error, impacting on, and attributed by the Plaintiff to, anything from accounts receivable, to inventory, to gross and net revenue figures.

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[32] The motion judge then applied the two-part test for leave under s. 138 of the *Securities Act* based on this characterization of the claim. He found that the action was brought in good faith and therefore that the first part of the test was met. However, he found that there was no reasonable possibility that the appellant could succeed at trial and therefore the second part of the test was not met.

[33] In reaching his conclusion on the second part of the test, the motion judge reviewed the appellant's expert evidence and found that the appellant's expert evidence was "weak" on the issue of whether the misrepresentations affected the share prices, partly because the COVID-19 pandemic likely had an impact on share prices at the relevant time.

[34] In addition, the motion judge held that, given that the appellant advanced the claim on the basis that the defendants collectively made close to 8,000 misrepresentations, the expert evidence did not support or even address the separate misrepresentations. On that basis, the motion judge found that the test for leave was not met because the appellant had not shown, nor was he capable of showing, that each separate alleged misrepresentation materially contributed to a loss in share price during the relevant time period.

[35] Having found that the test for leave was not met, the motion judge then turned to the motion for certification. In that context, he focused his analysis on the requirement in s. 5(1)(a) of the *Class Proceedings Act* that the claim disclose a

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cause of action. He concluded that the claim does not disclose a cause of action because the claim did not provide any of the misrepresentations made by the individual defendants and because the pleading did not address how the multiple individual misrepresentations caused the plaintiff's losses or the drop in share prices.

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## B. POSITIONS OF THE PARTIES

[36] On appeal, the appellant has narrowed the proposed claim as follows:

a. The only cause of action the appellant seeks to pursue is a claim for misrepresentation under s. 138.3 of the *Securities Act*. He no longer asserts a claim for negligent misrepresentation at common law or for oppression under the *Ontario Business Corporations Act*.

b. Other than Cronos, the plaintiff only seeks to pursue a claim against Mr. Gorenstein and Mr. Barbato, who were respectively Cronos's CEO and CFO at the relevant time. The appellant no longer seeks to pursue a claim against the other individual defendants.

c. The appellant only relies on misrepresentations in the 2019 Q1, Q2 and Q3 interim financial statements, MD&As and Certificates. He no longer relies on misrepresentations in other documents or on oral misrepresentations.

d. The appellant has also narrowed the class period from the period of August 14, 2018 to March 30, 2020, to the period of May 9, 2019 to March 30, 2020.

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[37] The appellant submits that the motion judge erred in requiring that he meet the materiality aspect of the test for leave under s. 138.8 of the *Securities Act* by showing that each of the alleged 7,449 misrepresentations caused specific drops in share prices. The appellant also submits that the trial judge erred in holding that the drop in share prices at the relevant time was attributable to COVID-19 rather than to the misrepresentations. In addition, the appellant submits that the motion judge erred in finding that the claim did not disclose a cause of action, and he asks that this court certify the action as a global class proceeding.

[38] The respondents argue that the motion judge made no errors. They argue that the motion judge properly characterized the claim, and that the evidence on the motion could not support a finding that each alleged misrepresentation had a material impact on the price of shares. They further argue that the motion judge did not improperly attribute the drop in share prices to the COVID-19 pandemic, but rather based his decision on a review of all the available evidence. Finally, they argue that, if this court finds that the motion judge erred in not granting leave pursuant to s. 138.8 of the *Securities Act*, the issue of certification under the *Class Proceedings Act* should be sent back to the Superior Court for determination.

## C. ANALYSIS

[39] I agree with the appellant that the motion judge erred in characterizing the claim as being based on 7,449 separate misrepresentations. This approach to the claim tainted his analysis.

[40] As set out below, viewed properly, the claim alleges one central misrepresentation, namely that Cronos misrepresented its revenues for 2019 Q1 and Q3 by treating transactions involving the exchange of cannabis products with a third party as generating revenue (resulting in misrepresentations in its interim financial statements, MD&As and Certificates for 2019 Q1, Q2 and Q3). Cronos ultimately corrected those documents and line items. The issue of whether this core misrepresentation should be broken down and treated as several misrepresentations for the purpose of calculating damages is to be decided at trial and not at this early stage of the proceedings.

[41] At this stage of the proceedings, the evidence supports a finding that the appellant has a reasonable possibility of success. There are admitted misrepresentations that were corrected. The price of Cronos's shares dropped around the dates when the corrections were publicly announced. While there is conflicting evidence on the issue of whether the drops in price were caused by the misrepresentations or other factors, such as the COVID-19 pandemic, there is

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sufficient evidence to find that the appellant's claim has a reasonable possibility of success.

[42] I have broken the analysis below down into the following parts: (1) an overview of the relevant provisions of the *Securities Act* and the test for obtaining leave; (2) a discussion of the errors committed by the motion judge in characterizing the claim; (3) once the claim is properly characterized, a discussion of whether the evidence supports a finding that there is a reasonable possibility of success; and (4) a discussion of the appellant's request that this court certify the action as a global class proceeding.

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**(1) Test for obtaining leave under s. 138.8 of the *Securities Act***

[43] Section 138.3(1) of the *Securities Act* creates a statutory right of action for misrepresentations made by issuers or persons authorized to act on behalf of issuers. The provision gives a right of action to a person or company who acquires or disposes of the issuer's security between the date of release of a document containing a representation and the date the document is publicly corrected, regardless of whether the person or company relied on the misrepresentation.

[44] When a party brings an action for misrepresentation under s. 138.3(1), s. 138.3(6) gives the court discretion to treat multiple misrepresentations "having common subject matter or content" as a "single misrepresentation".

[45] Section 138.5 of the *Securities Act* prescribes how damages for a misrepresentation are to be calculated, and s. 138.7 places limits on those damages.

[46] While s. 138.3(1) of the *Securities Act* creates a statutory cause of action that eliminates the need to prove reliance on the misrepresentation, to guard against strike suits, s. 138.8(1) of the *Act* requires that a party obtain leave of the court before proceeding with a claim: see *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 67-69; *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 417 D.L.R. (4th) 97, at paras. 36-38. The statutory test for leave provides that the court is only to grant leave if 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 in favour of the plaintiff at trial.

[47] In order to meet the "reasonable possibility" of success branch of the test for leave, the plaintiff must show that there was a misrepresentation and that the misrepresentation was material: see *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184, 364 D.L.R. (4th) 302, at para. 64, leave to appeal refused, [2013] S.C.C.A. No. 225. Section 1 of the *Securities Act* defines "misrepresentation" as including "an untrue statement of material fact". In turn, s. 1 of the *Act* defines a "material fact" used in relation to issued securities as "a fact that would reasonably be expected to have a significant effect on the market price of value of the securities".

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[48] In *Theratechnologies Inc. v. 121851 Canada Inc*., 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 39, the Supreme Court explained, in relation to the same provision in the equivalent Quebec statute[2], that the "reasonable possibility" branch of the test for leave is meant to be "more than a speed-bump" but not meant to be a "mini-trial". When seeking leave, a plaintiff must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": at para. 39. The court explained the rationale for these requirements as follows:

> A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success – and the time and expense they impose – are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour. [Emphasis in original.]

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[2] *Securities Act*, C.Q.L.R. c. V-1.1, s 225.4.

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**(2) The motion judge erred in treating the action as a claim based on 7,449 misrepresentations**

[49] As reviewed above, the motion judge treated the proposed action as a claim alleging that the defendants collectively made 7,449 individual misrepresentations. He found that there was no reasonable possibility that the appellant could succeed at trial because there was no evidence that each of the alleged misrepresentations affected Cronos's share prices, nor would it be possible to demonstrate that each misrepresentation affected the share prices.

[50] In my view, the motion judge made a palpable and overriding error in characterizing the claim as alleging that the defendants made 7,449 separate misrepresentations. This approach to the statement of claim is inconsistent with the structure and wording of the claim itself and with statutory intent.

[51] On its face, the claim does not plead that the defendants collectively made 7,449 misrepresentations. As reviewed above, Cronos's claim focuses on the company's mischaracterization of the cannabis flower/resin exchange transactions as generating revenue. In the overview section of the claim, the core allegations are summarized as follows:

> Through each of its first three quarters of 2019, Cronos posted increasing revenue, signalling to shareholders bright future prospects as it fought with competitors for a share of the nascent cannabis market.

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> Unknown to its shareholders, however, Cronos had orchestrated a scheme to inflate its reported revenue figures. To do so, Cronos entered into simultaneous transactions with third parties to both sell to them cannabis dry flower and to purchase back cannabis resin and tincture, transactions that were concluded in contemplation of one another.
>
> Instead of properly accounting for these transactions at the carrying value of inventory transferred by Cronos, Cronos booked these sales as revenue, thereby inflating its balance sheet and its bottom line by signaling to shareholders quarter by quarter that Cronos was a growing company.
>
> These improper transactions represented 35% of Cronos's reported revenue for Q1 2019 and 38% for Q3 2019. [Emphasis added.]

[52] Further in the claim, at paragraph 53, as quoted above, the misrepresentations are broken down into six categories, only four of which the appellant relied on at the motion. The claim then goes on to provide particulars of each category of the misrepresentations, including Schedule "A", which sets out all the line items from the interim financial statements that were later corrected. Admittedly, a handful of the particulars do not relate to the core alleged misrepresentation. However, the vast majority of the particulars are manifestations of the core allegation that Cronos and the other defendants misrepresented their revenues by characterizing the exchange transactions as generating revenue. Now, with the appellant's proposed narrowing of the claim, all alleged misrepresentations relate to this core misrepresentation.

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[53] The motion judge based his approach to the claim in part on the appellant's request for a declaration that the misrepresentations listed at paragraph 53 of the claim not be treated as a single misrepresentation for the purpose of s. 138.3(6) of the *Securities Act*. The motion judge explained his rationale for this approach as follows:

> [67] The *OSA* also addresses the prospect of there being a sequence of numerous misstatements which are alleged to cumulatively add up to a material misrepresentation. Thus, section 138.3(6)(a) provides that "multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation". This would allow a plaintiff to base a secondary market claim on, for example, a number of interim financial statements, MD&As, press releases, etc. disseminated by a reporting issuer, all of which collectively convey the allegedly misrepresented information on which the claim is based. However, as indicated above, the Plaintiff has specifically pleaded that this collective approach to misrepresentations is not the case here. Paragraph 2(g) of the Amended Statement of Claim seeks:
>
> > a declaration that each misrepresentation stated in paragraph 53 gives rise to separate liability limits for each of the Defendants pursuant to Part XXIII.1 of the *OSA* and the corresponding provisions of the other Securities Legislation, such that there is no basis to grant the Defendants relief under sc. 138.3(6) of the *OSA* and the corresponding provisions of the other Securities Legislation to treat the misrepresentations as a single misrepresentation.
>
> [68] Section 138.7 of the *OSA* sets out liability limits in calculating damages for secondary market claims. Each

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> actionable misrepresentation is subject to its own separate liability limit. In including in the prayer for relief a declaration that each of the nearly 8,000 alleged misrepresentations is a separate ground of liability, the Amended Statement of Claim seeks to attribute a separate liability limit for each of them. This, of course, could potentially increase the damages limit exponentially, and might go some way to explain why the pleading has been framed so that multiple and repetitive allegations are not grouped together under section 138.3(6)(a) as cumulatively adding up to a single or lesser number of actionable misrepresentations.
>
> [69] As pleaded, each of the alleged 7,449 individual misrepresentations therefore must be shown to have been separately and distinctly "material" in the *OSA*'s section 1(1) definition of that term. The Defendants' evidence of materiality – i.e. of market impact – does not even attempt to meet that standard.

[54] As reviewed above, s. 138.3(6) of the *Act* gives the court discretion to treat misrepresentations dealing with a common subject matter as a single misrepresentation. By requesting that the misrepresentations listed at paragraph 53 be treated as single misrepresentations, presumably the appellant is seeking to maximize the available damages by avoiding the limits on damages in s. 138.7 of the *Securities Act*. However, the request for declaratory relief did not suggest that the claim was based on 7,449 separate misrepresentations, but rather that the plaintiff sought to have the claim treated as dealing with originally six, and ultimately four, separate misrepresentations. While the paragraphs of the claim following paragraph 53 provide particulars of the alleged categories of misrepresentations, there is nothing in the claim to suggest that the appellant

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seeks to have each manifestation of the misreported revenue treated as a separate misrepresentation for the purpose of the claim for damages.

[55] More significantly, in my view, the declaration sought by the appellant is part of the relief sought and therefore an issue to be dealt with at trial. The requested declaration should not drive the analysis of whether there is a reasonable possibility that the appellant will succeed at trial. Section 138.3(6) gives the court discretion to treat misrepresentations with a common subject matter as a single misrepresentation. In *Kaynes v. BP, P.L.C.*, 2018 ONCA 337, at para. 21, this court explained that the purpose of s. 138.3(6) is to protect defendants from multiple liability:

> [W]e agree with the motion judge's conclusion that the legislative history of s. 138.3(6) demonstrates that it was enacted as a consequence of an Ontario Securities Commission response to a Request for Comments. It is plain from that submission that the section was designed to protect issuers from multiple rights of action or multiple liability for essentially the same misrepresentation repeated on a number of occasions. [Emphasis added.]

[56] Accordingly, where the issuer made multiple related misrepresentations, the damages attributable to those misrepresentations may be limited to the damages available if the issuer had made only one misrepresentation. However, fundamentally, this is an issue for trial. It would be up to the trial judge to decide whether to exercise their discretion to treat multiple misrepresentations as a single

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misrepresentation and the effects of such a determination on the availability of damages.

[57] For the purposes of the leave motion, on the facts of this case, it was premature for the motion judge to assume that the alleged misrepresentations should be treated as multiple individual misrepresentations rather than a single misrepresentation given their common subject matter. In other words, given the manner in which the claim is pleaded and the core commonality among the alleged misrepresentations, there is a basis for treating the claim as being about a single misrepresentation and the analysis of the reasonable possibility test should proceed on that basis. The reasonable possibility test is about weeding out unmeritorious claims. It is not about dismissing potentially valid claims on technical grounds.

[58] In fairness to the trial judge, his reasons suggest that counsel for the appellant may have overemphasized the individuality of the alleged misrepresentations during oral argument. In addition, the appellant's factum and reply factum on the motion do state that there were multiple individual misrepresentations.

[59] Nevertheless, while the reasonable possibility test is meant to be more than a "speed bump", at this early stage in the proceeding the claim is to be read generously. The appellant's claim may be overexpansive in its details, but this

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does not detract from the fact that, at its core, this is a claim alleging that Cronos misrepresented its revenues for two quarters based on one accounting error, and that those misrepresentations, once they were corrected, affected the share prices. This is the type of claim s. 138.3 is designed to address. In determining whether the claim meets the test for leave, this is how the claim should be characterized.

**(3) The evidence supports granting leave**

[60] The motion judge's decision not to grant leave was primarily based on his characterization of the claim as being based on 7,449 individual misrepresentations, and his view that there was no evidence to support a finding that each of those misrepresentations separately caused share prices to drop. Given that this approach was an error, the question then becomes whether the motion judge's other findings and the evidence on the record support his conclusion that there is no reasonable possibility that the appellant will succeed at trial. In my view, as discussed below, had the motion judge approached the claim properly, he ought to have found that there is a reasonable possibility that the appellant will succeed in the action.

[61] The respondents argue that, even if the motion judge erred in treating the claim as alleging 7,449 separate misrepresentations, he nevertheless found that, if construed as a claim based on one central misrepresentation, there is no

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reasonable possibility that the appellant will succeed. The respondents argue that this finding is entitled to deference and that the appeal should be dismissed.

[62] The appellant disagrees and argues that, to the extent the motion judge found that the misrepresentations did not have a material impact on share prices, he erred in making this finding because he improperly based this conclusion on a finding that any drop in share prices was caused by the COVID-19 pandemic and not by the misrepresentations. The appellant argues that the record does not support such a finding and the motion judge thereby made a palpable and overriding error.

[63] In addressing the merits of these positions, it is helpful to review in some detail the motion judge's reasoning. Specifically, I will focus on whether, regardless of the mischaracterization of the claim as being about a multitude of individual misrepresentations, the motion judge nevertheless found that the misrepresentations treated collectively had no material impact on the price of Cronos's shares and, if so, whether such a finding is consistent with the reasonable possibility test and the evidence.

[64] As reviewed above, the reasonable possibility test is not meant to be a mini-trial, but it is also not meant to be limited to a *de minimis* assessment of the evidence on the record. As held by this court in *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, at para. 43, "a 'reasoned consideration of the evidence' must

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include scrutiny of the evidence proffered by both sides, and some weighing of the defence evidence against that adduced by the plaintiff."

[65] In his reasons, before getting to the issue of the lack of evidence that the 7,449 alleged misrepresentations individually caused drops in the share prices, the motion judge discussed the parties' evidence and addressed the issue of whether the misrepresentations made in relation to the revenues for 2019 Q1 and Q3 could be characterized as material.

[66] In reviewing this evidence, the motion judge started with the correct premise that a restatement on its own is not sufficient to make a finding that a misrepresentation was material. Rather, relying on authority from this court and the Superior Court, the motion judge held that whether a correction is material is not a matter of semantics, but rather requires an understanding of how a specific correction would be understood in an efficient market and also requires a statistical analysis of the effect of the correction:

> [53] The Court of Appeal made this very point in *Barrick*, at para. 50, quoting approvingly from the motion court's judgment in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784, at para. 45:
>
> > [T]he determination of whether a corrective disclosure is corrective depends not only on a semantic analysis of how the words would be understood in an efficient market and also a statistical analysis of the effect of those words on the market's evaluation of

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> the value of the securities that had been misrepresented to the marketplace.
>
> [54] The impact on the market lies at the heart of the statutory definition of "material fact". It is not just an add-on to be examined in case the public corrections are somehow unclear. The possibility exists that there were misrepresentations in the form of inaccuracies in financial statements, but that they had negligible impact and were not material in the *OSA* sense of the term.

[67] The motion judge then reviewed some of the evidence regarding how the March 2020 corrections were understood.

[68] He started by expressing his view that the evidence suggested that the corrections to the 2019 Q1and Q3 financial disclosures had little or no impact on share prices in March 2020.

[69] In doing so, he reviewed Dr. Skinner's evidence and, as part of that review, addressed his view of the impact of the COVID-19 pandemic:

> [57] Finally, and perhaps most importantly, Professor Skinner observes that, "[t]he alleged corrective disclosure during a period of unusual market volatility, as news came to the market regarding the seriousness of the COVID-19 pandemic in February and March, 2020." This, if anything, is an understatement.
>
> [58] The Plaintiff himself has included in his Supplemental Motion Record a market analysis by Morningstar Financial Research whose very title makes the point emphatically: "COVID-19 Pandemic Tanks Cannabis Stocks but Has Little Impact on Their Long-Term Potential". The market decline in late 2020 that is pointed to by the Plaintiff and his economics expert is, according to this evidence, more reflective of the materiality of the pandemic than of anything that Cronos

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> did or did not announce to the public. As Morningstar puts it, "The COVID-19 outbreak has rattled the economy and broader equity markets. Likewise, shares in cannabis companies have dropped significantly."

[70] The motion judge also reviewed some of the other contemporaneous documents released at the time discussing the impact of the disclosures. He stated that those documents suggested that the "accounting matters that were restated by Cronos in March 2020 were already relatively obscure, with market analysts generally perceiving them as insignificant in both the long term and the short term." He referred to a report that stated that the transactions that led to the restated financial reports were a relatively small portion of Cronos's business and that Cronos was nevertheless viewed as a healthy company. He also referred to a report that opined that the March 2020 restatement was a sign of Cronos's health as a company, and that it was doing better than other companies in the same industry.

[71] Despite this evidence, the motion judge acknowledged that there were some contemporaneous documents to support a finding that the March 2020 disclosure had a negative impact on Cronos's share prices. He described this evidence as follows:

> [63] To be fair, there are some negative contemporaneous market reports about Cronos in the Plaintiff's motion record. Eight Capital's March 27, 2020 report entitled "Top line misses on lower volumes" indicated that Cronos had "disappointing Q4 results" and that the analysis had revised their performance analysis

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> "to reflect adjusted expectations on the timing and ramp-up of the company's cultivation assets". That said, the market report portion of the analysis was headed "Results disappoint but shares hang in", indicating that the analysts' concern was with Cronos' actual business performance and not with any reporting issues which impact on share prices.

[72] Immediately following his review of the evidence on the impact of the March 2020 disclosure on share prices, the motion judge's reasons focus on his view, discussed above, that the claim is based on allegations that there were 7,449 separate misrepresentations and his conclusion that there is no evidence that would support a finding that any of those misrepresentations was individually material.

[73] The motion judge ultimately concludes as follows:

> [77] In sum, the evidence of materiality contained in the record is all but non-existent. What evidence that does exist is weak and tends to confuse market-wide movements in share prices, especially those coinciding with the March 2020 onset of the COVID-19 pandemic, with company-specific movements.
>
> [78] Even more importantly, nothing in the record demonstrates that the thousands of alleged misrepresentations pleaded in the Amended Statement of Claim would each, to use the words of section 1(1) of the *OSA*, "reasonably be expected to have a significant effect on the market price or value" of Cronos' securities. In particular, the Plaintiff's materiality evidence fails to demonstrate the materiality of any individual misrepresentations asserted in the Amended Statement of Claim on an individual or even a category basis.

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> [79] Rather than pleading factual causation for each alleged misrepresentation, the analysis is done on a global basis. All of the alleged misrepresentations are treated as a single misrepresentation, and this is despite their being specifically pleaded as separate and distinct from each other.
>
> [80] The record before me does not support leave to proceed. The Plaintiff has not established that there is a reasonable possibility of establishing at trial that the alleged misrepresentations were material. In fact, his own expert witness has conceded that cannot be shown. The claim is therefore lacking a crucial ingredient for liability under Part XXIII.1 of the *OSA*.

[74] As indicated above, the appellant argues that the motion judge erred because he improperly found that the COVID-19 pandemic caused any drop in share prices at the relevant time. The appellant argues that this finding was inconsistent with the record and went beyond the scope of the motion judge's role on the motion; the issue of what impact the COVID-19 pandemic had on share prices, and whether such an impact can explain the relevant drop in share prices, is more properly decided at trial than on the motion for leave. In my view, the appellant overstates the motion judge's characterization of the impact of COVID-19 on Cronos's share prices. As reviewed above, the motion judge's consideration of whether the misrepresentations had an impact on the price of Cronos's shares focused primarily on the respondents' expert evidence and comments in contemporaneous documents dealing with the significance of the corrections. While he referred to the impact of the pandemic, this was only one of several factors he considered in assessing the materiality of the March 2020 disclosures.

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[75] But this does not end the inquiry. There is no doubt that deference is owed to the motion judge's assessment of the evidence on the motion. However, in my view, the motion judge's assessment of the evidence was tainted by his characterization of the claim. As outlined above, the motion judge's conclusion on the strength of the evidence is followed immediately by his discussion about his view that the pleading was fundamentally flawed and that the evidence did not support, and could not support, a finding that each individual misrepresentation was material.

[76] In this sense, he arguably never completed the exercise of deciding whether, if the claim was treated as alleging a single misrepresentation, the threshold for granting leave was met. Notably, while the motion judge reviewed and relied on the evidence of Dr. Skinner, the respondents' expert, he did not review and assess Dr. Cumming's evidence, other than to comment that this expert did not assess whether each of the alleged 7,449 misrepresentations was material. While the motion judge found that the claim was weak, he did not address whether the evidence was sufficient for granting leave. Rather, his conclusion on whether leave should be granted focused primarily on what he viewed as the fundamental flaws in the pleading and evidence.

[77] Even if one were to treat the motion judge's analysis as complete, in my view, it tips into the realm of a mini-trial. In this case, there is evidence of misrepresentations regarding Cronos's revenues in 2019 Q1 and Q3. There is also

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evidence that those misrepresentations were corrected in March 2020 through disclosures between February 24 and March 30, 2020. There were accompanying share price drops soon after the disclosures on March 2, 19 and 30, 2020. There is conflicting evidence on the significance of those drops in share prices. There is also conflicting evidence on the cause of those share price drops. This conflict is found in both contemporaneous documents that address the marketplace's reaction to the disclosure and expert evidence that analyzes the statistical significance of the disclosure. There is no doubt that the market forces at the time included the onset of the COVID-19 pandemic, but there is conflicting evidence regarding the pandemic's impact on Cronos's share prices.

[78] These circumstances are sufficient to meet the reasonable possibility test. The evidence in support of the claim is well beyond *de minimis*. On a motion for leave, it is no doubt appropriate for the court to engage in some weighing of the evidence. On a case such as this one, where there was a drop in share prices, and there is credible, complex and competing evidence on whether misrepresentations have a material effect on share prices, the reasonable possibility threshold is met and the issue should be left for trial. Accordingly, I would grant leave under s. 138.3(1) of the *Securities Act*.

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**(4) The issue of certification should be decided by the Superior Court**

[79] In my view, it would not be appropriate for this court to decide whether the action should be certified as a class proceeding, and this issue should be sent back to the Superior Court for determination.

[80] The appellant's position is that, if this court grants the appeal on the leave issue, the court should also grant an order certifying the action as a global class proceeding. In making this argument, the appellant suggested that the respondents have conceded that the action meets most aspects of the test for certification pursuant to s. 5(1)(a) of the *Class Proceedings Act*.

[81] The respondents dispute that they have made these concessions and that the case is appropriate for certification as a global class proceeding.

[82] In his decision, the motion judge dismissed the motion for certification only on the basis of his finding that the claim does not disclose a cause of action. In doing so, he found that the claim did not plead sufficient particulars of the misrepresentations made by each defendant and that the claim does not address the materiality of each individual alleged misrepresentation. Given my conclusion above that this was a mischaracterization of the claim, in my view, the motion judge erred in finding that the claim fails to disclose a cause of action.

[83] However, it would not be appropriate for this court to decide that the action meets all requirements for certification, including as a global class proceeding. The

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motion judge did not address the other requirements in s. 5(1) of the *Class Proceedings Act* for certification of the action nor did he address whether the action should be certified on a global basis. The Superior Court is in a better position to address these issues at first instance.[3]

## D. DISPOSITION

[84] I would allow the appeal and grant leave to proceed with the misrepresentation action under s. 138.3 of the *Securities Act*. I would remit the issue of whether the action should be certified as a class proceeding back to the Superior Court for determination.

[85] As agreed between the parties, the appellant is entitled to costs of $35,000 inclusive of disbursements and HST. “K.F”

Released: September 26, 2022

“L Favreau J.A.”
“I agree. K. Feldman J.A.”
“I agree L.B. Roberts J.A”

[3] Given that the plaintiff has narrowed his proposed claim as reflected in para. 36 above, presumably the certification motion will proceed on the basis of a further amendment to the statement of claim that reflects these changes.

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# Tab 4

# COURT OF APPEAL FOR ONTARIO

CITATION: Baldwin v. Imperial Metals Corporation, 2021 ONCA 838
DATE: 20211125
DOCKET: C68768

2021 ONCA 838 (CanLII)

Strathy C.J.O., Pepall and Pardu JJ.

BETWEEN

Claire Baldwin

Plaintiff (Appellant)

and

Imperial Metals Corporation, J. Brian Kynoch, Andrew Deepwell, Larry G. Moeller, Laurie Pare, N. Murray Edwards, Edco Financial Holdings Ltd. and Edco Capital Corporation

Defendants (Respondents)

Michael G. Robb, Kevin Richard, Garett Hunter and Bethanie Pascutto, for the appellant

Lawrence E. Thacker, Aoife Quinn and Kathleen Glowach, for the respondents

Heard: September 14, 2021 by video conference

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated September 23, 2020, with reasons reported at 2020 ONSC 5616, 152 O.R. (3d) 774.

**Strathy C.J.O.:**

## A. INTRODUCTION

[1] This appeal considers the role of "public correction" in a shareholder's proposed class action for misrepresentation in the secondary securities market, pursuant to s. 138.3 of the *Securities Act*, R.S.O. 1990, c. S.5.

[2] That same issue was considered by this court in a decision released in February of this year*: Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 ("*Barrick OCA*"), leave to appeal refused, [2021] S.C.C.A. No. 202, and rev'g 2019 ONSC 4160, 148 O.R. (3d) 755 ("*Barrick SCJ*").

[3] The motion judge in this case, who followed his own decision in *Barrick SCJ*, did not have the benefit of *Barrick OCA* when he dismissed the appellant's motion for leave to pursue the statutory remedy under s. 138.8 of the *Securities Act*. After the release of that decision, and before argument of this appeal, this court requested additional written submissions from the parties on the impact of *Barrick OCA* on this appeal.

[4] For the reasons that follow, I would allow the appeal and remit the leave motion to the Superior Court for determination.

## B. BACKGROUND

### (1) The Facts

[5] The facts necessary for the disposition of this appeal can be briefly stated.

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[6] The respondent Imperial Metals Corporation (“Imperial”) is a reporting issuer in Ontario. Its shares trade on the Toronto Stock Exchange.

[7] The appellant is an individual shareholder. She pleads that she acquired shares of Imperial during the class period (defined as August 15, 2011 to August 4, 2014, inclusive) and held some or all of those shares at the end of the class period.

[8] On August 4, 2014, Imperial issued a press release, reporting that the tailings storage facility (the “TSF”) at its Mount Polley gold and copper mine in British Columbia had been breached, releasing an “undetermined amount of water and tailings”. The press release stated that the cause of the breach was unknown.

[9] Following this disclosure, Imperial’s share price declined by 40% and the company lost about $500 million in market capitalization.

[10] As a result of the failure of the TSF, millions of cubic metres of liquid mining waste were released into the surrounding environment. Government authorities and independent commissions investigated and produced reports on the circumstances of the TSF breach.

[11] This action pursuant to s. 138.3 of the *Securities Act* was commenced by notice of action filed three days after the failure of the TSF. The statement of claim was issued one month later, on September 8, 2014. The appellant alleged that the

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breach of the TSF was caused by deficiencies in its design, construction, and operation.

**(2) The Statutory Cause of Action**

[12] Section 138.3, contained in Part XXIII.1 of the *Securities Act*, creates a cause of action for misrepresentation in the secondary securities market. It complements ss. 130 and 131, contained in Part XXIII, which create statutory causes of action for misrepresentation in the "primary" market, in a prospectus, offering memorandum, or take-over bid circular.

[13] Section 138.3(1) provides:

> Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against, [the responsible issuer, directors, certain officers, influential persons and experts.] [Emphasis added.]

[14] Section 138.8(1) contains a screening mechanism: no action may be commenced under s. 138.3 without leave of the court and the court shall only grant leave 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. In *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, Abella J. stated that the leave requirement was intended to be more

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than a “speed bump” and requires a reasoned consideration of the evidence to ensure the action has a reasonable possibility of success.

[15] For the purpose of this appeal, it is unnecessary to describe the genesis or content of the statutory scheme in any detail. This ground has been thoroughly covered by the decision of the Supreme Court in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 63-69 and the decision of this court in *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241, *per* Hourigan J.A., at paras 35-49, leave to appeal refused, [2017] S.C.C.A. No. 443.

[16] Based on the recommendations of the Allen Committee in 1997,[1] Part XXIII.1 was aimed at deterring corporate non-disclosure, protecting investors, and incentivizing accurate and timely disclosure by public issuers, while avoiding the American experience of predatory “strike suits”. It was designed to be implemented through class actions, so as to realize the goals of access to justice for shareholders and behaviour modification in relation to public issuers of securities.

[17] Unlike the common law action for misrepresentation, which requires the plaintiff to prove that they relied on the misrepresentation, the statutory remedy does not require the plaintiff to prove reliance. A causal link between the

[1] Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance*, final report (Toronto: Toronto Stock Exchange, 1997).

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misrepresentation and the plaintiff's damages is presumed, and the defendant bears the onus of proving that some or all of the damages are "attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure": *Securities Act*, s. 138.5(3). The statute contains caps on corporate and individual liability (s. 138.7(1)) and a defence of "reasonable investigation" (s. 138.4(6)).

[18] There has been some debate in the case law concerning the role of "public correction" in the statutory scheme. Section 138.3(1) provides the remedy to anyone who "acquires or disposes of the issuer's security during the period between the time when the document [containing the misrepresentation] was released and the time when the misrepresentation contained in the document was publicly corrected". The case law diverges on the question of whether public correction is an element of the statutory cause of action or simply a time-post to identify and delimit the members of the class.

[19] In *Barrick OCA*, Hoy J.A. did not find it necessary to resolve this question, finding that in any event public correction is a "necessary part of the statutory scheme": at para. 41. Later in her reasons, she observed that the Allen Committee "appears to have viewed a public correction simply as part of the statutory scheme — a necessary time-post for the proposed class period and any eventual damages calculation": *Barrick OCA*, at para. 66. She noted that the Committee appears to have assumed that the misrepresentation would be corrected or that the necessary

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disclosure would be made. She concluded that "[i]f the Committee intended to limit the proposed statute's applicability only to those misrepresentations later explicitly corrected, it is surprising that it did not so indicate in its otherwise extensively canvassed report": *Barrick OCA*, at para. 67.

**(3) Allegations in the Statement of Claim**

[20] In her second fresh as amended statement of claim, the appellant seeks, among other things, leave to commence a statutory action pursuant to s. 138.3 of the *Securities Act*, and an order certifying the action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and appointing her as the representative plaintiff.

[21] The appellant asserts that Imperial was negligent in the design, construction, and operation of the TSF. She claims that Imperial's disclosure documents contained untrue representations, omitted material facts that were required to be stated, and omitted material facts that were necessary to make other statements not misleading in light of the circumstances in which they were made. She alleges that "the truth was revealed" by the breach of the TSF and the press release on August 4, 2014, which she pleads were "corrective" of the misrepresentations.

[22] On behalf of herself and all other class members, the appellant asserted the statutory remedy in s. 138.3(1), the remedy for primary market misrepresentation in s. 132.1(1) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 in

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relation to an offering memorandum, negligence *simpliciter*, and common law negligent misrepresentation.

**(4) The Motion Judge's Reasons**

[23] Relying on his reasons in *Barrick SCJ*, the motion judge dismissed the appellant's motion for leave under s. 138.8(1) of the *Securities Act*. He found that to obtain leave under the *Act*, the plaintiff must allege not only a misrepresentation but also some discrete and identifiable public correction. That correction, he said, must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact. At the outset of his reasons, he stated, at para. 1:

> In a motion for leave under s. 138.8 of the *Securities Act*, it is not enough to allege a secondary market misrepresentation. There must also be some evidence of a public correction. Absent a public correction, the statutory action for damages is not available and the motion for leave must be dismissed. [Footnote omitted.]

[24] Later, the motion judge observed that s. 138.3(1) makes it clear that the statutory right of action does not arise unless the plaintiff can point to both an alleged misrepresentation and a public correction of the misrepresentation. Relying on his decision in *Barrick SCJ*, he stated, at para. 10:

> Absent a discrete and identifiable public correction (whether provided by the defendant company or a third party) there is no basis for a s. 138.3 misrepresentation action – the absence of a public correction is "dispositive" and there is no need to proceed further and consider

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> whether leave should be granted under s. 138.8. [Footnotes omitted.]

[25] He continued, at paras. 11-13:

> In the *Barrick Gold* leave motion, I summarized how this court has defined "public correction." It is sufficient for the purposes of this motion to focus on what in my view is the key requirement: the public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact.
>
> In other words, there must be some indication in the alleged public correction (when compared to an earlier material disclosure) that the earlier material disclosure contained a misstatement or was misleadingly incomplete.
>
> If the alleged public correction, on a fair reading (and in comparison to an earlier disclosure) does not provide some indication that the earlier disclosure was not truthful or was misleadingly incomplete, then there is no public correction and no basis for the proposed s. 138.3 action. [Footnotes omitted.]

[26] The motion judge did not find it necessary to determine whether Imperial's public statements about the safe design, construction, or operation of the mine contained misrepresentations, because Imperial argued – and the motion judge agreed – that none of the statements had been publicly corrected.

[27] The motion judge found that the press release issued on August 4, 2014 could not be a public correction because it said nothing more than (1) the TSF had been breached; (2) the cause of the breach was unknown; and (3) the company was working with the authorities to assess the damage. There was nothing in the press

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release to indicate that the breach of the TSF was caused by deficient design, defective construction, or problems in operation. There was nothing to correct any misrepresentation or to indicate to an informed reader or analyst that what the company had previously said about the subjects was untrue or misleading. Nor was there anything in the press release that, on a fair reading, could be linked to any of the alleged misrepresentations. “Put simply”, the motion judge said, “the news that the TSF has failed for reasons that are unknown does not amount to a correction of anything that was stated previously”: at para. 28.

[28] The motion judge said that the press release could only have served as a correction if the earlier misrepresentation had stated, “The TSF is built to be failproof, and will never, ever fail.” Had that been the misrepresentation, the press release advising that the TSF had indeed failed would arguably have been a public correction of the earlier misstatement.

[29] The motion judge concluded that the required public correction had not been established and there was no reasonable possibility that the appellant could show otherwise at trial.

**(5) The *Barrick* Decisions**

[30] To frame the analysis of the issues in this appeal, it is necessary to review the motion judge’s reasons in *Barrick SCJ* and this court’s reasons for directing a new hearing in that case.

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[31] In *Barrick SCJ*, as in this case, the motion judge dealt with a motion for leave under s. 138.8 of the *Securities Act*. The plaintiffs sought to bring a class action against Barrick Gold on the basis of alleged misrepresentations and omissions in its public disclosures concerning a mining project in Chile and Argentina. The motion judge denied leave for most of the alleged misrepresentations on the basis that they had not been publicly corrected.

[32] The motion judge observed that public correction plays an important role in the statutory scheme under Part XXIII.1. It not only serves to identify the nature and extent of the misrepresentation allegation, but also gives notice to the defendant of the case it has to meet, and acts as a "time-post" for the proposed class period and the calculation of damages: *Barrick SCJ*, at para. 15.

[33] In the motion judge's view, expressed at paras. 16 and 19 of *Barrick SCJ*, public correction is also a constituent element of the statutory cause of action:

> In the absence of a discrete and identifiable public correction (whether provided by the defendant company or a third party) there is no basis for a s. 138.3 misrepresentation action - the absence of a public correction is "dispositive" and there is no need to proceed further and consider whether leave should be granted under s. 138.8.
>
> …
>
> If the alleged public correction, on a fair reading, does not arguably reveal to the market the existence of the alleged misrepresentation - that is, the existence of the allegedly untrue assertion or the alleged omission in the impugned

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> representation - then there is no public correction and no basis for the proposed s. 138.3 action. [Footnotes omitted.]

[34] As he did in this case, the motion judge said that the leave application could be determined by assuming misrepresentations had been made and focusing on whether the public correction requirement had been satisfied. He dismissed most of the claims on the basis that there was nothing in the alleged corrections that provided a link to the alleged misrepresentations or omissions or that was capable of revealing their existence.

[35] This court, speaking through Hoy J.A., allowed an appeal from the motion judge's order: *Barrick OCA*. It directed that the issue of leave with respect to certain alleged misrepresentations should be remitted to a judge of the Superior Court.

[36] As mentioned, Hoy J.A. did not find it necessary to determine whether "public correction" is an element of the statutory cause of action, but she observed that it is a "necessary part of the statutory scheme": *Barrick OCA*, at para. 41. She said that the approach taken by the motion judge – assuming the alleged misrepresentations are made out and denying leave on the basis that there is no reasonable possibility that a trial court would find that there was a public correction – "is an approach that should be used rarely" and with "great caution": *Barrick OCA*, at para. 46. She added, at para. 48, that:

> Judicial economy likely only outweighs the interests of an issuer and its shareholders in a finding as to whether there is a reasonable possibility that the trial court would

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> find a misrepresentation and the risks entailed in assuming a misrepresentation when: the motion judge is faced with an overwhelming record; and the motion judge is confident that there is no material overlap between the evidence relevant to whether there is a misrepresentation, and the evidence of the context in which the alleged public correction was made and how the alleged public correction would be understood in the secondary market.

[37] Hoy J.A. also found that the motion judge erred in engaging in a purely textual reading of the proposed public correction: *Barrick OCA*, at paras. 53-54. A proper analysis would also require an examination of the context in which the alleged public correction was made and how the alleged public correction would have been understood in the secondary market if it does not, on its face, reveal the existence of the alleged misrepresentation: *Barrick OCA*, at para. 48.

[38] Moreover, Hoy J.A. found that assuming the falsity of the misrepresentation may not be appropriate where the misrepresentation is not facially obvious. That may require the judge to consider evidence relevant to whether there is a reasonable possibility that a trial court will find a misrepresentation: *Barrick OCA*, at para. 48.

[39] Hoy J.A. explained that the same reasoned consideration of the evidence is necessary when the alleged misrepresentations are misrepresentations by omission. She disagreed with the motion judge's statement that the alleged public correction, on a fair reading, must arguably reveal to the market the alleged omission of the material fact. She stated, at para. 76:

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> The public correction need not specifically identify the omitted material fact or specifically relate the information in the correction to the omitted material fact. As stated earlier, if the alleged public correction does not, on its face, reveal the existence of the alleged misrepresentation, the motion judge must engage in a reasoned consideration of evidence concerning the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market. The critical question for the motion judge is whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement. [Footnote omitted.]

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## C. ISSUES AND SUBMISSIONS ON APPEAL

[40] The primary issue before us is the role of public correction in the statutory remedy and whether the motion judge took an "impermissibly narrow approach to determining whether the alleged misrepresentations were publicly corrected": *Barrick OCA*, at para. 5.

[41] The appellant submits that the motion judge erred by adopting the same approach this court disapproved of in *Barrick OCA*. The motion judge misapprehended the role of public correction in the statutory cause of action under s. 138.3, which caused him to undertake a purely textual analysis of the correction, without regard to the evidentiary context of the misrepresentation and of the public correction. He construed public correction as an element of the right of action that must be pleaded and proven, rather than as a "time-post" to identify those

shareholders who are class members entitled to the benefit of the statutory cause of action.

[42] The appellant contends the motion judge erred in requiring that the public correction be effectively the “mirror-image” of the misrepresentation, an approach she says would incentivize public issuers to make vague, incomplete, and piecemeal disclosure.

[43] The appellant submits that there is at least a reasonable possibility that she will satisfy the statutory test: the public correction made by the press release was the direct manifestation of the specific and identifiable risk that the appellant alleges ought to have been disclosed – namely, the risk that the TSF might fail. The statutory right of action should be read in a manner that will incentivize both the avoidance of misrepresentations, and their prompt and thorough public correction where identified.

[44] The respondent submits that this is, in fact, one of those cases contemplated by this court in *Barrick OCA*, where a judge can resolve the motion and deny leave because there is no reasonable possibility that a trial court would find that there has been a public correction of the pleaded misrepresentation.

[45] The respondent submits that whether public correction is a “feature” of the statutory cause of action or an “element” of the statutory cause of action is a distinction without a difference. The threshold test in s. 138.3 requires that a

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"correction" be pleaded and proven by the plaintiff. The respondent submits that the issue of whether public correction is an element of the statutory cause of action was not disputed before the motion judge and should not be addressed in this court. The respondent submits that the motion judge's determination that the press release could not constitute a public correction was a determination of mixed fact and law and is entitled to deference.

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## D. ANALYSIS

[46] I do not propose to address the issue of whether public correction is an element of the statutory cause of action. It was not fully argued in the court below and it is unnecessary to resolve it in order to dispose of this appeal. As Hoy J.A. observed in *Barrick OCA*, however, public correction is a "necessary part of the statutory scheme": at para. 41.

[47] The overarching question for the purpose of the leave motion is "whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Barrick OCA*, at para. 76. See also: *Swisscanto v. Blackberry*, 2015 ONSC 6434, at para. 65; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784, at para. 147; *Cappelli v. Nobilis Health Corp.*, 2019 ONSC 2266, at para. 143; *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179, 145 O.R. (3d) 100, at para. 124.

[48] In my respectful view, the motion judge set the bar too high by requiring that the public correction be express and directly linked to a specific misrepresentation, which, he said, would have to have been something like: "The TSF is built to be failproof, and will never, ever fail." To paraphrase the observation of Hoy J.A. in *Barrick OCA*, there need not be facial symmetry between the public correction and the alleged misrepresentation or omission: at para. 76.

[49] I adopt the observations of Hoy J.A. in *Barrick OCA* with respect to the role of public correction in the statutory cause of action. Unlike the common law action for misrepresentation, which is theoretically available in this case and in other claims for misrepresentation in the securities context, the plaintiff and class members asserting statutory claims for secondary market misrepresentation are not required to plead or establish causation – that is, that they relied on the misrepresentation in acquiring the securities. The statute effectively deems reliance.

[50] Absent the need to prove causation, misrepresentation does the heavy lifting in the statutory cause of action. It is the wrong at issue and it forms part of the context in which the public correction operates and would be understood by the market. In most cases, the trial judge (or the judge on the s. 138.8 leave motion) will be required to consider the misrepresentation(s) or omission(s), the alleged public correction, and the context of both to determine whether the misrepresentation was corrected. It will remain open to the defendant to establish that the drop in the share price was caused by general market conditions, or by a

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specific development in the issuer's business or the industry that was not a consequence of the inadequate disclosure: see Committee on Corporate Disclosure, *Toward Improved Disclosure: A Search for Balance in Corporate Disclosure*, interim report (Toronto: Toronto Stock Exchange, 1995), at para. 6.43.

[51] While public correction is a necessary part of the statutory scheme, its role, at least at the leave stage, is a modest one. Hoy J.A. clearly considered this to be the case when she observed in *Barrick OCA*, at para. 71, that:

> Where there is a reasonable possibility of a misrepresentation, the plaintiff's claim can hardly be characterized as a strike suit. Furthermore, the clearing of the misrepresentation threshold, combined with the fact that the plaintiff brought an action, suggests that there was a public correction. The plaintiff must have learned of the misrepresentation somewhere. [Footnote omitted.]

[52] The role of public correction was not set out by the Allen Committee and, as Hoy J.A. observed, the committee appears to have assumed that the misrepresentation would be corrected or the necessary disclosure would be made: *Barrick OCA*, at para. 67.

[53] In many cases, perhaps most, the public correction will clearly reveal the existence of the alleged misrepresentation and the Allen Committee may have assumed that would be the case. Indeed, most of the secondary market misrepresentation cases that have come before the courts in Canada have involved express public corrections. But that does not necessitate an express

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correction or preclude the plaintiff from asking the court to infer a correction based on something other than an express statement by the company, coupled with the market's response.

[54] As the motion judge himself noted in *Swisscanto*, the public correction need not be a "mirror-image" of the alleged misrepresentation or a "direct admission that a previous statement is untrue": at para. 62, citing *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083, at paras. 64-71. There need only be "*some linkage or connection* between the pleaded public correction and the alleged misrepresentation": *Swisscanto*, at para. 65; *SNC-Lavalin*, at para. 147; *Cappelli*, at para. 143; *Kauf*, at para. 124. That linkage or connection will assist the judge in determining how the alleged corrective disclosure would be understood in the secondary market.

[55] Moreover, as the motion judge also observed in *Swisscanto*, the public correction need not be issued by the company itself and can emanate from third parties: at para. 62; see also *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, at para. 29.

[56] The modest role of public correction in the statutory cause of action is consistent with s. 138.5(3) of the *Securities Act*, mentioned earlier, which places the onus on defendants to prove that some or all of the plaintiffs' damages are attributable to a change in the market price of securities that is unrelated to the misrepresentation. This would leave it open to the defendants to prove that the

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alleged public correction is not a correction at all, because the change in market price was due to other factors.

[57] Focusing on the market's understanding of the alleged correction is also consistent with one of the core purposes of the statutory framework – to incentivize fair and accurate disclosure by public issuers. Permitting an issuer to escape liability by making vague or general disclosures ("something has happened and we are looking into it") is inconsistent with that core purpose. It would undermine confidence in the securities market and deprive shareholders of compensation.

[58] I conclude that, in light of *Barrick OCA*, the motion judge erred by imposing an unduly onerous standard for establishing public correction. This was an error of law and is reviewable on a correctness standard: see *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161, at paras. 36-37.

[59] Furthermore, this was not one of those rare cases alluded to by Hoy J.A. in *Barrick OCA*, in which the motion judge could fairly and safely dispose of the requirement to determine whether the issuer released a document that contains a misrepresentation and conclude that there is no reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[60] As the motion judge observed, the record was voluminous, and the allegations of misrepresentations and omissions were hotly contested. The motion judge decided, however, that he did not have to deal with the misrepresentation issues

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because he found, based on a purely facial reading of the press release, that there was no public correction.

[61] Without an examination of the evidence concerning the alleged misrepresentations or omissions – what they were, when they occurred, and the context in which they were made – it would be impossible for the motion judge to determine whether the alleged public correction was reasonably capable of being understood in the market as correcting what was misleading in the impugned statement. Depending on what had been said, or not said, in Imperial's public disclosures over the years concerning its waste management practices and environmental compliance measures, and the context in which the representations and the alleged public correction were made, a motion judge could find that the press release could be understood by the market as corrective and that there was a reasonable possibility that the action would be resolved in favour of the plaintiff at trial.

## E. DISPOSITION

[62] For these reasons, I would allow the appeal and remit the motion for leave to a judge selected by the Regional Senior Judge for the Toronto Region.

[63] The parties may make written submissions on costs. The appellant shall serve and file their submissions within 15 days of the release of these reasons and the

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respondent shall have 15 days to respond. The submissions shall not exceed 5 double-spaced pages in length, exclusive of costs outlines.

Released: November 25, 2021 “G.R.S.”

“George R. Strathy C.J.O.”
“I agree. S.E. Pepall J.A.”
“I agree. G. Pardu J.A.”

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# Tab 5

# COURT OF APPEAL FOR ONTARIO

CITATION: Bayens v. Kinross Gold Corporation, 2014 ONCA 901
DATE: 20141217
DOCKET: C57988

2014 ONCA 901 (CanLII)

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

E. Eddy Bayens, John Sinclair, Luc Fortin, Pierre Racicot and Stanley Shortt, in their capacity as Trustees of the Musicians' Pension Fund of Canada

Appellants

and

Kinross Gold Corporation, Tye W. Burt, Paul H. Barry, Glen J. Masterman and Kenneth G. Thomas

Respondents

Kirk M. Baert, Celeste Poltak and Garth Myers, for the appellants

Mark A. Gelowitz, Allan D. Coleman and Robert Carson, for the respondents

Heard: June 11, 2014

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated November 5, 2013, with reasons reported at 2013 ONSC 6864.

**Cronk J.A.:**

## A. Introduction

[1] The appellants, the trustees of the Musicians' Pension Fund of Canada, are representative plaintiffs in a putative class proceeding against the respondents, Kinross Gold Corporation ("Kinross"), a Toronto-based international mining company, and four of its current or former officers. Kinross' shares trade on the Toronto and New York Stock Exchanges. The appellants purchased

Kinross shares, in their capacity as trustees of the pension fund. In 2012, they commenced a class action against the respondents on their own behalf and on behalf of other specified persons who acquired Kinross shares during the period February 16, 2011 to January 16, 2012, claiming damages in the amount of $4 billion for alleged common law and statutory misrepresentations pertaining to two gold mines owned by Kinross: the "Tasiast" mine in Mauritania, West Africa and the "Chirano" mine in Ghana. The statutory claims are based on the statutory cause of action for misrepresentation created under s. 138.3[1] of Part XXIII.1 of the Ontario *Securities Act* (the "*Securities Act*")[2].

[2] The appellants assert that Kinross' public disclosure concerning the mines was misleading in two key respects. First, they allege that Kinross overstated the value of goodwill for the mines by failing to record a goodwill impairment charge relating to the Tasiast mine on a timely basis (the "Goodwill Impairment Claim").[3] In particular, the appellants say that adverse drilling results at the Tasiast mine in 2011 constituted a "triggering event" under applicable accounting standards, requiring Kinross to record a goodwill impairment charge that year. Although Kinross did record a goodwill impairment charge of $2.94 billion in early 2012, the appellants maintain that this recording occurred much too late.

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[1] The full text of s. 138.3 is reproduced in Schedule "A" to these reasons.
[2] R.S.O. 1990, c. S.5.
[3] Although, as pleaded, the appellants' Goodwill Impairment Claim applies to both mines, the focus of their submissions on the leave motion and this appeal was the goodwill associated with the Tasiast mine.

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[3] Second, the appellants submit that Kinross wrongly represented that its planned expansion project for the Tasiast mine remained on schedule when, in fact, the schedule was unrealistic (the "Expansion Claim").

[4] The appellants brought a motion for an order granting them leave under s. 138.8(1) of the *Securities Act* to proceed with the statutory action and for an order certifying their action as a class proceeding under the *Class Proceedings Act, 1992* (the "*CPA*").[4]

[5] The motion judge dismissed the leave and certification motion. He ruled that there was no possibility, let alone a reasonable possibility, that the Goodwill Impairment Claim would succeed at trial because the expert accounting evidence relied on by the appellants to support this claim was fatally flawed. As a result, in his view, there was no factual basis for this claim.

[6] The motion judge declined to consider the Expansion Claim because it was not pleaded by the appellants. In addition, he refused to certify the statutory or common law misrepresentation claims under the *CPA* because he had denied leave to proceed with the statutory claims and, in his view, it "necessarily follow[ed] that both the statutory claim and the common law negligence claim fail[ed] to satisfy the certification criteria of the [*CPA*]": at para. 11. In light of

[4] S.O. 1992, c. 6.

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these rulings, all that remained of the appellants' claims was their uncertified action for common law damages.

[7] The appellants appeal from the motion judge's leave and certification rulings. They make three main submissions. First, the motion judge erred, in several respects, by finding that there was no reasonable possibility that the Goodwill Impairment Claim could succeed at trial. Second, the motion judge erred by refusing to consider the Expansion Claim on the basis that it was not pleaded. Finally, the motion judge also erred by denying certification of the common law negligent misrepresentation claims solely on the basis of his refusal to grant leave to proceed with the statutory claims, especially where, the appellants say, he concluded that the common law claims met all criteria for certification under the *CPA*.

[8] For the reasons that follow, I would dismiss the appeal from the motion judge's leave and certification rulings.

## B. Background in Brief

### (1) Acquisition of the Gold Mines

[9] In September 2010, Kinross acquired Red Back Mining Inc. ("Red Back"), which owned the Tasiast and Chirano gold mines, for an aggregate purchase price of $8.72 billion. The purchase price included a substantial premium beyond the established value of the mines: *e.g.* $6.58 billion of the purchase price was

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allocated to the Tasiast mine, although its net asset value ("NAV") at acquisition was $1.92 billion. Of the $8.72 billion purchase price, $5.54 billion was attributed to goodwill, $4.62 billion of which related to the Tasiast mine.

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### (2) Kinross' Drilling Programs and Results at the Tasiast Mine

[10] The record before the motion judge established that there are three categories of mineral resources:

> 1) **"Inferred" mineral resources** – the existence of which is estimated with a low degree of confidence, based on limited drilling. Due to the restricted degree of confidence attaching to inferred mineral resources, estimates of these resources are excluded from estimates grounding mine feasibility studies;
>
> 2) **"Indicated" mineral resources** – the existence of which is estimated with a level of confidence sufficient to support mine planning and the evaluation of mine economic viability, based on reasonable assumptions of geological and grade or quality continuity of resources derived from "infill drilling"; and
>
> 3) **"Measured" mineral resources** – the existence of which is estimated with a higher level of confidence than those applicable to inferred and indicated mineral resources, based on drilling that confirms geological and grade or quality continuity of mineral deposits.

[11] When Kinross acquired Red Back, it publicly announced that the acquisition created a "transformational opportunity" for the company, and that the Tasiast mine had the "potential to be one of the world's great gold deposits". It

also stated that it would engage in an extensive drilling program at the Tasiast mine, culminating in an economic feasibility study for the mine by July 2011 and the commencement of mine construction by mid-2012 and mine production by early 2014.

[12] At the time of these announcements, Red Back had reported approximately 9.3 million ounces of estimated proven and probable mineral reserves and measured and indicated mineral resources at Tasiast, plus an additional 1.9 million ounces of estimated inferred mineral resources.

[13] In the months following the September 2010 Red Back acquisition, Kinross sought to expand the mineral resource estimates at the Tasiast mine by undertaking "exploration" drilling. On the motion judge's uncontested findings, this type of drilling involves the search for new mineral deposits in previously unexplored or underexplored areas.

[14] On February 16, 2011, Kinross issued a press release indicating that, as at December 31, 2010, its post-acquisition exploration drilling at the Tasiast mine had added approximately 7.1 million ounces of estimated mineral reserves and mineral resources to previous estimates.

[15] Commencing in 2011, Kinross shifted its drilling program at the Tasiast mine to "infill" or "expansion" drilling. The motion judge accepted that this type of drilling is conducted in areas adjacent to or below existing, known ore deposits

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with the view to increasing confidence in the characteristics of the known mineralization.

[16] Based on the results of its 2011 infill drilling, Kinross upgraded about 6.4 million ounces of estimated “inferred” mineral resources at the Tasiast mine to the “indicated” and “measured” resource categories. There was evidence before the motion judge that by the end of 2011, the amount of mineral resources available for use in the intended Tasiast mine feasibility study had almost doubled.

[17] From February 2011 to January 16, 2012, Kinross continued to report that its drilling program at the Tasiast mine was “meeting or exceeding expectations”, that the Tasiast feasibility study was progressing positively, and that the planned commencement of construction at the mine was on-target for mid-2012, with production to follow in early 2014.

[18] Kinross claims that nothing came to light in the first three fiscal quarters (Q1 to Q3) of 2011 to suggest that it should test for goodwill impairment in connection with the Tasiast mine. Nonetheless, in each fiscal quarter, it evaluated whether any indicators of goodwill impairment for the mine were present. It also conducted a formal goodwill impairment test as at December 31, 2011, in accordance with applicable International Financial Reporting Standards (“IFRS”).

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### (3) 2012 Announcements

[19] Kinross hired an investment banking firm, Duff & Phelps LLC, to undertake valuations of the Tasiast and Chirano mines at the time of acquisition and to perform goodwill impairment analyses for Kinross' 2010 and 2011 fiscal years.

[20] In early January 2012, based on Duff & Phelps LLC's preliminary valuation work, Kinross determined that it should disclose a possible future goodwill impairment charge relating to the Tasiast mine.

[21] On January 16, 2012, Kinross issued a press release announcing that it expected to record a goodwill impairment charge for the Tasiast mine and that the Tasiast expansion project would be delayed. In its news release, Kinross stated in part concerning goodwill:

> Goodwill impairment assessment
>
> As required by [IFRS], the Company is in the process of carrying out its annual impairment assessment and expects to release the results of this assessment with its year-end financial results. *In view of the Company's evolving understanding of Tasiast project parameters, and market conditions, including industry-wide increases in capital and operating costs, the Company expects to record a material non-cash accounting charge, primarily relating to the goodwill recorded for the Tasiast mine in connection with the 2010 Red Back acquisition*. As disclosed in the 2011 third quarter financial statements, as at September 30, 2011, the book value of total assets of Tasiast was $7.1 billion, of which $4.6 billion was goodwill. *The Company has not finalized the Tasiast feasibility study or mine plan, and drilling results processed to date continue to demonstrate significant*

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> *exploration potential supporting a world class mine*. [Emphasis added.]

[22] The appellants allege in their pleading that this announcement precipitated a dramatic decline in the value of Kinross shares, causing "more than $3.4 billion in lost shareholder value" (at para. 8).

[23] In early 2012, Duff & Phelps LLC completed their valuation of the Tasiast mine. In its 2011 valuation report, dated February 15, 2012,[5] Duff & Phelps LLC explained that the reduced value for the mine was based on market factors, especially, the contraction of market NAV multiples.

[24] On February 15, 2012, Kinross announced its 2011 Q4 and year end results as at December 31, 2011. On that date, it wrote down $2.94 billion of its goodwill: $2.49 billion for the Tasiast mine and $447.5 million for the Chirano mine. In its February 15th press release, Kinross indicated:

> Reported net earnings included a non-cash goodwill impairment charge of $2,937.6 million, as outlined on page 12 of this news release. *The impairment charge was a result of changes in market conditions, including industry-wide increases in capital and operating costs, a decline in industry-wide valuations as at year-end and the Company's growing understanding of the Tasiast project parameters including its analysis of a draft mine plan. The Tasiast project represents $2,490.1 million*

[5] On October 11, 2013, the motion judge ordered that the Duff & Phelps LLC reports be sealed, kept confidential and not form part of the public record, with access to the reports being made available only to specified persons or entities, including the court. The motion judge also directed that the sealing order continue after the final disposition of the leave and certification proceedings. Accordingly, while this court reviewed the full version of the reports, reference in these reasons is made only to part of the contents of the reports as disclosed on the public record.

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> *and Chirano $447.5 million of the non-cash goodwill impairment charge recorded*. [Emphasis added.][6]

[25] Also on February 15th, Kinross disclosed that it expected to complete its feasibility study for the Tasiast mine in the first half of 2013, and that mine construction would commence in mid-2013 and mine production in 2015. Each of these dates was at least one year later than the original estimated date for completion of the activity in question.

[26] Kinross subsequently recorded two additional write downs of the value of the Tasiast mine, eventually leading to a 100% write down of the goodwill. By the time of the leave and certification motion, the Tasiast mine was valued at about $1.42 billion, reflecting a 78% decline in value from the $6.58 billion allocated by Kinross to the Tasiast mine on the 2010 Red Back acquisition.

### (4) Expert Accounting and Valuation Evidence

[27] In their factum on the leave and certification motion, the appellants described their Goodwill Impairment Claim in these terms:

> ***ii. The Strength, Merits and Evidence of the Plaintiffs' Case***
>
> *Overview*. When Kinross acquired Red Back and a 100% interest in the Tasiast mine in 2010, it paid a premium of $5.5 billion over the value of Red Back's

[6] Although Kinross' February 15, 2012 press release refers to a goodwill write down of $2.94 *million*, this appears to have been a typographical error. In a February 16, 2012 Q4 earnings conference call, Kinross reported a goodwill impairment charge of $2.9 *billion*. The latter figure is the amount referenced by the motion judge, at para. 142 of his reasons, by the appellants in their facta on appeal and on the leave motion, and by the appellants' accounting expert (Alan T. Mak) in his reports filed on the leave motion.

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> identifiable net assets. The premium reflected Kinross' expectation of significant yet-to-be confirmed gold reserves being found on the Tasiast property. … *By March 31, 2011, the infill drilling program had been 95% completed, further confirming materially lower than expected ore reserves and adverse data*.
>
> As the failure to achieve a predetermined expectation of asset performance constitutes a "triggering event", *the Tasiast goodwill write down ought to have been taken by Kinross in its March 31, June 30 or September 30, 2011 quarterly financial statements*. [Emphasis added.]

[28] In support of their Goodwill Impairment Claim, the appellants relied on an expert accounting opinion from Alan T. Mak, a chartered accountant, that Kinross should have reported a goodwill impairment charge for the Tasiast mine prior to the end of 2011. Mr. Mak's initial report, dated October 1, 2012, contains this summary of his opinion:

> Kinross acquired the Tasiast Mine with an expectation that it contained significant, yet-to-be discovered gold deposits. A purchase price premium of over $5.5 billion was paid, over and above Red Back's identifiable net assets.
>
> IFRS requires asset impairment evaluations whenever impairment indicators exist. If an asset, such as goodwill, is impaired and the carrying value exceeds the recoverable value of the asset, a write-down would be required. The purpose is to prevent overstated asset values (and profits), which could mislead financial statement readers.
>
> *Upon completing a scoping study in December 2011, Kinross conducted an infill drilling program to confirm the expected ore. Kinross's first quarter 2011 report claimed to have 95% completion of its infill drilling program by March 31, 2011. The reserve data that was*

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> *disclosed by Kinross in its first and third quarters of 2011 indicates that the confirmed gold deposits at Tasiast remained substantially consistent throughout the relevant period. The expected additional reserves were not confirmed by Kinross' infill drilling*.
>
> Evidence that an asset will not perform as expected, such as adverse drilling results, constitute an "impairment indicator". From an accounting perspective, a serious concern is that Kinross ought to have performed an impairment evaluation at each of the interim reporting periods in 2011, and that *an impairment charge for the goodwill associated with the Tasiast Mine ought to have been recorded earlier than the December 31, 2011 financial statement*. [Emphasis added.]

[29] After receiving Duff & Phelps LLC's 2011 valuation report and the respondents' expert evidence on the leave and certification motion, Mr. Mak delivered a further report in which he offered the opinion that Kinross had reduced the NAV multiple on the Tasiast mine because its drilling data in early 2011 failed to confirm its expectations of the existence of additional mineralization at the mine. In his second report, dated May 6, 2013, Mr. Mak said:

> We are not persuaded by their remarks to alter our opinions as stated in our October Report. Kinross claims that its December 31, 2011 write-down of the [Red Back] goodwill asset (announced on or about January 16, 2012) was motivated by industry-wide Net Asset Value Multiple ("NAVM") "contraction". Even if this explanation were to be accepted, it does not address our concern that a much earlier write-down due to inferior anticipated mineralization was necessary and appropriate. *As set out in our October Report, the absence of data to confirm pre-determined expectations*

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> *of asset performance (such as the existence of additional or potential gold) constitutes a "triggering event" in accordance with acceptance Canadian accounting standards*.
>
> Some of the Defendants' witnesses also claim that the mineralization at Tasiast was consistent with management's expectations when Red Back was acquired. *To the contrary, the available data in early 2011 supports our view that Kinross' management's high expectations of Red Back's gold potential at the Tasiast and Chirano mines were not supported by contemporaneous data. "Triggering events", requiring accounting recognition of impairment, include the failure to confirm the existence of expected additional ore*. [Emphasis added.]

[30] In contrast, Edward Lee of Duff & Phelps LLC provided opinion evidence on behalf of Kinross that, contrary to the appellants' allegations, the reduction or "contraction" of the NAV multiple for the Tasiast mine was not related to mine-specific drilling results prior to Kinross' 2011 year-end or diminished management expectations concerning ore or exploration potential. Duff & Phelps LLC maintained that the reduction was attributable to market forces, that is, to industry-wide, systemic contractions in market NAV multiples.[7]

## C. Issues

[31] As argued, the grounds of appeal advanced in respect of the motion judge's leave ruling may be framed as follows:

[7] Where additional facts are relevant to the issues on appeal, I will discuss those facts in the context of the issues to which they relate.

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1) Did the motion judge err in finding that there was no possibility, let alone a reasonable possibility, that the Goodwill Impairment Claim would succeed at trial:

   a) by misapprehending the nature of the leave test under s. 138.8(1) of the *Securities Act*;

   b) by exceeding his proper role on the leave motion;

   c) by "assuming" that the entirety of the relevant information regarding Kinross' 2011 drilling program was before the court on the leave motion; and

   d) by mischaracterizing the nature of the appellants' Goodwill Impairment Claim and, consequently, by failing to properly consider Kinross' explanation for its goodwill write down?

2) Did the motion judge err by failing to consider the Expansion Claim?

[32] There is one principal issue regarding the motion judge's certification ruling: did the motion judge err by denying certification of the common law misrepresentation claims on the basis that the denial of leave to proceed with the statutory claims was dispositive of the certification issue concerning the common law claims?

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## D. Analysis

### (1) Leave Ruling

[33] Under s. 138.8(1) of the *Securities Act*, leave of the court is required to proceed with a statutory misrepresentation claim under s. 138.3. 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.

[34] The narrow but critical issue in this case is whether the appellants met the second branch of the leave test, that is, whether they demonstrated "a reasonable possibility" that their action would be resolved at trial in their favour (the "reasonable possibility requirement"). The respondents do not dispute that the appellants brought the action in good faith, satisfying the first branch of the test.

#### (a) Goodwill Impairment Claim

##### (i) *Motion Judge's Appreciation of the Leave Test*

[35] The appellants' first ground concerning the leave ruling is that, in light of this court's recent decision in *Green v. Canadian Imperial Bank of Commerce*,

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2014 ONCA 90, 118 O.R. (3d) 641, leave to appeal to S.C.C. granted, [2014] S.C.C.A. No. 137, the motion judge misapprehended the reasonable possibility requirement of the leave test.

[36] Although the appellants attack the motion judge's reasons on multiple fronts, they take particular aim at two parts of his reasons. The first part, set out at paras. 34 and 38 of the reasons, reads as follows:

> [T]he leave test is not a mere "road bump" threshold and is not so low as to be redundant to the notoriously low bar used to test whether a plaintiff has disclosed a cause of action (the not plain and obvious test) under Rule 21 of the *Rules of Civil Procedure* or under s. 5(1)(a) of the [*CPA*]. And, remembering that certification is not to be a test of the merits, *in my opinion, the merits-based leave test under the Ontario Securities Act sets a higher evidentiary standard than the "some basis in fact" standard used to implement the test for certification under the [CPA]*.
>
> ….
>
> However, for my part, I do not think that the debate about the measure of the height for the bar for the test for leave is over. *I do not see how the Supreme Court's judgment in R. v. Imperial Tobacco Canada, which is about a test where the court is obliged to accept the material facts set out in the statement of claim as true, is helpful in setting the bar for an evidentiary merits-based leave test, where the consensus is that the test is a genuine screening mechanism that requires the court to assess and weigh the evidence and to determine whether the plaintiff's chance of success is a reasonable possibility*. [Citations omitted; Emphasis added.]

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[37] The appellants maintain that these statements conflict with this court's holding in *Green*, at para. 88, that the test for meeting the reasonable possibility requirement is "the *same test* that is used for determining whether the claim has a reasonable prospect of success for the purpose of certification [under the *CPA*]" (emphasis added).

[38] The second impugned part of the motion judge's reasons is found at paras. 43 and 44. In these paragraphs, the motion judge set out a negative formulation of the reasonable possibility requirement, describing it in part, at para. 44, in this fashion:

> There is not a reasonable possibility that an action will be resolved at trial in favour of the plaintiff, if:
>
> …
>
> (b) the plaintiff fails to provide any admissible or believable evidence of the material facts of his or her claim;
>
> ….
>
> (f) the defendant disproves the truth of the facts of the plaintiff's claim.

[39] The appellants contend that by expressing the reasonable possibility requirement in a negative fashion, the motion judge misdirected himself by asking the wrong question. It is inappropriate at the leave stage, the appellants say, to try to determine why a claim should not proceed. Rather, the proper inquiry is whether there is a reasonable possibility that the claim will succeed at

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trial. In addition, some of the negative propositions articulated by the motion judge, for example subparagraphs (b) and (f) above, are clearly inapplicable at the leave stage.

[40] To address these complaints, I begin with *Green*. Before this court's decision in *Green*, there were conflicting Superior Court rulings regarding the nature of the s. 138.8(1) leave test under the *Securities Act*. Predominate in the debate was the question of how "high" or "low" the bar should be set to meet the reasonable possibility requirement under s. 138.8(1)(b).

[41] Justice Feldman wrote the reasons of the unanimous five-person panel in *Green*. She reviewed the history and purpose of ss. 138.3 and 138.8(1) of the *Securities Act*, as well as several leading authorities in which the meaning of the term "reasonable possibility of success" or analogous phrases was considered by the courts, including in the context of s. 5(1)(a) of the *CPA*.[8]

[42] After undertaking this review, Feldman J.A. made the following observations regarding the leave test, including the reasonable possibility requirement of the test, at paras. 40 and 85-88:

> [T]wo further protections were later added to the proposed new action [under s. 138.3 of the *Securities Act*] to prevent strike suits in Canada; one was court-approved settlements. *The other was a screening mechanism that required a plaintiff to seek leave of the*

[8] Section 5(1)(a) of the *CPA* provides: "The court shall certify a class proceeding…if, (a) the pleadings or the notice of application discloses a cause of action."

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*court to commence an action, where the court would consider the merits of the proposed action by examining the evidence and determining whether the action was being brought in good faith and had a reasonable possibility of success*. That is the leave requirement in s. 138.8 of the *Securities Act*.

….

Fortunately, in the class action context, the reasonable possibility concept is very familiar because it is used for determining whether the pleading discloses a cause of action as required by the first part of the test for certification in s. 5(1)(a) of the *CPA*. As this court recently said in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, at para. 14:

> Certification is to be denied on the basis that the requirement of s. 5(1)(a) is not met only if, assuming the facts pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action, meaning that the plaintiff has no reasonable prospect of success. [Citations omitted.]

The phrase "reasonable prospect of success" was used by McLachlin C.J. in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (also called *R. v. Imperial Tobacco Canada Ltd*.) where, in reference to a motion to strike a claim, the Chief Justice stated the test to be whether "the claim has any reasonable prospect of success". She described its effect as "weeding out the hopeless claims and ensuring that those that have some chance of success go to trial" (para. 19). Again, at para. 20, she refers to claims that have "a reasonable prospect of success" and "a reasonable chance of success".

It is apparent that the terms "prospect" and "chance" are being used by the Chief Justice as synonyms, and I would include the term "possibility" as another one.

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> The purpose of the leave provision under Part XXIII.1 of the *Securities Act* is to discourage and eliminate bad faith strike suits that do not have a reasonable possibility of being successful. *The statute asks the leave judge to first determine good faith, then whether there is a "reasonable possibility" that the action will be resolved at trial in favour of the plaintiff, i.e. that the plaintiff's case will be successful -- a reasonable possibility of success. In order to make that determination, the motion judge applies the same test that is used for determining whether the claim has a reasonable prospect of success for the purpose of certification*. As the Chief Justice has described it, the purpose is to weed out hopeless claims and only allow those to go forward that have "some chance of success". [Emphasis added.]

[43] However, Feldman J.A. also cautioned, at para. 89:

> *Of course, the evidentiary record for the leave and certification motions is quite different*. For the leave motion, each side may file affidavit evidence upon which there can be cross-examination. But…the motion is brought before discovery and production of documents, with the result that the evidence may or may not be the same at trial. In contrast, for the certification motion under s. 5(1)(a), there is no evidentiary record but the facts as pleaded in the statement of claim are taken to be true. In both there is an evidentiary or deemed evidentiary record to which the test is applied. [Emphasis added.]

[44] Justice Feldman thus focused on the purpose of the leave test and the actual words used by the legislature in s. 138.8(1)(b). She stressed that the language employed in that section is effectively the same as the language of the test applicable to the cause of action criterion for certification under s. 5(1)(a) of the *CPA* and under the test on a pleadings motion to strike a claim. Under all

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three tests, the operative concept is “a reasonable prospect” or “a reasonable chance” or “a reasonable possibility” of success. The meaning to be accorded to all three phrases, therefore, must be the same.

[45] It is in this sense that *Green* holds, at para. 88, that the test for the reasonable possibility requirement under s. 138.8(1)(b) is the “same test” that is used for determining whether the statutory claim has a reasonable prospect of success for the purpose of certification. In other words, the standard to be applied to the record before the court is identical. Crucially, however, Feldman J.A. also emphasized that this standard is applied in entirely different contexts. As she put it, at para. 89, “the evidentiary record for the leave and certification motions is quite different.”

[46] On a leave motion, the standard is brought to bear on a paper record, consisting of affidavit evidence and the transcripts of any cross-examinations on the affidavits filed. The court is not required to make any assumptions about the quality of the evidence filed by the plaintiffs. In contrast, for certification purposes, the standard under s. 5(1)(a) of the *CPA* is applied to the pleadings. There is no evidentiary record filed and the facts pleaded are assumed to be true, leading to what Feldman J.A. termed in *Green*, at para. 89, “a deemed evidentiary record”. Thus, the evidentiary bases differ, although the test or standard applied to the applicable evidentiary base is the same.

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[47] That this is the central holding on this issue in *Green*, properly read, is made clear by Feldman J.A.'s comments at para. 91:

> In the securities class action context, there is also a significant procedural advantage to having the same test apply to the leave motion as to the certification motion. If the leave motion is heard before the certification motion and leave is denied, the claim is at an end. But if leave is granted, it will be unnecessary to reconsider the issue on the certification motion. *Because the test is the same, and the evidentiary basis is the highest it can be for the plaintiff on the certification motion, once leave is granted on the record filed, the claim will also meet the cause of action criterion under s. 5(1)(a) of the CPA*. [Emphasis added.]

[48] This statement recognizes that, unlike on a leave motion, the plaintiffs on a certification motion enjoy the benefit of their case being assessed in the most favourable possible factual light: under s. 5(1)(a) of the *CPA*, the facts pleaded are assumed to be true unless they are patently ridiculous or incapable of proof. If leave is granted under s. 138.8(1) of the *Securities Act*, where no such assumption applies, the claim in respect of which leave is granted will inevitably meet the cause of action criterion for certification. Simply put, regardless of the outcome on the leave motion, the plaintiffs' case is at its strongest on the certification motion.

[49] Thus, in sum, the reasonable possibility requirement of the leave test is a relatively low threshold, merits-based test. The determination whether a plaintiff's statutory action will have a reasonable possibility of success at trial

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requires some critical evaluation of the merits of the action, based on all the evidence proffered by the parties on the leave motion. Further, the standard applied to the evidentiary record is the same standard applicable to a certification determination under s. 5(1)(a) of the *CPA* or on a motion to strike. However, the standard is applied to different records, in different contexts, for entirely different purposes.

[50] In my view, it does not assist to fashion a negative construct of the reasonable possibility requirement under s. 138.8(1)(b). The important point under *Green* is that the relatively low threshold, merits-based leave test is to be applied to the entirety of the record before the court, mindful of the inherent limitations of a preliminary motion determined in advance of discovery and documentary production. Any further qualification of the leave test, including the reasonable possibility requirement, is unnecessary: *Green* at para. 90.

[51] Applying these principles to the appellants' first ground of appeal, I am not persuaded that, in the end, the motion judge misapprehended the leave test in any material way. Read as a whole, his reasons confirm that he appreciated the essential nature of the leave test under s. 138.8(1) of the *Securities Act*, including the reasonable possibility requirement, as outlined by this court in *Green*. I say this for the following reasons.

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[52] First, the motion judge did not have the benefit of this court's decision in *Green*. However, in his lengthy reasons he relied heavily on the decision of Strathy J. (as he then was) in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, which this court affirmed in part, as well as related cases in which the leave test was implicated. In so doing, he identified the following key features of the leave test:

> 1) the leave test is not purely a procedural or jurisdictional test. It is "a low-threshold evidentiary merits-based test using affidavit evidence and cross-examinations" that requires some weighing of the evidence (paras. 27, 49 and 51);
>
> 2) the test is a genuine screening mechanism and "an evidentiary merits-based leave test" that requires the court to assess and weigh the evidence and to determine whether the plaintiff's chance of success is a reasonable possibility (paras. 27 and 38);
>
> 3) in setting the bar for this "low evidentiary threshold", the court must take into account that the leave motion involves merely a paper record and "it is neither possible nor desirable to decide reasonably arguable issues of fact or of mixed fact and law" (para. 41); and
>
> 4) "in all events, the court must assess the evidentiary record … and measure that evidence against a substantive but low threshold test of probity" (para. 45).

[53] These observations capture the core features of the leave test, including the reasonable possibility requirement under s. 138.8(1)(b), and they are

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consistent with the *Green* court's interpretation of the test. Indeed, they foreshadowed many of Feldman J.A.'s comments in *Green*.

[54] Second, both before the motion judge and initially before this court, the appellants argued that the leave test does not envisage or permit any weighing of the evidence adduced on the leave motion. They maintained that in weighing the evidence, particularly Mr. Mak's opinion evidence, the motion judge erred. However, in oral argument, the appellants acknowledged that the leave test involves a merits-based review of the evidentiary record on the leave motion and that this review necessarily requires some weighing of the evidence, the drawing of appropriate inferences, and the finding of facts established by the record.

[55] This was a proper concession. It conforms with this court's holdings in *Green*, set out above. The motion judge was alert to this issue when he observed, correctly, that the exercise of granting or refusing leave requires "some weighing of the evidence" of both parties "within the constraints of a low bar evidentiary merits-based test" (at paras. 49-51 and 55).

[56] That this is so, is also confirmed by the statute itself. Under s. 138.8(2) of the *Securities Act*, upon a leave application under s. 138.8(1), the plaintiff and each defendant may serve and file affidavit evidence setting forth the material facts upon which each intends to rely. Section 138.8(3) explicitly provides for the right to cross-examine the deponents of the affidavits filed. If the legislature had

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intended that the leave test not involve some weighing of the evidence adduced on the leave motion, there would be no need for the filing of responding affidavits by each defendant, nor any purpose in providing for a right of cross-examination on those affidavits. In those circumstances, as the respondents argue, the leave requirement would be hollow indeed.

[57] I would reject this ground of appeal.

**(ii) *Other Grounds Concerning Leave Ruling***

[58] The appellants' other grounds of appeal from the leave ruling concern the motion judge's treatment of the evidence. I will address these grounds in turn.

***Did the Motion Judge Exceed His Proper Role?***

[59] The appellants' argument that the motion judge exceeded his proper role on the leave motion has two components. First, as originally cast, it is predicated on the proposition that the motion judge was precluded from engaging in any weighing of the evidence on the leave motion. I have already rejected this proposition. It collides with the merits-based focus of the leave inquiry as described in *Green* and, additionally, in my view, with the statutory leave scheme itself.

[60] The second component concerns the motion judge's assessment of Mr. Mak's opinion evidence. As set out in their factum, the appellants maintain that the motion judge "improperly undertook a trial-like weighing of technical evidence

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and drew inferences that would have only been appropriate at trial or a post-discovery summary judgment motion". During oral argument, the appellants elaborated that the motion judge's reasons for rejecting Mr. Mak's evidence involved conclusions on technical evidence that were beyond the scope of the motion judge's expertise.

[61] I disagree. In my opinion, the motion judge applied a proper level of scrutiny to Mr. Mak's evidence and his conclusions regarding the Mak opinion were squarely within his domain on the leave motion.

[62] The appellants indicated in their factum on the leave motion that the Goodwill Impairment Claim was based on the assertion that, by the spring of 2011, Kinross drilling results at the Tasiast mine had confirmed "materially lower than expected ore reserves and adverse data", which evidenced a failure "to achieve a predetermined expectation of asset performance" in relation to the mine. This, the appellants said, constituted a "triggering event" under applicable accounting standards, necessitating the recording by Kinross of a goodwill impairment charge in its Q1 to Q3 2011 financial statements.

[63] Mr. Mak's evidence was the only expert accounting evidence led by the appellants on the leave motion in support of their Goodwill Impairment Claim. Mr. Mak offered the opinion that evidence that an asset will not perform as expected – such as adverse drilling results – constitutes an "impairment

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indicator" or a "triggering event" under accepted Canadian accounting standards. In this case, as Kinross allegedly failed to confirm the existence of expected additional ore at the Tasiast mine in 2011, a goodwill impairment charge before 2012 was required.

[64] The motion judge concluded that this opinion suffered from three fatal flaws. He held, in effect, that in formulating his opinion, Mr. Mak: 1) relied on irrelevant data; 2) ignored relevant data that did not support his opinion; and 3) mischaracterized or misunderstood the import of existing data regarding the Tasiast mine.

[65] It is unnecessary to repeat the motion judge's detailed analysis of each of these flaws, as described in his lengthy reasons. In brief, he concluded that:

> 1) Mr. Mak relied on the results of Kinross' infill or expansion drilling at the Tasiast mine, rather than its exploration drilling, to ground his assertion that expected additional mineralization at the mine was not confirmed in 2011. However, infill drilling, as distinct from exploration drilling, is not designed to identify or confirm previously unknown exploration potential. Rather, it is intended to garner additional data about known, existing mineral resources;
>
> 2) Mr. Mak failed to take account of the results of Kinross' 2010 exploration drilling at the Tasiast mine (September to December 2010). The evidence indicated that Kinross' 2010 post-acquisition exploration drilling at the Tasiast mine yielded several million additional ounces of estimated mineral reserves and resources, beyond those previously reported by Red Back; and

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> 3) Mr. Mak claimed that "[t]he expected additional reserves [at the Tasiast mine] were not confirmed by Kinross' [2011] infill drilling" and that this infill drilling "fail[ed] to confirm the existence of expected additional ore" at the mine. Mr. Mak's misconception of the purpose of infill drilling aside, in the motion judge's view, these statements did not accurately reflect the results of the infill drilling. Contrary to the suggestion that these results were disappointing or adverse, the evidence established that following the infill drilling, the Tasiast mine mineral resource estimates were upgraded from merely inferred resources, to indicated and measured resources.

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[66] Based on these deficiencies in the Mak opinion, the motion judge held, at para. 193, "[t]here is, therefore, no factual basis for [the appellants' Goodwill Impairment Claim] and no reasonable possibility that [this] claim could succeed at trial."

[67] I see no reversible error in the motion judge's approach to or analysis of the Mak opinion. It is true, as the appellants stress, that the motion judge made no adverse credibility finding regarding Mr. Mak. To the contrary, he accepted Mr. Mak as a believable and honest witness. However, that was not the end of the matter. The motion judge also evaluated the reliability of the Mak opinion, as he was entitled to do, and found that it was infected by the three critical flaws described above.

[68] The motion judge did not overstep his proper role on the leave motion by examining the factual underpinnings of Mr. Mak's opinion. Indeed, this type of scrutiny of expert evidence is both required to determine its reliability and

common place where an asserted claim depends, as here, on expert evidence. The motion judge's conclusions were open to him on the evidentiary record. They derived from a logical analysis of the factual contents of Mr. Mak's reports, in the light of all the expert accounting and valuation evidence led on the leave motion.

[69] In my view, this ground of appeal fails.

***Sufficiency of Evidence of Kinross' 2011 Drilling Program***

[70] The appellants submit that the motion judge erred by "assuming" that all relevant information about Kinross' 2011 drilling program was before the court on the leave motion, notwithstanding that discoveries and documentary production had not yet occurred. Again, I disagree.

[71] The motion judge expressly considered whether the normal progress of the action through the discovery and documentary production stages of civil litigation might furnish additional facts or other evidence that would strengthen the prospects of the appellants' ultimate success at trial. He held, at para. 176, that "the factual foundation for the theory of [the appellants'] case is now known and does not await further disclosures". He continued:

> Whether there was a triggering event based on the known empirical results of the drilling programs at the Tasiast mine are now known facts that will not be changed by the discovery process or by a trial. …[The appellants'] case is built on what it says should have

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> been Kinross' objective response to the results of its drilling programs.

This conclusion focused on the facts asserted in the Mak opinion.

[72] As detailed in their factum, the appellants attack this conclusion on two grounds: 1) Mr. Mak's opinion was preliminary in nature since it was based solely on public information; and 2) the motion judge did not explain how, at the leave stage, he "knew, *definitively*, that there was no negative non-public information about the 2011 drilling program or the Tasiast mine in 2011" (emphasis in original).

[73] Neither of these complaints, in my opinion, undermines the motion judge's conclusion that the evidence on the leave motion was sufficient, even without the benefit of discoveries and production, to properly assess whether there was a reasonable possibility of the success of the appellants' statutory action at trial.

[74] The motion judge's task on the leave motion was to determine whether there was a reasonable possibility that the appellants' statutory action would be resolved at trial in their favour. His reasons confirm his understanding that the reasonable possibility requirement is to be addressed in the context of a paper evidentiary record, compiled without the benefit of discoveries or documentary production. Within these parameters and for the purpose of the leave motion, the motion judge was required to base his reasonableness inquiry on the evidentiary record as filed, without speculating about possible future, unknown evidence.

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[75] The motion judge's ruling on the reasonable possibility requirement was based on the case advanced by the appellants in support of their Goodwill Impairment Claim: that the results of Kinross' 2011 infill drilling program constituted a triggering event mandating an earlier goodwill write down. For the reasons set out above, the motion judge found that the expert accounting evidence relied on by the appellants to establish the foundation for this claim was inherently flawed. The infill drilling expressly relied on by the appellants' expert (Mr. Mak) was not designed to identify new mineralization or to confirm the exploration potential of the Tasiast mine. In these circumstances, further evidence about Kinross' infill drilling program, if any, could not enhance the case for establishing the Goodwill Impairment Claim.

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***Nature of the Goodwill Impairment Claim***

[76] The appellants next argue that the motion judge erred by mischaracterizing the nature of the Goodwill Impairment Claim and, consequently, by holding that it was unnecessary for the purpose of the leave motion to assess Kinross' explanation for its 2012 goodwill write down. This argument may be dealt with summarily.

[77] The motion judge stated, at paras. 169 and 181 of his reasons:

> Stripped down to its essence, it is [the appellants'] argument that Kinross ought to have written down the goodwill for the Tasiast mine within six months or eleven months, at the latest, after its purchase of the

> Tasiast mine because the failure to achieve its high expectations was a triggering event for a write down.
>
> ….
>
> For the purposes of this leave motion, [the appellants] are under no obligation to demonstrate that Kinross's non-culpable explanation for the write down was untrue or incorrect, and it is not necessary for me to make any findings about the merits of Kinross's explanation. What is, however, necessary is that I decide whether [the appellants'] allegations of misrepresentations have a reasonable possibility of success at trial.

See also para. 171 of the reasons.

[78] I fail to see any error in this reasoning. The motion judge did not suggest that Kinross' explanation for its goodwill write down was irrelevant. Rather, he noted that the appellants did not need to disprove Kinross' explanation in order to meet the threshold for leave under s. 138.8(1)(b).

[79] I agree. Even assuming that Kinross could ultimately establish that its professed reasons for taking the goodwill write down in 2012 were accurate and complete, this would not meet the appellants' claim that a triggering event for a goodwill write down had occurred earlier, in 2011.

[80] Nor, in my view, did the motion judge misconceive or misstate the nature of the appellants' Goodwill Impairment Claim. The appellants' pleading and factum on the leave motion belie this contention.

[81] The motion judge observed, at para. 183, that the appellants' action "is based on a theory of a case developed by Mr. Mak". This statement was correct,

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as far as it went. But the reasons also reveal that, before turning to the Mak opinion, the motion judge articulated his understanding of the nature of the Goodwill Impairment Claim based on the appellants' pleading, their factum and their submissions on the leave motion. It is difficult to conceive how the motion judge could properly have approached his task of assessing whether there was a reasonable possibility that the Goodwill Impairment Claim would succeed at trial any differently. It was the appellants' own characterization of the Goodwill Impairment Claim, as pleaded and argued, that framed the motion judge's analysis of the reasonable possibility requirement.

[82] Accordingly, as I see it, this ground of appeal cannot succeed.

**(b) Expansion Claim**

[83] The appellants' final complaint about the leave ruling is that the motion judge erred by failing to consider the Expansion Claim because the appellants failed to plead this claim. The appellants maintain that this was an overly "technical" and erroneous basis on which to deny leave to proceed with the Expansion Claim.

[84] I disagree. As this court has consistently emphasized, it is central to the litigation process that issues in a civil action be decided within the boundaries of the pleadings. Fundamental fairness and the efficacy of the civil litigation process demand no less. See for example, *Rodaro v. Royal Bank of Canada*

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(2002), 59 O.R. (3d) 74 (C.A.), at paras. 59-63; *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 270 D.L.R. (4th) 181 (Ont. C.A.), at para. 60; *Lewi v. Lewi* (2006), 80 O.R. (3d) 321 (C.A.), at paras. 89-90.

[85] This foundational principle applies with no less force to a leave motion in a class action involving statutory securities market claims. Indeed, the s. 138.8(1) leave requirement is premised on an assessment of the good faith and reasonable possibility of success of the action, *as framed by the plaintiffs*. Where the plaintiffs elect not to plead a potential claim, they cannot be heard to complain when a late-breaking claim is not considered on the leave motion.

[86] That is what occurred in this case. The Expansion Claim was not pleaded. Nor did the appellants amend their pleading before the leave motion or seek leave to amend their leave notice of motion to include it.[9] Instead, they advanced the claim for the first time in their factum on the leave motion, even though the material facts necessary to assert this claim were contained in Kinross' public announcements and press releases dating from well before the motion.

[87] In these circumstances, the motion judge ruled, at para. 201, that the court should not grant leave to proceed with a misrepresentation claim that had not been pleaded. In his view, it would be "procedurally improper and unfair to allow [the appellants] to advance this claim for the leave motion": at para. 204. This

[9] It was not until January 7, 2014, after the release of the motion judge's reasons on the leave motion, that the appellants amended their statement of claim to plead the Expansion Claim.

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was the motion judge's call to make. The appellants have failed to establish any basis for interference with his discretionary ruling on this issue.

**(c) Conclusion on Leave Ruling**

[88] For the reasons given, I would confirm the motion judge's leave ruling.

**(2) Certification Ruling**

[89] Section 5(1) of the *CPA* provides:

> 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.

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[90] The parties accept that if leave to proceed with the statutory misrepresentation claims was properly refused under s. 138.8(1) of the *Securities Act*, the statutory claims cannot be said to meet the criteria for certification under the *CPA*. I agree. See *Green* at para. 91.

[91] Since I would uphold the motion judge's leave ruling, the issue whether the statutory claims should be certified is at an end. The remaining question is whether the motion judge erred by declining to certify the common law negligent misrepresentation claims under the *CPA*.

[92] The appellants argue that the motion judge erred by refusing to certify the common law claims solely on the basis of his denial of leave to proceed with the statutory claims. They submit that the outcome of a leave motion under the s. 138.8(1) merits-based leave test is irrelevant to the question whether an associated common law action should be certified. The appellants maintain that, but for his improper reliance on the refusal of leave for the statutory claims, the motion judge concluded that the common law claims met all five criteria for certification under s. 5(1) of the *CPA*. Accordingly, those common issues found by the motion judge to apply to the common law claims should have been certified as a class proceeding.

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### (a) Motion Judge's Certification Analysis

[93] The motion judge began his certification analysis with a description of the principles that, in his view, apply for the purpose of a certification motion when a statutory misrepresentation claim is combined with a common law negligent misrepresentation claim. His starting point is set out at para. 208 of his reasons:

> [I]n my opinion, the normal certification criterion [*sic*] for a class action must be adapted or restructured to the circumstance that the plaintiff is advancing a class action claim using Part XXIII.1 of the Ontario *Securities Act*.

[94] The motion judge then held, at paras. 209-10, that this "adaption" or "restructuring" of the normal certification criteria has two aspects. First, if leave is granted under s. 138.8(1) of the *Securities Act*, "it follows that the court should certify a class action for both the statutory and the common law negligent misrepresentation claim[s]". This finding is not contested before this court.

[95] The motion judge next considered the implications for the certification of the common law claims of the denial of leave for the statutory claims. He held, at para. 211, that if leave is not granted for the statutory claims, "the action will not be certified for both the statutory claim and also the common law claim which, however, may proceed as an individual claim by the plaintiff". He reasoned, at paras. 212 and 218-220:

> *If leave is not granted under the Ontario Securities Act*, the statutory claim obviously cannot be certified, and *the*

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> *common law claim will fail to satisfy three of the five certification criteria* (class definition, common issues, and preferable procedure) largely for the reason that *there will be no basis in fact for these certification criterion [sic] and because the common law claim standing alone will not satisfy the preferable procedure criterion*.
>
> ….
>
> In making these adaptions to the approach to certification of an action in which there is a statutory claim under Part XXIII.1 of the Ontario *Securities Act*, *it must be kept in mind that the evidentiary footprint, save for the issue of reliance* (which I will discuss later in these reasons for decision) *for the statutory action and the common law action will essentially be the same. If the plaintiff is granted leave for the statutory claim, it would and should naturally follow that there is some basis in fact for each of the certification criterion for the common law claim*.
>
> *Conversely, it would and should naturally follow that if leave is denied that there would be no basis in fact for the certification criterion [sic]*.
>
> I will adopt this restructuring in discussing the certification criterion [*sic*] for [the appellants'] proposed class action and *thus it follows that because I have refused leave for the statutory claim, it follows that [the appellants'] motion for certification should be dismissed*. [Emphasis added.]

[96] Thus, on the motion judge's approach, when statutory and common law misrepresentation claims are combined, the "evidentiary footprint" for the two types of claims "will essentially be the same", except for the issue of reliance. On this basis, the motion judge concluded that if leave to proceed with the statutory

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claims is denied, the refusal of certification for the common law claims is effectively axiomatic.

[97] In my opinion, this approach to certification of the common law claims reflects an error in principle. It does not automatically follow from the denial of leave for the statutory claims that there will be no basis in fact for all of the class definition, common issues and preferable procedure certification criteria.

[98] The focus on a certification motion is on the form of the action and whether the asserted claims are suitable to proceed as a class proceeding: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 39-42; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99 and 102; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 16; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, at para. 50, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50. All that is required to succeed on a certification motion is that the plaintiff show some basis in fact for each of the *CPA* certification requirements, other than the requirement under s. 5(1)(a) that the pleadings disclose a cause of action: *Fischer* at paras. 1, 30, 39-42; *Pro-Sys Consultants* at paras. 99-100; *Hollick* at para. 25.

[99] The fact that the court, on a leave motion, has determined that the statutory claims have no reasonable possibility of success and that the evidence supporting the statutory and common law actions would essentially be the same

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does not mean that there is not some basis in fact: 1) that "there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant" (the class definition criterion at s. 5.1(b)); or 2) that the "claims or defences of the class members raise common issues" (the common issues criterion at s. 5.1(c)). The court's determination of the merits of the statutory claims has no place in the analysis of these certification criteria. However, as I discuss later in these reasons, in cases like this one, the denial of leave for the statutory claims is a relevant factor in the preferability analysis.

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[100] In this case, recognizing that his decision may be appealed, the motion judge commented on each of the certification criteria in relation to the common law claims. Apart from the preferability criterion under s. 5(1)(d) of the *CPA*, which I will discuss shortly, he held as follows:

> 1) **cause of action criterion** – assuming that the appellants' pleading was amended to properly plead the reliance and causation elements of the tort of negligent misrepresentation, the common law claims would satisfy the cause of action criterion for certification under s. 5(1)(a) (at paras. 225, 228 and 230);
>
> 2) **class definition criterion** – if leave had been granted for the statutory claims, the appellants' proposed class definition would meet the identifiable class criterion under s. 5(1)(b) (at paras. 233 and 236);
>
> 3) **commonality criterion** – again, if leave had been granted, the common law claims would have met the s. 5(1)(c) common issues criterion, with two

> exceptions relating to inferred reliance by the class members on Kinross' alleged misrepresentations and the determination of their consequential damages on an aggregate basis (at paras. 239-242); and
>
> 4) **representative plaintiff criterion** – as Kinross essentially conceded that the appellants would be appropriate representative plaintiffs for the common law action, the s. 5(1)(e) representative plaintiff criterion would also have been satisfied if leave had been granted (at paras. 249-50).

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[101] Thus, with respect to the s. 5(1)(b), (c) and (e) certification criteria – the class definition, common issues and representative plaintiff requirements – the motion judge's certification findings were contingent on leave having been granted to proceed with the statutory claims. In other words, his analysis of these criteria was anchored on the premise that since the "evidentiary footprint" for the statutory and common law claims "will essentially be the same", there was no basis in fact for these certification criteria. Since, as I discuss above, this premise is flawed, the motion judge's evaluation of the s. 5(1)(b), (c) and (e) certification criteria was infected by error.

[102] The motion judge's evaluation of the preferability criterion under s. 5(1)(d) of the *CPA* suffers from the same defect. Recall that, at para. 212 of his reasons, the motion judge stated that if leave is denied under s. 138.8(1) of the *Securities Act* for a statutory misrepresentation claim, a companion common law claim will fail to satisfy three of the five certification criteria under s. 5(1) of the *CPA* – the class definition, common issues, and preferable procedure criteria –

"largely for the reason that there will be no basis in fact for these certification [criteria] and because the common law claim standing alone will not satisfy the preferable procedure criterion".

[103] Later in his reasons, at paras. 246-47, when specifically addressing the preferability criterion in relation to the common law claims, the motion judge stated:

> As I explained above, in my view, if leave is not granted for the statutory claim then there is no basis in fact for the common law negligence claim which has the same evidentiary footprint. In other words, in circumstances where most of the constituent element[s] of the common law negligence claim are scrutinized by a genuine merits test and are found wanting, it is not necessary to determine whether a class action is the preferable procedure because there will be no basis in fact for the common issues.
>
> I, therefore, conclude that, in the case at bar, the preferable procedure criterion is not satisfied. [Emphasis added.]

[104] The difficulty with this reasoning is that the motion judge approached his certification analysis from the perspective that if the evidentiary base for the statutory claims failed to establish a basis in fact for those claims, there could be no basis in fact for the certification criteria. I have already concluded that this approach is in error.

[105] The motion judge's preferability analysis also suffers from an additional flaw. In *Fischer*, the Supreme Court reiterated that the preferabiltiy inquiry is to

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be conducted through the lens of the three principal goals of class actions, namely, judicial economy, behaviour modification and access to justice. *Fischer* holds that within the proper scope of the certification process, both substantive and procedural aspects of access to justice must be assessed in determining whether a class action is the preferable procedure. By reason of *Fischer*, that assessment is conducted under the rubric of a series of specific questions identified by the Supreme Court.

[106] Unfortunately, the motion judge did not have the benefit of the Supreme Court's decision in *Fischer*. As a result, his preferability analysis does not conform with the analytical approach to the preferability inquiry now mandated by *Fischer*.

[107] In light of the motion judge's error in his approach to the certification inquiry for the common law claims, coupled with the failure of his certification analysis to comport with *Fischer*, the deference normally owed to a motion judge's certification analysis is not engaged. It therefore falls to this court to undertake the necessary evaluation whether the common law claims are appropriate for certification under the *CPA*.

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### (b) Certification Revisited

#### (i) *Cause of Action, Class Definition, Commonality, and Representative Plaintiff Criteria*

[108] Before this court, the respondents do not dispute that the proposed class action for negligent misrepresentation meets the certification requirements of the *CPA*, except for the contested issue whether a class action is the preferable procedure. Accordingly, only brief comment regarding the undisputed certification criteria is necessary.

[109] Turning first to the cause of action criterion at s. 5(1)(a) of the *CPA*, the motion judge noted, at para. 159, that the appellants failed to plead two required elements of the tort of negligent misrepresentation – reliance and consequential damages. Having scrutinized the appellants' pleading, the motion judge observed, at para. 160, that the closest the appellants came to pleading these constituent elements of the tort is at para. 99 of their Amended Statement of Claim. That paragraph reads:

> The plaintiffs and Class Members relied on these misrepresentations to their detriment by the act of purchasing or acquiring Kinross shares. They also relied on the defendants' obligation to make timely disclosure of all material facts, to comply with securities law and to prepare financial statements, MD & As and Kinross's other filings in accordance with GAAP or IFRS. The defendants violated these obligations.

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[110] This averment is not a claim that the plaintiffs relied on Kinross' alleged representations in deciding to purchase Kinross shares. Rather, it is an allegation that the act of acquiring shares was itself an act of detrimental reliance. The motion judge, therefore, held that the appellants' pleading failed to properly plead both reliance and causation (at para. 226).

[111] Nonetheless, the motion judge concluded that the appellants could deliver a proper pleading for negligent misrepresentation that included all the constituent elements of the tort. Based on this assumption, he ruled that the cause of action criterion for certification was met: at paras. 228 and 230.

[112] Accepting his assumption, I see no error in the motion judge's reasoning or in his conclusion on the cause of action criterion. The appellants' pleading is susceptible to appropriate amendments to assert the required elements of the common law tort. This criterion, therefore, presents no insurmountable hurdle to certification.

[113] The second criterion for certification, at s. 5(1)(b) of the *CPA*, requires that "there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant". Section 5(1)(e) additionally requires that there is an appropriate representative plaintiff.

[114] These certification criteria are readily met in this case. The class definition proposed by the appellants clearly identifies the persons who have a potential

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claim against the respondents and adequately defines the class period. And, before the motion judge, the respondents essentially conceded the s. 5(1)(e) representative plaintiff criterion. Accordingly, the class definition and the representative plaintiff criteria pose no impediment to certification of the common law claims.[10]

[115] The commonality certification requirement is set out at s. 5(1)(c) of the *CPA*. Under this section, an action shall be certified as a class proceeding if "the claims or defences of the class members raise common issues". An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim, the class members' claims share a substantial common ingredient, and all members of the class would benefit from the successful prosecution of the action, although perhaps not to the same extent: *Pro-Sys Consultants* at para. 108.

[116] I have set out the common issues proposed by the appellants in Schedule "B" to these reasons. The respondents did not contest the commonality of these questions before the motion judge. Like the motion judge, with two exceptions, I conclude that these questions meet the common issues criterion. In my view, the resolution of the questions posed as common issues is necessary to the resolution of the claims of each class member. Moreover, the resolution of these

[10] I note that the question whether the appellants have proposed an acceptable litigation plan is not an issue on appeal.

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questions would appear to advance the claims of the entire class and, if commonly determined, will avoid duplication of legal and factual analysis. See *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39.

[117] The first exception concerns the issue of reliance. Reliance is a claimant-specific issue, requiring individualized evaluation and fact-finding. See *Green*, at paras. 100-103. In most cases of negligent misrepresentation, therefore, issues of individual reliance have been regarded by the courts as inherently unsuitable for certification. In this case, in my view, the question of reliance is not a common issue.

[118] The second exception concerns the question whether damages for negligent misrepresentation may properly be quantified on an aggregate basis. In some cases, the courts have held that, once liability has been established, s. 24 of the *CPA* provides a method to assess the quantum of damages on a global basis.[11] In *Pro-Sys*, at paras. 127-134, the Supreme Court clarified that while the question whether damages can be determined on an aggregate basis can be certified as a common issue in a proper case, provincial statutory provisions that permit the calculation of aggregate damages in a class action (for

[11] See for example, *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 40, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346, citing *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22, at para. 49, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106. See also *Gilbert v. Canadian Imperial Bank of Commerce*, 2004 CanLII 34176 (S.C.J.).

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example, s. 24 of the *CPA*), are procedural in nature and cannot be used to establish liability. Thus, the common issue whether damages assessed in the aggregate are an appropriate remedy is only determined at the common issues trial, after a finding of liability has been made.

[119] Here, the motion judge disagreed with the notion that damages for negligent misrepresentation could be calculated on an aggregate basis in this case (at para. 242).

[120] I agree. As I have already said, the issue of reliance is not a common issue in this case. And, as I discuss later in these reasons, individual trials of some complexity will be required to determine the question of reliance and, hence, liability. In these circumstances, the associated issue of consequential damages, should liability be found, must be determined in those individual trials rather than on a global basis.

**(ii) *Preferability Criterion***

[121] The real certification battleground between the parties in relation to the common law claims concerns the issue whether a class action is the preferred procedure for the resolution of the common issues. The respondents argue that the common questions do not meet the preferable procedure criterion. They contend that if the action were certified, the resulting proceeding would involve a vast number of individual trials on the critical issues of reliance, causation and

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damages, thus undermining two of the key goals of a class action – judicial economy and access to justice – and imposing an unmanageable, inefficient, and unfair process on the parties and the court. For the following reasons, I agree.

[122] Considerable guidance has been afforded by the Supreme Court in *Hollick*, *Pro-Sys* and *Fischer* and by this court in *Cloud* concerning the principles that govern the application of the preferability requirement, and the proper approach to assessing preferability. These authorities confirm that there must be some basis in fact for the claim that a class proceeding is the preferable procedure to resolve the class members' claims. This obliges the representative plaintiff to show that: 1) a class proceeding would be a fair, efficient and manageable method of advancing the claim; and 2) a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims: *Fischer* at para. 48, citing *Hollick* at paras. 28 and 31; *Cloud* at paras. 73-75.

[123] To establish some basis in fact for the preferable procedure criterion, the court does not consider whether the claim is likely to succeed; rather, it asks whether the claim should be permitted to proceed as a class action because that procedure would facilitate the three principal goals of class proceedings – judicial economy, behaviour modification and access to justice: *Fischer* at para. 22; *Hollick* at para. 27.

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[124] However, it is not necessary to prove that the proposed class action will in fact achieve these goals: *Fischer* at para. 22. Rather, the court must consider the common issues in the context of the action as a whole and, when undertaking the comparative analysis that is contemplated by the preferability criterion, "focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized": *Fischer* at paras. 21-22.

[125] Importantly, *Fischer* also provides guidance as to when a class action will be found to serve the goal of achieving access to justice. *Fischer* instructs, at para. 25, that the correct approach to the preferability inquiry must include both substantive and procedural aspects in relation to access to justice. To determine whether a class proceeding will facilitate access to justice, the court should address the following questions:

1. What are the barriers to access to justice?
2. What is the potential of the class proceedings to address those barriers?
3. What are the alternatives to class proceedings?
4. To what extent do the alternatives address the relevant barriers to access to justice?
5. How do the two proceedings compare?

*Fischer*, at paras. 27-38.

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[126] These questions must be addressed "within the confines of the certification process; the court cannot engage in a detailed assessment of the merits or likely outcome of the class action or any alternatives to it": *Fischer* at paras. 39-44.

[127] In this case, I conclude that a class proceeding is not the preferable procedure for prosecution of the common law claims. In my view, a class proceeding would not represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the common law claims.

[128] First, proof of reliance, causation and damages poses particular difficulties in this case. To establish these elements of the common law tort, individualized inquiries and fact-finding will be both necessary and unavoidable. For example, to establish reliance on Kinross' alleged misrepresentations regarding the goodwill associated with the Tasiast mine and consequential damages, numerous investor-specific questions arise. These include: 1) what representations were communicated or made known to each investor, and when; 2) what was the comparative experience level and degree of investment sophistication of each investor at the relevant times; 3) what investment recommendations were made to each investor; 4) what connection, if any, exists between Kinross' alleged misrepresentations and each investor's acquisition of Kinross shares; 5) how many Kinross shares were held, and when, by each investor; and 6) what was the date of acquisition, the acquisition price and the sale price for each investor's shares?

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[129] Resolution of these questions does not lend itself to a class action. Rather, the need for a host of individual inquiries regarding reliance, causation and damages renders the common law claims unsuitable for certification. See for example, *Green* (S.C.J.), at paras. 599-601. At a minimum, the need for numerous individual inquiries undercuts the goal of judicial economy and could overwhelm the resolution of the common issues, producing an inefficient and unmanageable class proceeding.

[130] Second, it has already been determined in this case that the appellants' statutory misrepresentation claims have no reasonable prospect of success at trial. This assessment of the merits was made on the basis of the comprehensive record on the leave motion. In my opinion, in the unique circumstances where 1) statutory misrepresentation claims and common law misrepresentation claims, based on the same evidentiary foundation, are combined, and 2) the former claims have been found to have no reasonable possibility of success under a statutory mechanism that is directed at access to justice, it is appropriate to consider the outcome of the leave motion for the statutory claims in the preferability inquiry regarding the common law claims. This conclusion is reinforced, in my view, by the fact that the courts have recognized that reliance-based claims are particularly unsuitable for resolution in a class proceeding.

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[131] With the exception of the cause of action criterion, the class representative on a certification motion must demonstrate some basis in fact for each of the certification criteria, including the preferability criterion. In this case, the appellants advanced the same theory of misrepresentation, grounded on the same factual matrix, for the purpose of both leave and certification. The motion judge scrutinized the evidentiary record relied on by the appellants in support of the Goodwill Impairment Claim in detail, concluding that the appellants' statutory misrepresentation claims had no reasonable possibility of success.

[132] In these circumstances, in my opinion, it is inappropriate to simply ignore the denial of leave for the statutory claims. The motion judge's leave decision is a relevant consideration in determining whether the class representative has demonstrated some basis in fact that a class proceeding is the preferable procedure to resolve the class members' claims. It, too, favours the conclusion that a class action is not the preferred method of advancing the common law claims in this case.

[133] Third, it does not assist the appellants that this court certified common law misrepresentation claims in *Green*. In *Green*, this court was willing to certify the common law claims alongside associated statutory misrepresentation claims. Nothing in *Green* suggests that the common law misrepresentation claims, standing alone, would have been certified.

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[134] Nor is this a case like *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660, cited by the appellants. In *Bre-X*, the motion judge granted certification of a fraudulent misrepresentation claim but denied certification of a companion negligent misrepresentation claim on the basis that the individual trials required to determine reliance, causation and damages would be "complex and lengthy": *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.), at pp. 202, 221 and 239-40, aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.). On appeal to this court, the latter ruling was reversed and certification of the negligent misrepresentation claim was granted. No appeal was taken from the motion judge's ruling on certification of the fraudulent misrepresentation claim.

[135] As in *Green*, nothing in *Bre-X* suggests that the negligent misrepresentation claim, standing alone, was suitable for certification. It was only in the face of the certification of the fraudulent misrepresentation claim that the goals of judicial economy and access to justice justified certification of the negligent misrepresentation claim. As MacPherson J.A. of this court said, at para. 42:

> Given the accepted definitions of the torts of fraudulent misrepresentation and negligent misrepresentation, I can see no logical or principled basis for treating them differently on the question of certification. I could understand the order certifying, or refusing to certify, both claims. I do not, however, understand why opposite orders were considered appropriate for the two claims.

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Accordingly, as the fraudulent misrepresentation claim was certified and that ruling was not appealed, the need for individual inquiries did not prevent certification of the negligent misrepresentation claim either.

[136] I therefore do not read the decisions of this court in *Green* and *Bre-X* as retreating from the proposition that, generally, common law negligent misrepresentation claims in securities cases are not suitable for certification. As Strathy J. (as he then was), indicated in *Green*, (S.C.J.), at para. 610, a class proceeding is not the preferable procedure for resolving such reliance-based claims, which give rise "to individual issues of causation and reliance that would be unmanageable". In contrast, of course, there is no need to prove reliance in statutory misrepresentation claims under the *Securities Act*. For this and other reasons, the statutory action under s. 138.3, which was enacted in part due to the difficulty in proving reliance-based common law claims, is "tailor-made for a class action": *Green* (S.C.J.) at paras. 595 and 611.

[137] Finally, I am mindful of *Fischer*'s holding that the access to justice evaluation under the preferability inquiry is to be approached by reference to a series of questions directed at identifying the barriers to access to justice that a class action could address and determining whether those concerns would remain even when alternative avenues of redress are considered: *Fischer* at para. 26.

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[138] In the case at bar, as I have stressed, numerous individual trials will be required to establish reliance, causation and damages. If a class action were to be certified, those trials would proceed against the backdrop of an existing judicial determination that the appellants' core claims of misrepresentation, in particular, the Goodwill Impairment Claim, hold no reasonable prospect for success at trial. Yet the same claim is said to warrant a class action for common law negligent misrepresentation claims grounded on the same alleged facts. In these circumstances, encumbering the parties and the courts with a complex class action that is destined to fail hardly promotes the goals of judicial economy and access to justice.

[139] That said, I recognize that there may well be economic barriers to the pursuit of the common law claims on an individual basis. I also acknowledge that the option of individual actions to pursue securities misrepresentation claims is unappealing, costly and cumbersome. But that is precisely the access to justice impediment sought to be remedied by s. 138.3 of the *Securities Act*. To permit a class action to proceed in the circumstances of this case, in my view, would render access to justice more illusory than real and would significantly undercut the goal of judicial economy. The goal of behaviour modification does not alter this conclusion.

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### (c) Conclusion on Certification Ruling

[140] For the reasons given, I conclude that the common law claims do not satisfy the preferable procedure certification criterion. While the motion judge's certification analysis is tainted by error, I agree with his ultimate holding that certification of the common law negligent misrepresentation claims should be denied.

## E. Disposition

[141] Accordingly, I would dismiss the appeal and confirm the motion judge's leave and certification rulings. As the respondents have been successful on appeal, they are entitled to costs of the appeal. I would fix those costs in the sum of $85,000, inclusive of disbursements and all applicable taxes.

Released:

"AH"
"DEC 17 2014"

"E.A. Cronk J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree S.E. Pepall J.A."

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**Schedule "A"**

***Securities Act*, R.S.O. 1990, c. S.5**

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

**Public oral statements by responsible issuer**

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral

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statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

**Influential persons**

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(b) the person who made the public oral statement;

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(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

**Failure to make timely disclosure**

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

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**Multiple roles**

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

**Multiple misrepresentations**

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

**No implied or actual authority**

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

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## Schedule "B"

## Proposed Common Issues

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(a) Did the Defendants make representations that were untrue, inaccurate or misleading, including omissions, and if so, what are the misrepresentations, who made these representations, when, where and how?

(b) If the answer to (a) is yes, do the misrepresentations constitute misrepresentations within the meaning of the *OSA* or the equivalent provisions of securities legislation in other provinces?

(c) Did the Defendants fail to make timely disclosure within the meaning of the *OSA* or the equivalent provisions of securities legislation in other provinces?

(d) If the answer to (b) or (c) is yes,

(i) when and by what means were the misrepresentations publicly corrected or in the case of failure to make timely disclosure, when and by what means was the disclosure made?

(ii) did the individual Defendants authorize, permit or acquiesce in the release of documents containing the misrepresentations, in the making of a public oral statement containing misrepresentations or in the failure to make timely disclosure?

(iii) for public oral statements containing such misrepresentations, did the person who made the statement do so with actual implied or apparent authority to speak on behalf of Kinross?

(iv) for the misrepresentations in non-core document[s] or in a public oral statement, did the Defendants know of the misrepresentations at the time they were made? If not, did the Defendants deliberately avoid acquiring such knowledge or were they guilty of gross misconduct in connection with the misrepresentations?

(v) before the release of the documents and the public oral statements containing misrepresentations and before the failure to make timely disclosure first occurred, did the Defendants conduct or cause to be conducted a "reasonable investigation" in accordance with subsection

138.4(6) of the *OSA* or the equivalent provisions of securities legislation in other provinces?

(vi) at the time of the release of the document[s] and public oral statements containing misrepresentations or at any time for a failure to make timely disclosure, as the case may be, did the Defendants have reasonable grounds to believe that the documents or oral statement[s] contained the misrepresentations or that the failure to make timely disclosure would occur?

(e) If the answer to (a) is yes, did the Defendants owe a duty of care to the class members?

(f) If the answer to (e) is yes, did the Defendants act negligently in making the misrepresentations?

(g) If the answer to (f) is yes, can each class member's reliance be inferred from the fact of the class member having acquired Kinross shares in an efficient market?

(h) Can the amount of damages for negligent misrepresentation or the statutory claims under Part XXIII.1 of the *OSA* or the equivalent provisions of securities legislation in other provinces be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

(i) What are the applicable limits on damages, if any, for each Defendant under section 138.7 of the *OSA* or the equivalent provisions of securities legislation in other provinces?

(j) For each Defendant found liable for claims under Part XXIII.1 of the *OSA* or the equivalent provisions of securities legislation in other provinces, what is the Defendant's respective responsibility for assessed damages?

(k) Is Kinross vicariously liable or otherwise responsible for the acts of the individual Defendants?

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# Tab 6

**Canadian Imperial Bank of Commerce** *Appellant*

*v.*

**Howard Green and Anne Bell** *Respondents*

and

**Gerald McCaughey, Tom Woods, Brian G. Shaw and Ken Kilgour** *Appellants*

*v.*

**Howard Green and Anne Bell** *Respondents*

and

**Canadian Foundation for Advancement of Investor Rights, Shareholder Association for Research and Education, Ontario Securities Commission and Insurance Bureau of Canada** *Interveners*

- and -

**IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble** *Appellants*

*v.*

**Marvin Neil Silver and Cliff Cohen** *Respondents*

and

**Canadian Foundation for Advancement of Investor Rights and Ontario Securities Commission** *Interveners*

**Banque Canadienne Impériale de Commerce** *Appelante*

*c.*

**Howard Green et Anne Bell** *Intimés*

et

**Gerald McCaughey, Tom Woods, Brian G. Shaw et Ken Kilgour** *Appelants*

*c.*

**Howard Green et Anne Bell** *Intimés*

et

**Fondation canadienne pour l'avancement des droits des investisseurs, Shareholder Association for Research and Education, Commission des valeurs mobilières de l'Ontario et Bureau d'assurance du Canada** *Intervenants*

- et -

**IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron et Kathryn A. Gamble** *Appelants*

*c.*

**Marvin Neil Silver et Cliff Cohen** *Intimés*

et

**Fondation canadienne pour l'avancement des droits des investisseurs et Commission des valeurs mobilières de l'Ontario** *Intervenantes*

2015 SCC 60 (CanLII)

- and -

**Celestica Inc., Stephen W. Delaney and Anthony P. Puppi** *Appellants*

*v.*

**Trustees of the Millwright Regional Council of Ontario Pension Trust Fund** *Respondent*

and

**Celestica Inc., Stephen W. Delaney and Anthony P. Puppi** *Appellants*

*v.*

**Nabil Berzi** *Respondent*

and

**Celestica Inc., Stephen W. Delaney and Anthony P. Puppi** *Appellants*

*v.*

**Huacheng Xing** *Respondent*

and

**Canadian Foundation for Advancement of Investor Rights and Ontario Securities Commission** *Interveners*

- et -

**Celestica Inc., Stephen W. Delaney et Anthony P. Puppi** *Appelants*

*c.*

**Fiduciaires de la caisse de retraite en fiducie du Millwright Regional Council of Ontario** *Intimé*

et

**Celestica Inc., Stephen W. Delaney et Anthony P. Puppi** *Appelants*

*c.*

**Nabil Berzi** *Intimé*

et

**Celestica Inc., Stephen W. Delaney et Anthony P. Puppi** *Appelants*

*c.*

**Huacheng Xing** *Intimé*

et

**Fondation canadienne pour l'avancement des droits des investisseurs et Commission des valeurs mobilières de l'Ontario** *Intervenantes*

**Indexed as: Canadian Imperial Bank of Commerce *v.* Green**

**2015 SCC 60**

File Nos.: 35807, 35811, 35813.

2015: February 9; 2015: December 4.

Present: McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon and Côté JJ.

**Répertorié : Banque Canadienne Impériale de Commerce *c.* Green**

**2015 CSC 60**

N[os] du greffe : 35807, 35811, 35813.

2015 : 9 février; 2015 : 4 décembre.

Présents : La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon et Côté.

2015 SCC 60 (CanLII)

2015 SCC 60 (CanLII)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Securities — Class actions — Limitation of actions — Statutory action for secondary market misrepresentation — Suspension of limitation period — Plaintiffs in three class proceedings claiming damages under common law tort of negligent misrepresentation and under statutory cause of action for secondary market misrepresentation in s. 138.3 of Securities Act — Leave required to commence statutory action under s. 138.8 of Securities Act — Limitation period for statutory action expiring prior to leave being granted — Whether s. 28 of Class Proceedings Act, 1992, operates to suspend limitation period applicable to statutory action before leave to commence statutory action is granted — Whether statutory action time-barred — If yes, whether statutory action can be saved by order granting leave nunc pro tunc or doctrine of special circumstances — Whether threshold of reasonable possibility of success applies for leave to commence statutory action under s. 138.3 of Securities Act — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 28 — Securities Act, R.S.O. 1990, c. S.5, ss. 138.3, 138.8, 138.14.*

*Civil procedure — Class actions — Preferable procedure — Plaintiffs in three class proceedings claiming damages under common law tort of negligent misrepresentation and under statutory cause of action for secondary market misrepresentation — Whether Court of Appeal erred in holding that five of seven common issues relating to common law misrepresentation claim should be certified.*

The appeals in these three cases (*CIBC*, *IMAX* and *Celestica*) stem from motions in class proceedings brought before different judges of the Ontario Superior Court of Justice. In each case, the respondent plaintiffs claimed damages under the common law tort of negligent misrepresentation and pleaded an intention to claim damages under the statutory cause of action in s. 138.3 of Part XXIII.1 of the Ontario *Securities Act* ("*OSA*") for alleged misrepresentations in respect of shares trading in the secondary market. None of the plaintiffs obtained leave to commence the statutory action, required under

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Valeurs mobilières — Recours collectifs — Prescription — Action prévue par la loi pour présentation inexacte des faits sur le marché secondaire — Suspension du délai de prescription — Dommages-intérêts réclamés par les demandeurs dans trois recours collectifs pour délit de déclaration inexacte faite par négligence en common law et sur le fondement de la cause d'action pour présentation inexacte des faits sur le marché secondaire en vertu de l'art. 138.3 de la Loi sur les valeurs mobilières — Autorisation requise par l'art. 138.8 de la Loi sur les valeurs mobilières pour intenter l'action prévue par la loi — Délai de prescription pour intenter l'action échu avant que l'autorisation ne soit accordée — L'article 28 de la Loi de 1992 sur les recours collectifs a-t-il pour effet de suspendre le délai de prescription applicable à l'action prévue par la loi avant que l'autorisation d'intenter celle-ci ne soit accordée? — L'action prévue par la loi est-elle prescrite? — Si oui, peut-elle être sauvegardée par une ordonnance accordant l'autorisation nunc pro tunc ou par la doctrine des circonstances particulières? — Le critère préliminaire de la possibilité raisonnable d'avoir gain de cause s'applique-t-il à la demande d'autorisation d'intenter une action en vertu de l'art. 138.3 de la Loi sur les valeurs mobilières? — Loi de 1992 sur les recours collectifs, L.O. 1992, c. 6, art. 28 — Loi sur les valeurs mobilières, L.R.O. 1990, c. S.5, art. 138.3, 138.8, 138.14.*

*Procédure civile — Recours collectifs — Procédure constituant le meilleur moyen — Dommages-intérêts réclamés par les demandeurs dans trois recours collectifs pour délit de déclaration inexacte faite par négligence en common law et sur le fondement de la cause d'action pour présentation inexacte des faits sur le marché secondaire — La Cour d'appel a-t-elle commis une erreur en concluant que cinq des sept questions communes relatives à une réclamation pour déclaration inexacte en common law devaient être autorisées?*

Les pourvois dans ces trois causes (*CIBC*, *IMAX* et *Celestica*) découlent de motions dans le cadre de recours collectifs présentées devant des juges différents de la Cour supérieure de justice de l'Ontario. Dans chacune des causes, les demandeurs intimés réclamaient des dommages-intérêts fondés sur le délit de déclaration inexacte faite par négligence en common law et ont plaidé qu'ils avaient l'intention de réclamer des dommages-intérêts en se fondant sur la cause d'action prévue à l'art. 138.3 de la partie XXIII.1 de la *Loi sur les valeurs mobilières* (« *LVM* ») de l'Ontario pour la présentation présumément

s. 138.8 *OSA*, before commencing the class proceeding based on the common law cause of action. In all of the cases, the limitation period for the statutory action, if not suspended, would have run out prior to leave being obtained. In *CIBC*, the motion for leave was filed before the expiry of the limitation period; in *IMAX*, the motion for leave was filed and argued before the expiry of the limitation period; and in *Celestica*, the motion for leave was filed after the expiry of the limitation period.

Section 28 of the *Class Proceedings Act, 1992* ("*CPA*") operates to suspend the limitation period for a cause of action asserted in a class proceeding in favour of the members of a class on the commencement of the class proceeding. During the course of the class proceedings at issue in these appeals, the Ontario Court of Appeal released its decision in another matter, *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569 ("*Timminco*"), in which it interpreted the application of s. 28 *CPA* to the limitation period in s. 138.14 *OSA* for the first time. The panel held that s. 28 *CPA* did not operate to suspend the limitation period in s. 138.14 *OSA* until leave was obtained under s. 138.8 *OSA*. The motion judges considering the issue of leave to commence the statutory action in the present cases found that they were bound by *Timminco*. The motion judges in *IMAX* and *Celestica* applied the common law doctrines of *nunc pro tunc* and special circumstances to save the statutory claims in those proceedings from being statute-barred. The motion judge in *CIBC* found that those doctrines were inapplicable, and that the statutory claim could not be saved.

In *CIBC*, in addition to the limitation period issue, the defendants challenged the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA* and the plaintiffs sought certification for seven common issues relating to the common law misrepresentation claim. Despite his finding that the statutory action was statute-barred, the motion judge interpreted s. 138.8 *OSA* as establishing a relatively low threshold. With respect to certification of the issues, the motion judge held that reliance, a necessary element of a common law misrepresentation claim, was not an issue that was capable of

inexacte de faits à l'égard du commerce d'actions sur le marché secondaire. Aucun des demandeurs n'a obtenu l'autorisation d'intenter l'action prévue par la loi (ou action légale), autorisation exigée aux termes de l'art. 138.8 de la *LVM*, avant d'introduire le recours collectif fondé sur la cause d'action en common law. Dans tous les dossiers, le délai de prescription pour intenter l'action prévue par la loi, s'il n'était pas suspendu, aurait expiré avant l'obtention de l'autorisation. Dans *CIBC*, la motion demandant l'autorisation a été déposée dans le délai fixé par la loi; dans *IMAX*, la motion demandant l'autorisation a été déposée et plaidée dans le délai fixé par la loi; dans *Celestica*, la motion demandant l'autorisation a été déposée après l'expiration du délai.

L'article 28 de la *Loi de 1992 sur les recours collectifs* (« *LRC* ») a pour effet de suspendre le délai de prescription applicable à une cause d'action invoquée dans un recours collectif en faveur des membres du groupe à l'introduction du recours collectif. Pendant que les recours collectifs en cause dans les présents pourvois étaient en instance, la Cour d'appel de l'Ontario a rendu sa décision dans une autre affaire, *Sharma c. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569 (« *Timminco* »), où elle a interprété pour la première fois l'application de l'art. 28 de la *LRC* au délai de prescription prévu à l'art. 138.14 de la *LVM*. La formation a statué que l'art. 28 de la *LRC* n'avait pas pour effet de suspendre le délai de prescription prévu à l'art. 138.14 de la *LVM* jusqu'à ce que l'autorisation soit obtenue conformément à l'art. 138.8 de la même loi. Les juges saisis des motions demandant l'autorisation d'intenter l'action prévue par la loi dans les présents dossiers se sont estimés liés par l'arrêt *Timminco*. Les juges saisis des motions dans *IMAX* et *Celestica* ont appliqué les doctrines de *nunc pro tunc* et des circonstances particulières, reconnues en common law, pour empêcher la prescription des actions prévues par la loi dans ces dossiers. Dans *CIBC*, le juge des motions a conclu que ces doctrines n'étaient pas applicables et que l'action prévue par la loi ne pouvait être sauvegardée.

Dans l'affaire *CIBC*, en plus de la question du délai de prescription, les défendeurs ont contesté le critère préliminaire auquel doit satisfaire un demandeur lorsqu'il demande l'autorisation au titre de l'art. 138.8 de la *LVM* et les demandeurs ont sollicité la certification du recours collectif quant à sept questions communes relatives à la réclamation pour déclaration inexacte en common law. Même s'il a conclu que l'action prévue par la loi était prescrite, le juge des motions a jugé que l'art. 138.8 de la *LVM* établit un critère préliminaire relativement peu élevé. Quant à la certification des questions, le juge des

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resolution on a common basis, and that a class proceeding would not be the preferable procedure for resolving a reliance-based claim. He refused to certify all seven issues relating to the common law misrepresentation claim.

On appeal, the three cases were heard together by a five-member panel of the Ontario Court of Appeal. The panel unanimously overruled the interpretation of *Timminco*, holding that s. 28 *CPA* operates to suspend the limitation period for all class members once the statutory cause of action is asserted in a class proceeding by a representative plaintiff, even if leave has not yet been granted under s. 138.8 *OSA*, as long as the facts that found the action and the intent to seek leave to commence the action have been pleaded. As a result, the court concluded that in all three cases, the plaintiffs' statutory claims for secondary market misrepresentation were not statute-barred. With respect to the threshold to be met for leave to be granted under s. 138.8 *OSA*, the Court of Appeal upheld the interpretation of the motion judge in *CIBC*. Finally, the Court of Appeal upheld the motion judge's decision in *CIBC* not to certify the issues relating to reliance and damages, but it held that five out of the seven issues proposed by the plaintiffs related to the intent and conduct of the defendant CIBC and should be certified as against that defendant in order to advance the litigation against it.

*Held* (McLachlin C.J. and Rothstein and Côté JJ. dissenting in part): The appeals in *CIBC* should be dismissed. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. find that the statutory action is time-barred. McLachlin C.J. and Rothstein and Côté JJ. would allow the appeals on this issue. Cromwell J. would grant leave *nunc pro tunc* and dismiss the appeals. Moldaver, Karakatsanis and Gascon JJ. find that the statutory action is not time-barred and would dismiss the appeals. On the issues of the threshold for leave and the certification of common issues, a unanimous court would dismiss the appeals.

motions a conclu que la question de savoir si une personne s'est fiée aux déclarations inexactes, élément nécessaire du recours de common law pour déclaration inexacte, n'est pas une question susceptible d'être traitée collectivement et qu'un recours collectif ne serait pas le meilleur moyen de régler une action fondée sur le fait que le demandeur s'est fié aux déclarations. Il a refusé de certifier les sept questions relatives à l'action en common law pour déclaration inexacte.

En appel, les trois affaires ont été instruites ensemble par une formation de cinq juges de la Cour d'appel de l'Ontario. La formation a infirmé à l'unanimité l'arrêt *Timminco*, jugeant que l'art. 28 de la *LRC* a pour effet de suspendre le délai de prescription applicable à tous les membres du groupe dès qu'un représentant des demandeurs invoque la cause d'action légale dans un recours collectif, et ce, même si l'autorisation n'a pas encore été accordée en application de l'art. 138.8 de la *LVM*, pourvu que les faits à l'origine de l'action et l'intention de demander l'autorisation d'intenter l'action aient été plaidés. Par conséquent, la Cour d'appel a conclu que dans les trois cas, les actions prévues par la loi intentées par les demandeurs pour déclaration inexacte des faits sur le marché secondaire n'étaient pas prescrites. Quant au critère préliminaire auquel il faut satisfaire pour que l'autorisation soit accordée en application de l'art. 138.8 de la *LVM*, la Cour d'appel a confirmé l'interprétation du juge des motions dans *CIBC*. Enfin, la Cour d'appel a confirmé la décision du juge des motions dans *CIBC* de ne pas certifier les questions relatives au fait de se fier aux déclarations et relatives aux dommages-intérêts, mais elle a conclu que cinq des sept questions proposées par les demandeurs se rapportaient à l'intention et à la conduite de la défenderesse CIBC et devaient être certifiées à l'encontre de cette défenderesse pour que la poursuite engagée contre elle aille de l'avant.

*Arrêt* (la juge en chef McLachlin et les juges Rothstein et Côté sont dissidents en partie) : Les pourvois dans l'affaire *CIBC* sont rejetés. La juge en chef McLachlin et les juges Rothstein, Cromwell et Côté concluent que l'action prévue par la *LVM* est prescrite. La juge en chef McLachlin et les juges Rothstein et Côté sont d'avis d'accueillir les pourvois sur cette question. Le juge Cromwell est d'avis d'accorder l'autorisation *nunc pro tunc* et de rejeter les pourvois. Les juges Moldaver, Karakatsanis et Gascon concluent que l'action prévue par la loi n'est pas prescrite et sont d'avis de rejeter les pourvois. Quant aux questions du critère préliminaire d'autorisation et de la certification des questions communes, les juges, à l'unanimité, sont d'avis de rejeter les pourvois.

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*Held* (McLachlin C.J. and Rothstein and Côté JJ. dissenting in part): The appeal in *IMAX* should be dismissed. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. find that the statutory action is time-barred. McLachlin C.J. and Rothstein and Côté JJ. would allow the appeal with respect to the defendants who were not parties to the original statement of claim but would grant leave *nunc pro tunc* and dismiss the appeal with respect to the defendants who were parties to the original statement of claim. Cromwell J. would grant leave *nunc pro tunc* and dismiss the appeal with respect to all defendants. Moldaver, Karakatsanis and Gascon JJ. find that the statutory action is not time-barred and would dismiss the appeal.

*Held* (Moldaver, Karakatsanis and Gascon JJ. dissenting): The appeal in *Celestica* should be allowed. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. find that the statutory action is time-barred and would allow the appeal. Moldaver, Karakatsanis and Gascon JJ. find that the statutory action is not time-barred and would dismiss the appeal.

The issues are decided as follows:

1. On a majority reasoning by Côté J. (and McLachlin C.J. and Rothstein and Cromwell JJ.), s. 28 *CPA* operates to suspend the limitation period in s. 138.14 *OSA* applicable to a statutory cause of action under s. 138.3 *OSA* at the time when the action is commenced, that is, when leave is granted under s. 138.8 *OSA* in a class proceeding. Moldaver, Karakatsanis and Gascon JJ. (dissenting on this issue) would find that s. 28 *CPA* operates to suspend the limitation period in s. 138.14 *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.

2. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. hold that courts have the inherent jurisdiction to issue orders *nunc pro tunc* for leave to proceed with an action where leave is sought prior to the expiry of the limitation period. In *CIBC*, McLachlin C.J. and Rothstein and Côté JJ. would not exercise their discretion to grant such an order, but Cromwell J. would. In *IMAX*, McLachlin C.J. and Rothstein and Côté JJ. are of the view that the motion judge exercised her discretion to grant such an

*Arrêt* (la juge en chef McLachlin et les juges Rothstein et Côté sont dissidents en partie) : Le pourvoi dans l'affaire *IMAX* est rejeté. La juge en chef McLachlin et les juges Rothstein, Cromwell et Côté concluent que l'action prévue par la *LVM* est prescrite. La juge en chef McLachlin et les juges Rothstein et Côté sont d'avis d'accueillir le pourvoi à l'endroit des défendeurs qui n'étaient pas parties à la déclaration initiale, mais d'accorder l'autorisation *nunc pro tunc* et de rejeter le pourvoi à l'endroit des défendeurs qui étaient parties à la déclaration initiale. Le juge Cromwell est d'avis d'accorder l'autorisation *nunc pro tunc* et de rejeter le pourvoi à l'endroit de tous les défendeurs. Les juges Moldaver, Karakatsanis et Gascon concluent que l'action prévue par la loi n'est pas prescrite et sont d'avis de rejeter le pourvoi.

*Arrêt* (les juges Moldaver, Karakatsanis et Gascon sont dissidents) : Le pourvoi dans l'affaire *Celestica* est accueilli. La juge en chef McLachlin et les juges Rothstein, Cromwell et Côté concluent que l'action prévue par la *LVM* est prescrite et sont d'avis d'accueillir le pourvoi. Les juges Moldaver, Karakatsanis et Gascon concluent que l'action prévue par la loi n'est pas prescrite et sont d'avis de rejeter le pourvoi.

Les questions en litige sont tranchées comme suit :

1. Selon une opinion majoritaire de la juge Côté (avec l'appui de la juge en chef McLachlin et des juges Rothstein et Cromwell), l'art. 28 de la *LRC* a pour effet de suspendre le délai de prescription fixé à l'art. 138.14 de la *LVM* et applicable à l'action prévue par l'art. 138.3 de la *LVM* au moment où l'action est intentée, c'est-à-dire dès lors que l'autorisation exigée par l'art. 138.8 de la *LVM* dans le contexte d'un recours collectif a été accordée. Les juges Moldaver, Karakatsanis et Gascon (dissidents sur ce point) sont d'avis de conclure que l'art. 28 de la *LRC* a pour effet de suspendre le délai de prescription fixé à l'art. 138.14 de la *LVM* dès que le représentant des demandeurs introduit valablement un recours collectif fondé sur une cause d'action en common law et plaide la cause d'action légale et ses éléments constitutifs dans la déclaration.

2. La juge en chef McLachlin et les juges Rothstein, Cromwell et Côté concluent que les tribunaux disposent d'une compétence inhérente pour rendre des ordonnances *nunc pro tunc* relativement à une demande d'autorisation d'intenter un recours lorsque l'autorisation est sollicitée avant l'expiration du délai de prescription. Dans *CIBC*, la juge en chef McLachlin et les juges Rothstein et Côté sont d'avis de ne pas exercer leur pouvoir discrétionnaire pour rendre une telle ordonnance, mais le juge

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order correctly with respect to the defendants who were parties to the original statement of claim, but not in respect of the defendants who were not parties to any statement of claim at the time when argument on the leave application was concluded. Cromwell J. is of the view that the motion judge was correct to exercise her *nunc pro tunc* discretion in respect of all of the defendants. In *Celestica*, McLachlin C.J. and Rothstein, Cromwell and Côté JJ. would deny the *nunc pro tunc* order.

3. McLachlin C.J. and Rothstein, Cromwell and Côté JJ. hold that the doctrine of special circumstances is of no avail to any of the plaintiffs in the three cases since neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3 *OSA*.

4. Unanimous: the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA* is that there must be a reasonable or realistic chance that the action will succeed. Moldaver, Cromwell, Karakatsanis and Gascon JJ. find that the *CIBC* plaintiffs have met the required threshold.

5. Unanimous: in *CIBC*, the Court of Appeal did not err in holding that five of the seven common issues proposed by the plaintiffs relating to the common law misrepresentation claim should be certified.

Interaction Between Section 28 *CPA* and Section 138.14 *OSA*

*Per* McLachlin C.J. and Rothstein and Côté JJ. (majority opinion): Pleading an intention to seek leave in respect of a s. 138.3 *OSA* claim in a class proceeding together with a common law cause of action amounts to neither the assertion of the statutory cause of action nor the commencement of a class proceeding for that statutory cause of action under s. 28 *CPA*. Accordingly, the limitation period at s. 138.14 *OSA* cannot be suspended in favour of the class members under s. 28 *CPA* before leave is granted under s. 138.8 *OSA* to commence the statutory action.

Cromwell est d'avis de l'exercer. Dans *IMAX*, la juge en chef McLachlin et les juges Rothstein et Côté sont d'avis que la juge des motions a correctement exercé son pouvoir discrétionnaire de prononcer une telle ordonnance à l'endroit des défendeurs parties à la déclaration initiale, mais pas à l'endroit des défendeurs qui n'étaient parties à aucune déclaration lorsque le débat sur la demande d'autorisation s'est terminé. Le juge Cromwell est d'avis que la juge des motions a eu raison d'exercer son pouvoir discrétionnaire de prononcer une ordonnance *nunc pro tunc* à l'endroit de tous les défendeurs. Dans *Celestica*, la juge en chef McLachlin et les juges Rothstein, Cromwell et Côté sont d'avis de refuser de rendre une ordonnance *nunc pro tunc*.

3. La juge en chef McLachlin et les juges Rothstein, Cromwell et Côté concluent que la doctrine des circonstances spéciales n'est d'aucune utilité pour l'un ou l'autre des demandeurs dans les trois dossiers parce qu'on ne peut faire obstacle ni au délai prescrit à l'art. 138.14 de la *LVM* ni à l'exigence d'autorisation prévue par l'art. 138.8 de cette loi en amendant les actes de procédure pour y inclure l'action prévue à l'art. 138.3 de la *LVM*.

4. Unanimement : selon le critère préliminaire auquel doit satisfaire un demandeur lorsqu'il demande l'autorisation au titre de l'art. 138.8 de la *LVM*, il doit exister une possibilité raisonnable ou réaliste que l'action soit accueillie. Les juges Moldaver, Cromwell, Karakatsanis et Gascon concluent que les demandeurs dans l'affaire *CIBC* ont satisfait à ce critère.

5. Unanimement : dans *CIBC*, la Cour d'appel n'a pas commis d'erreur en concluant que cinq des sept questions communes proposées par les demandeurs quant à la réclamation de common law fondée sur la déclaration inexacte devaient être certifiées.

Interaction entre l'art. 28 de la *LRC* et l'art. 138.14 de la *LVM*

*La* juge en chef McLachlin et les juges Rothstein et Côté (opinion majoritaire) : Indiquer une intention de demander une permission à l'égard d'un recours fondé sur l'art. 138.3 de la *LVM* dans un recours collectif en plus de plaider une cause d'action en common law ne revient ni à invoquer la cause d'action statutaire ni à introduire un recours collectif pour cette cause d'action au sens de l'art. 28 de la *LRC*. Le délai de prescription fixé par l'art. 138.14 de la *LVM* ne peut donc être suspendu en faveur des membres du groupe en application de l'art. 28 de la *LRC* avant que la permission d'intenter le recours collectif visée à l'art. 138.8 ait été accordée.

There is no ambiguity in the interaction of s. 28 *CPA* with Part XXIII.1 *OSA*. Section 28 *CPA* requires "a cause of action asserted" in order for the limitation period to be suspended in favour of the class members on the commencement of the class proceeding. The interpretation of the meaning of the word "assert" in s. 28 *CPA* proposed by the Court of Appeal in *Timminco* is correct. The assertion of a cause of action must be premised on the existence of a "right of action". Given the clear wording of s. 138.3 *OSA*, pleading a factual matrix and an intention to seek leave under s. 138.8 *OSA* cannot amount to the assertion of the statutory cause of action.

Section 28 *CPA* does not operate to suspend the limitation period applicable to a cause of action until the commencement of a class proceeding in which the cause of action is asserted. This commencement cannot occur under Part XXIII.1 *OSA* until leave is granted. Section 138.8(1) *OSA* is clear that no action may be commenced under s. 138.3 without leave of the court.

Even if there was an ambiguity in the wording of the relevant provisions — which there is not — the legislative purpose and structure of those provisions would nonetheless support this conclusion. To hold that s. 28 *CPA* operates to suspend a limitation period for a statutory claim under s. 138.3 *OSA* before leave is obtained would be to circumvent the carefully calibrated purposive balance struck by the limits to the statutory action provided for in Part XXIII.1 *OSA* and render s. 138.8 *OSA* ineffective.

A careful consideration of the context of limitation periods, the *CPA* and Part XXIII.1 *OSA* reveals that the Court of Appeal's decision in the instant cases broadly undermines the legislative structures and the purposes at stake in these appeals. On the one hand, Part XXIII.1 *OSA* strikes a delicate balance between various market participants: the interests of potential plaintiffs and defendants and of affected long-term shareholders have been weighed considerably and deliberately in light of a desired precise balance between deterrence and compensation. On the other hand, class actions are procedural mechanisms which can only extend the substantive rights of the representative plaintiff to the other class members: before there is a right of action or a suspension of the limitation period flowing from the operation of the statutory scheme itself, the *CPA* cannot be interpreted in such a way as to create either one. Part XXIII.1 *OSA*, the more recent legislation, creates a scheme that is intended to be comprehensive, and was crafted with the *CPA* in

Il n'y a aucune ambiguïté entre l'art. 28 de la *LRC* et la partie XXIII.1 de la *LVM*. L'article 28 de la *LRC* exige « une cause d'action invoquée » pour que le délai de prescription soit suspendu en faveur des membres du groupe à l'introduction du recours collectif. L'interprétation que la Cour d'appel propose, dans *Timminco*, de donner au mot « invoquée » figurant à l'art. 28 de la *LRC* est correcte. L'assertion d'une cause d'action doit reposer sur l'existence d'un « droit d'action ». Vu le libellé clair de l'art. 138.3 de la *LVM*, alléguer un fondement factuel et indiquer une intention de demander la permission en vertu de l'art. 138.8 de la *LVM* ne peuvent signifier invoquer la cause d'action statutaire.

L'article 28 de la *LRC* n'a pas pour effet de suspendre le délai de prescription applicable à une cause d'action avant que le recours collectif invoquant la cause d'action ne soit introduit. Ce recours collectif ne peut être introduit en vertu de la partie XXIII.1 de la *LVM* jusqu'à ce que la permission soit accordée. Le paragraphe 138.8(1) de la *LVM* est clair : une action ne peut être intentée en vertu de l'art. 138.3 qu'avec l'autorisation du tribunal.

Même si le libellé des dispositions pertinentes comportait une ambiguïté — laquelle n'existe pas —, le but et la structure de ces dispositions étayeraient malgré tout cette conclusion. Conclure que l'art. 28 de la *LRC* a pour effet de suspendre un délai de prescription applicable à un recours visé par l'art. 138.3 de la *LVM* avant que la permission n'ait été obtenue contournerait l'équilibre téléologique soigneusement atteint par les limites imposées à l'action statutaire par la partie XXIII.1 de la *LVM* et rendrait inefficace l'art. 138.8 de la *LVM*.

Un examen attentif du contexte des délais de prescription, de la *LRC* et de la partie XXIII.1 de la *LVM* révèle que la décision de la Cour d'appel de l'Ontario dans les présents dossiers mine considérablement la structure et les objectifs du régime statutaire en jeu dans les présents pourvois. D'une part, la partie XXIII.1 de la *LVM* instaure un équilibre délicat entre les différents acteurs du marché. Les intérêts des demandeurs et des défendeurs éventuels, ainsi que des actionnaires à long terme touchés, ont été soupesés consciencieusement et délibérément dans l'optique d'un équilibre précis et voulu entre la dissuasion et l'indemnisation. D'autre part, les recours collectifs sont des véhicules (ou mécanismes) procéduraux qui peuvent uniquement étendre les droits substantiels du représentant des demandeurs aux autres membres du groupe : avant qu'il n'y ait de droit d'action ou suspension du délai de prescription résultant de l'opération du régime statutaire lui-même, la *LRC* ne peut être interprétée de façon à créer l'un ou l'autre.

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mind. The purposes associated with the *CPA* — judicial economy, access to the courts and behaviour modification — were each explicitly considered in developing the structure of Part XXIII.1 *OSA*. Policy concerns, as compelling as they are, do not override the plain meaning of the text and the intent of the Ontario legislature. This is not altered by the fact that both the *CPA* and Part XXIII.1 *OSA* are remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature's consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.

La partie XXIII.1 de la *LVM*, le texte législatif le plus récent, a instauré un régime se voulant complet et a été rédigée alors que la *LRC* était déjà en vigueur. Les objectifs associés à la *LRC* — l'économie des ressources judiciaires, l'accès aux tribunaux et la modification des comportements — ont chacun été explicitement considérés lorsque la structure de la partie XXIII.1 de la *LVM* a été élaborée. Les considérations de principe, aussi impératives soient-elles, ne peuvent primer le sens clair du texte et l'intention du législateur ontarien. Le fait que la *LRC* et la partie XXIII.1 de la *LVM* soient toutes deux de nature réparatrice et doivent par le fait même recevoir une interprétation large et téléologique n'y change rien. Le résultat final de l'exercice auquel s'est livré le législateur est que le régime statutaire impose l'exigence d'obtenir une permission en guise de condition préalable à l'introduction d'un recours, un délai de prescription et l'absence de nécessité de prouver que le demandeur s'est fié à la déclaration inexacte. La combinaison de ces aspects contribue à l'efficacité et à l'équité envers les deux parties.

The interpretation proposed by the Court of Appeal in these cases also significantly affects the protection provided against strike suits, which aims to screen out strike suits as early as possible in the litigation process. The preliminary leave requirement in s. 138.8 *OSA* was added because the usual measures under the *CPA* did not provide appropriate safeguards. Requiring merely that a statutory cause of action be mentioned in an existing class proceeding for the limitation period to be suspended can hardly be said to achieve the intended protection.

L'interprétation proposée par la Cour d'appel dans les présents dossiers modifie également de façon significative la protection accordée contre les poursuites opportunistes et dénuées de fondement qui vise à écarter ce type de poursuites aussitôt que possible dans le processus. L'obligation d'obtenir la permission préliminaire prévue à l'art. 138.8 de la *LVM* a été ajoutée parce que les mécanismes prévus par la *LRC* ne constituaient pas des garanties suffisantes. Accepter que la simple mention d'une cause d'action statutaire dans un recours collectif alors pendant suffit pour faire suspendre le délai de prescription ne permet guère d'atteindre la protection voulue.

*Per* Cromwell J.: The conclusions of Côté J. on the interpretation of the limitation and leave provisions are agreed with.

*Le* juge Cromwell : Il y a accord avec les conclusions de la juge Côté sur l'interprétation des dispositions relatives au délai de prescription et à l'autorisation.

*Per* Moldaver, Karakatsanis and Gascon JJ. (minority opinion): The five-member panel of the Court of Appeal was correct to overturn that court's earlier interpretation of the application of s. 28 *CPA* to the s. 138.14 *OSA* limitation period. As long as the statutory cause of action in Part XXIII.1 *OSA* is asserted in a properly commenced class proceeding, s. 28 *CPA* will suspend the limitation periods applicable to all causes of action asserted — including the limitation period governing the statutory claim — regardless of whether leave has been obtained under s. 138.8 *OSA*.

*Les* juges Moldaver, Karakatsanis et Gascon (opinion minoritaire) : La formation de cinq juges de la Cour d'appel a eu raison d'infirmer l'interprétation que cette cour avait donnée précédemment de l'application de l'art. 28 de la *LRC* au délai de prescription prévu par l'art. 138.14 de la *LVM*. Tant que la cause d'action prévue à la partie XXIII.1 de la *LVM* est invoquée dans un recours collectif valablement introduit, l'art. 28 de la *LRC* suspend les délais de prescription applicables à toutes les causes d'action invoquées — y compris le délai de prescription régissant l'action prévue par la loi — que l'autorisation exigée par l'art. 138.8 de la *LVM* ait ou non été obtenue.

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This understanding of s. 28 *CPA* best accords with the words, scheme and purpose of the *CPA*, as well as the language, purpose and operation of Part XXIII.1 *OSA*. A harmonious interpretation that respects the ordinary meaning of the text of both the *CPA* and the *OSA* and the context and the purpose of the *CPA*, recognizing its intended application in the securities context, must be sought. As both the *CPA* and Part XXIII.1 *OSA* are remedial in nature, the provisions from those statutes must be interpreted broadly and purposively. Moreover, in analysing the interaction between the laws of one legislature, it must be presumed that the laws are meant to work together, both logically and teleologically, as parts of a functioning whole. The relevant provisions in the *OSA* were enacted after the *CPA*, and it is clear that Part XXIII.1 *OSA* was intended to operate in the context of class proceedings legislation.

Section 28 *CPA* is engaged upon the commencement of a class proceeding with respect to "a cause of action asserted" in the class proceeding. "Assert" has multiple dictionary meanings, and "to assert" is defined variously as "to invoke or enforce a legal right" or "make or enforce a claim to". The Court of Appeal's conclusion that "asserting" a cause of action in s. 28 *CPA* refers to "invoking the legal right" or "making the claim" is more consistent with the English and the French text of s. 28 *CPA* and with the context of that provision.

In order to "make the claim" or "invoke the legal right", the representative plaintiff must plead the essential factual elements required to constitute the cause of action. Section 138.3 provides injured shareholders with four causes of action tied to misrepresentations or the failure to make timely disclosure of a material change. Leave is not one of the factual elements set out in that provision. Therefore, the leave requirement in s. 138.8 *OSA* is not a constituent element of the statutory cause of action set out in s. 138.3 *OSA*. Rather, obtaining leave under s. 138.8 *OSA* is a procedural requirement. It is necessary for the right arising from s. 138.3 to be ultimately exercised, adjudicated at trial and enforced; however, "asserting" the statutory cause of action for the purposes of s. 28 *CPA* does not require the representative plaintiff to first obtain leave. The statutory cause of action can therefore be asserted in a class proceeding statement of claim before leave is obtained.

Cette interprétation de l'art. 28 est celle qui s'accorde le mieux avec le libellé, l'économie et l'objet de la *LRC*, ainsi qu'avec le texte, l'objet et l'application de la partie XXIII.1 de la *LVM*. Il faut rechercher une interprétation harmonieuse qui respecte le sens ordinaire du texte tant de la *LRC* que de la *LVM* ainsi que le contexte et l'objet de la *LRC*, eu égard à la manière dont cette loi est censée s'appliquer dans le domaine des valeurs mobilières. Puisque la *LRC* et la partie XXIII.1 de la *LVM* sont toutes les deux de nature réparatrice, leurs dispositions doivent être interprétées de façon large et fondée sur leur objet. De plus, en analysant la corrélation entre les lois d'un législateur, il faut présumer que ces lois fonctionnent ensemble, tant logiquement que téléologiquement, comme les diverses parties d'un tout. Les dispositions pertinentes de la *LVM* ont été adoptées après la *LRC*, et il est clair que la partie XXIII.1 de la *LVM* était censée s'appliquer dans le contexte de la législation sur les recours collectifs.

L'article 28 de la *LRC* entre en jeu dès l'introduction du recours collectif à l'égard d'« une cause d'action invoquée » dans le recours collectif. Les dictionnaires donnent de nombreuses acceptions du mot anglais « *assert* » qui est défini tantôt comme « invoquer ou faire valoir un droit », tantôt comme « faire ou exécuter une réclamation ». La conclusion de la Cour d'appel selon laquelle le mot « *asserted* », dans la version anglaise de l'art. 28, parlant d'une cause d'action, a le sens d'« invoquer un droit » ou de « faire une réclamation » concorde mieux avec les textes anglais et français de l'art. 28 et le contexte de cette disposition.

Pour « faire la réclamation » ou « invoquer le droit », le représentant des demandeurs doit plaider les éléments de fait essentiels nécessaires pour constituer la cause d'action. L'article 138.3 accorde aux actionnaires lésés quatre causes d'action liées à la présentation inexacte des faits ou au non-respect des obligations d'information occasionnelle portant sur un changement important. L'autorisation ne fait pas partie des éléments de fait décrits dans cette disposition. Par conséquent, la nécessité d'obtenir l'autorisation prévue à l'art. 138.8 de la *LVM* n'est pas un élément constitutif de la cause d'action prévue à l'art. 138.3 de cette loi. De fait, l'obtention de l'autorisation visée à l'art. 138.8 de la *LVM* est une exigence procédurale. Elle est nécessaire pour que le droit découlant de l'art. 138.3 puisse être exercé, tranché au procès et exécuté par la suite. Cependant, « invoquer » (« *asserting* ») la cause d'action légale pour l'application de l'art. 28 de la *LRC* n'oblige pas le représentant des demandeurs à obtenir d'abord l'autorisation. La cause d'action légale peut donc être invoquée dans la déclaration d'un recours collectif avant que l'autorisation ne soit obtenue.

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Section 28 *CPA* suspends the running of the limitation periods upon the "commencement of the class proceeding". "Commencement" for the purpose of this provision refers to the commencement of an intended class proceeding under the *CPA* prior to certification. To commence a class proceeding, the representative plaintiff must file a statement of claim. The text of s. 28 recognizes that multiple causes of action could be asserted in a single statement of claim. Section 28 does not condition the commencement of the class proceeding on the prior fulfillment of all procedural requirements in respect of every cause of action asserted in the proceeding. On a plain reading of s. 28, the limitation periods applicable to all causes of action asserted in the proceeding are suspended upon the commencement of the proceeding, regardless of whether some would require leave to proceed individually. Thus, s. 28 *CPA* will suspend the limitation period in s. 138.14 *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.

Excluding the statutory cause of action in Part XXIII.1 *OSA* from the protection of s. 28 *CPA* until leave has been granted removes compliance with the limitation period from the plaintiff's control. It would also necessarily oblige potential class members to file a multitude of individual motions for leave to commence the statutory claim, thus unnecessarily adding procedural steps and increasing costs and delays for all parties involved. Such an obligation is not required by the text of s. 28 *CPA*, nor by the context or purposes of the *CPA*. Such a result serves neither judicial economy nor access to justice. Rather, it undermines the harmonious operation of class proceedings in the securities context. An interpretation that suspends the limitation period where leave has not yet been granted under s. 138.8 *OSA* promotes the purposes of the *CPA*, is harmonious with the language, purpose and operation of Part XXIII.1 *OSA*, and allows the class proceeding to remain an effective vehicle for the pursuit of Part XXIII.1 statutory claims while respecting the policy underpinnings of limitation periods.

In each of the three cases under appeal, the plaintiffs commenced class proceedings and pleaded the constituent facts of the tort of negligent misrepresentation and of

L'article 28 de la *LRC* suspend les délais de prescription à l'« introduction du recours collectif ». L'« introduction », pour l'application de cette disposition, s'entend de l'introduction d'un recours collectif projeté en vertu de la *LRC* avant la certification. Pour introduire un recours collectif, le représentant des demandeurs doit déposer une déclaration. Le texte de l'art. 28 reconnaît la possibilité que de multiples causes d'action soient invoquées dans une seule déclaration. L'article 28 n'a pas pour effet de rendre l'introduction du recours collectif conditionnelle à la réalisation de toutes les exigences procédurales à l'égard de chacune des causes d'action invoquées dans le recours. Selon le sens clair de l'art. 28, les délais de prescription applicables à toutes les causes d'action invoquées dans le recours sont suspendus à l'introduction du recours collectif, que certaines d'entre elles nécessitent ou non une autorisation pour aller de l'avant individuellement. Ainsi, l'art. 28 de la *LRC* suspend le délai de prescription fixé à l'art. 138.14 de la *LVM* dès que le représentant des demandeurs introduit valablement un recours collectif fondé sur une cause d'action en common law et plaide la cause d'action légale et ses éléments constitutifs dans la déclaration.

Exclure la cause d'action prévue à la partie XXIII.1 de la *LVM* de la protection conférée par l'art. 28 de la *LRC* jusqu'à ce que l'autorisation soit accordée fait en sorte que le respect du délai de prescription échappe à la volonté du demandeur. En outre, cela obligerait nécessairement les membres éventuels du groupe à déposer une multitude de motions individuelles en autorisation d'intenter l'action prévue par la loi, imposant ainsi inutilement à toutes les parties en cause des formalités procédurales supplémentaires, des coûts plus élevés et des délais plus longs. Une telle obligation n'est imposée ni par le libellé de l'art. 28 ni par le contexte ou les objets de la *LRC*. Un tel résultat ne favorise ni l'économie des ressources judiciaires ni l'accès à la justice. Il nuit plutôt au fonctionnement harmonieux des recours collectifs dans le contexte des valeurs mobilières. En outre, une interprétation qui a pour effet de suspendre le délai de prescription lorsque l'autorisation n'a pas encore été accordée en application de l'art. 138.8 de la *LVM* favorise la réalisation des objets de la *LRC*, s'harmonise avec le texte, l'objet et l'application de la partie XXIII.1 de la *LVM* et fait en sorte que le recours collectif demeure un moyen efficace d'exercer les poursuites fondées sur la partie XXIII.1, tout en respectant les considérations d'ordre public qui sous-tendent les délais de prescription.

Dans chacune des trois affaires portées en appel, les demandeurs ont introduit des recours collectifs et plaidé dans leurs déclarations les faits constitutifs du délit de

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the statutory cause of action in Part XXIII.1 *OSA* in their statements of claim. This pleading constitutes an assertion of the statutory cause of action for the purposes of s. 28 *CPA*. Thus, the limitation periods for the statutory claims at issue in these appeals are suspended as of the date of filing of their statements of claim and none of the claims are statute-barred.

## Remedies

*Per* McLachlin C.J. and Rothstein and Côté JJ.: *Nunc pro tunc* and special circumstances are two separate doctrines, which need to be addressed separately. The courts have inherent jurisdiction to issue orders *nunc pro tunc*, that is, to backdate their orders. This power is implied by rule 59.01 of the Ontario *Rules of Civil Procedure*. The following non-exhaustive factors guide the courts in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice. None of these factors is determinative.

An order granting leave to proceed with an action can theoretically be made *nunc pro tunc*, where leave is sought prior to the expiry of the limitation period. However, a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue. This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. *Nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. Accordingly, the courts' inherent jurisdiction to issue *nunc pro tunc* orders in relation to leave to commence claims under s. 138.3 *OSA* is not unlimited and should be exercised bearing in mind that the leave requirement, and its interaction with the limitation period, are central to the delicate balance struck in Part XXIII.1 *OSA*.

déclaration inexacte faite par négligence et de la cause d'action prévue à la partie XXIII.1 de la *LVM*. En plaidant ainsi ces faits, ils se trouvent à avoir invoqué la cause d'action légale pour l'application de l'art. 28 de la *LRC*. Par conséquent, les délais de prescription applicables aux actions prévues par la loi qui sont en litige dans les présents pourvois sont suspendus à compter de la date du dépôt de leurs déclarations et aucune des poursuites n'est prescrite.

## Mesures de redressement

*La* juge en chef McLachlin et les juges Rothstein et Côté : La doctrine *nunc pro tunc* et celle des circonstances spéciales sont distinctes et elles doivent être abordées séparément. Les tribunaux disposent d'une compétence inhérente pour rendre des ordonnances *nunc pro tunc*, ce qui signifie qu'ils ont le pouvoir d'antidater leurs ordonnances. Ce pouvoir est confirmé par l'art. 59.01 des *Règles de procédure civile* de l'Ontario. Les facteurs non exhaustifs suivants aident les tribunaux à décider d'exercer ou non leur compétence inhérente pour rendre pareille ordonnance : (1) l'ordonnance ne causera pas préjudice à la partie adverse; (2) l'ordonnance aurait été rendue si elle avait été sollicitée au moment propice, de sorte que le moment du prononcé de l'ordonnance est simplement une irrégularité; (3) l'irrégularité n'est pas intentionnelle; (4) l'ordonnance permettra effectivement d'obtenir le redressement demandé ou de remédier à l'irrégularité; (5) le retard est attribuable à un acte de la cour; (6) l'ordonnance faciliterait l'accès à la justice. Aucun de ces facteurs n'est déterminant en soi.

Une ordonnance accordant la permission d'intenter une action peut théoriquement être rendue *nunc pro tunc* lorsque la permission est sollicitée avant l'expiration du délai de prescription. Toutefois, le tribunal ne devrait pas exercer sa compétence inhérente si cela aurait pour effet de miner l'objectif du délai de prescription ou de la loi en cause. Il en est ainsi parce que, comme pour toutes les doctrines et règles de common law, la compétence inhérente de rendre des ordonnances *nunc pro tunc* est circonscrite par l'intention du législateur. Aucune ordonnance *nunc pro tunc* ne sera rendue si le libellé ou l'objet d'une loi ne l'autorise pas. Par conséquent, la compétence inhérente des tribunaux pour rendre des ordonnances *nunc pro tunc* visant la permission d'intenter un recours en vertu de l'art. 138.3 de la *LVM* n'est pas illimitée et doit être exercée en gardant à l'esprit que l'obligation d'obtenir la permission et son interaction avec le délai de prescription sont essentiels à l'équilibre délicat qui est au centre de la partie XXIII.1 de la *LVM*.

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The standard of review that ordinarily applies to a judge's discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion. However, if the judge's discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene. In *CIBC*, the motion judge found that he did not have jurisdiction to make the order *nunc pro tunc*. It follows that he did not actually exercise any discretion, and there is therefore no decision to defer to. But, even if he had done so, his reasoning on whether the order should be granted *nunc pro tunc* was based on an erroneous principle. In *IMAX*, in exercising her discretion, the motion judge failed to address or distinguish the situation of the defendants who were not parties to the original statement of claim. Therefore, no deference applies.

In *CIBC*, the plaintiffs were aware of the requirement of obtaining leave but made the choice not to expedite the leave motion, proceeding on the assumption that the court had the jurisdiction to extend the limitation period and that the discretion would be exercised in their favour by granting leave *nunc pro tunc*. In this case, to grant a *nunc pro tunc* order even though the plaintiffs did absolutely nothing to prevent the expiry of the limitation period would have the effect of overriding the legislature's intent.

In *IMAX*, the motion judge exercised her discretion correctly in making a *nunc pro tunc* order in relation to the defendants who were parties to the original statement of claim. However, as regards the other defendants, who were not defendants in any proceeding at the time when argument on the leave application was concluded, the plaintiffs, who waited more than two years after leave was granted before issuing a first statement of claim against them as defendants and provided no valid explanation for this delay, certainly cannot be said to have acted diligently. Granting relief to the plaintiffs against those defendants would undermine the strict limitation period set out in s. 138.14 *OSA* and the balance struck in the legislation.

In *Celestica*, no motion for leave was filed before the expiry of the limitation period. Accordingly, a *nunc pro*

La norme qui s'applique en temps normal à la décision discrétionnaire du juge de rendre ou non une ordonnance *nunc pro tunc* est celle de la déférence : si le juge a accordé suffisamment d'importance à toutes les considérations pertinentes, une cour d'appel doit s'en remettre à l'exercice du pouvoir discrétionnaire du juge de première instance. Cependant, si le juge de première instance a exercé son pouvoir discrétionnaire en se fondant sur un principe erroné, une cour d'appel peut intervenir. Dans le dossier *CIBC*, le juge de première instance a conclu qu'il n'avait pas compétence pour rendre l'ordonnance *nunc pro tunc*. Il s'ensuit qu'il n'a pas exercé de pouvoir discrétionnaire et que la déférence n'est pas de mise. Cela dit, même s'il avait exercé telle discrétion, son analyse de la question de savoir si l'ordonnance devrait être rendue *nunc pro tunc* était fondée sur un principe erroné. Dans *IMAX*, en exerçant son pouvoir discrétionnaire, la juge de première instance n'a pas traité de la situation des défendeurs qui n'étaient pas parties à la déclaration originale et n'a pas non plus fait de distinction entre leur situation et celle des défendeurs initiaux. Le principe de déférence ne s'applique donc pas.

Dans *CIBC*, les demandeurs étaient conscients de la nécessité d'obtenir la permission, mais ils ont fait le choix de ne pas procéder plus rapidement avec leur requête pour permission, tenant pour acquis que le tribunal avait compétence pour proroger le délai de prescription et qu'il exercerait son pouvoir discrétionnaire en leur faveur en leur accordant la permission *nunc pro tunc*. En l'espèce, prononcer une ordonnance *nunc pro tunc* même si les demandeurs n'ont absolument rien fait pour prévenir l'expiration du délai de prescription aurait pour conséquence de passer outre à l'intention du législateur.

Dans *IMAX*, la juge de première instance a exercé correctement son pouvoir discrétionnaire en rendant l'ordonnance *nunc pro tunc* à l'endroit des défendeurs parties à la déclaration initiale. Cependant, dans le cas des autres défendeurs, qui n'étaient parties à aucune instance pendante lorsque le débat sur la demande de permission s'est terminé, les demandeurs, ayant attendu plus de deux ans après l'octroi de la permission avant de déposer une première déclaration contre eux à titre de défendeurs et n'ayant fourni aucune explication valable pour ce délai, on ne peut assurément pas dire qu'ils ont fait preuve de diligence. Accorder un redressement aux demandeurs aux dépens de ces défendeurs minerait le délai de prescription strict établi à l'art. 138.14 de la *LVM* et compromettrait l'équilibre établi par la loi.

Dans *Celestica*, aucune requête pour permission n'a été déposée avant l'expiration du délai de prescription.

*tunc* order could not remedy that expiry. This is sufficient to deny such an order.

The doctrine of special circumstances allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. The circumstances warranting such an amendment will not often occur. In the case of statutory actions under s. 138.3 *OSA*, the legislature specifically barred a plaintiff from commencing such an action without first obtaining leave of the court. Accordingly, the doctrine of special circumstances is of no avail to any of the plaintiffs in the three instant cases. Neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3 *OSA*. The doctrine, therefore, does not provide the plaintiffs with an effective remedy, since it cannot on its own overcome the leave requirement of s. 138.8 *OSA*.

*Per* Cromwell J.: Agreement is expressed for the reasons of Côté J. in respect of the discretionary power of the courts to grant leave *nunc pro tunc* after the expiry of the limitation period to commence a statutory claim for secondary market misrepresentation.

In *CIBC*, the motion judge was ideally placed to assess and weigh all of the many considerations that are relevant to the question of whether the court's discretion should be exercised in the plaintiffs' favour. His assessment of those considerations and the weight to be given to them should be treated with deference on appeal. There is no error in the principles that the motion judge applied, in the factors that he considered relevant or in his assessment of the evidence. Accordingly, there is no basis to interfere with his conclusion that the *nunc pro tunc* discretion should be exercised in the plaintiffs' favour.

The motion judge in *IMAX* was also correct to exercise her *nunc pro tunc* discretion. The motion judge was intimately familiar with the progress of this file with which she had been dealing over several years. There is no basis on which to interfere with her assessment of the equities of the situation or of the plaintiffs' diligence.

Ainsi, une ordonnance *nunc pro tunc* ne pourrait remédier à cette expiration. Cette raison suffit pour refuser de rendre une telle ordonnance.

La doctrine des circonstances spéciales autorise le tribunal à modérer les effets potentiellement sévères et injustes des délais de prescription en permettant à un demandeur d'ajouter une cause d'action ou une partie à sa déclaration après l'expiration du délai de prescription applicable. Les circonstances justifiant une telle modification se présentent rarement. Dans le cas d'actions statutaires intentées en application de l'art. 138.3 de la *LVM*, le législateur a expressément prévu l'impossibilité pour un demandeur d'intenter un tel recours sans avoir d'abord obtenu la permission du tribunal. Par conséquent, la doctrine des circonstances spéciales n'est d'aucune utilité pour l'un ou l'autre des demandeurs dans les trois présents dossiers. On ne peut faire obstacle au délai prescrit à l'art. 138.14 de la *LVM* ou à la permission exigée à l'art. 138.8 de cette loi en amendant les actes de procédure pour y inclure le recours de l'art. 138.3. Cette doctrine ne permet donc pas aux demandeurs d'obtenir un redressement efficace, car elle ne peut contrer à elle seule l'exigence de permission prévue par l'art. 138.8 de la *LVM*.

*Le* juge Cromwell : Il y a accord avec les motifs de la juge Côté quant au pouvoir discrétionnaire des tribunaux d'accorder, après l'expiration de ce délai, l'autorisation *nunc pro tunc* d'exercer un recours conféré par la loi pour présentation inexacte des faits sur le marché secondaire.

Dans *CIBC*, le juge des motions se trouvait dans une situation idéale pour évaluer et soupeser l'ensemble des multiples considérations se rapportant au point de savoir si le tribunal doit exercer son pouvoir discrétionnaire en faveur des demandeurs. Il faut faire preuve de déférence en appel à l'égard de son analyse de ces considérations et du poids à leur attribuer. Il n'y a aucune erreur dans les principes que le juge des motions a appliqués, les facteurs qu'il a jugé pertinents ou son appréciation de la preuve. Il n'existe donc aucune raison de modifier sa conclusion qu'il y a lieu en l'espèce d'exercer le pouvoir discrétionnaire *nunc pro tunc* en faveur des demandeurs.

La juge des motions dans *IMAX* a également eu raison d'exercer son pouvoir discrétionnaire *nunc pro tunc*. La juge des motions connaissait fort bien l'évolution de ce dossier dont elle s'est occupée pendant des années. Il n'existe aucune raison de modifier son évaluation du caractère équitable de la situation ou de la diligence des demandeurs.

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The conclusions of Côté J. in *Celestica* are agreed with.

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Il y a accord avec les conclusions de la juge Côté dans *Celestica*.

**Jurisprudence**

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(3d) 401; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949.

By Cromwell J.

**Referred to:** *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569; *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401; *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764.

By Karakatsanis J.

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CarswellOnt 10391 (WL Can.); and affirming a decision of Perell J., 2012 ONSC 6083, 113 O.R. (3d) 264, [2012] O.J. No. 5083 (QL), 2012 CarswellOnt 13292 (WL Can.). The appeals in *CIBC* and *IMAX* are dismissed, McLachlin C.J. and Rothstein and Côté JJ. dissenting in part; the appeal in *Celestica* is allowed, Moldaver, Karakatsanis and Gascon JJ. dissenting.

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Written submissions only by *Margaret L. Waddell* and *Denise Cooney*, for the intervener the Canadian Foundation for Advancement of Investor Rights.

*Bonnie Roberts Jones*, for the intervener the Shareholder Association for Research and Education.

*Anna Perschy* and *Amanda Heydon*, for the intervener the Ontario Securities Commission.

No. 4002 (QL), 2012 CarswellOnt 10391 (WL Can.); et qui a confirmé une décision du juge Perell, 2012 ONSC 6083, 113 O.R. (3d) 264, [2012] O.J. No. 5083 (QL), 2012 CarswellOnt 13292 (WL Can.). Les pourvois dans *CIBC* et *IMAX* sont rejetés, la juge en chef McLachlin et les juges Rothstein et Côté sont dissidents en partie; le pourvoi dans *Celestica* est accueilli, les juges Moldaver, Karakatsanis et Gascon sont dissidents.

*Sheila R. Block* et *James C. Tory*, pour l'appelante la Banque Canadienne Impériale de Commerce.

*Benjamin Zarnett*, *David D. Conklin* et *Jonathan Edge*, pour les appelants Gerald McCaughey et autres.

*R. Paul Steep*, *Dana M. Peebles* et *Brandon Kain*, pour les appelants IMAX Corporation et autres.

*Nigel Campbell*, *Andrea Laing* et *Ryan A. Morris*, pour les appelants Celestica Inc., Stephen W. Delaney et Anthony P. Puppi.

*Peter R. Jervis*, *Joel P. Rochon*, *Sakie Tambakos* et *Remissa Hirji*, pour les intimés Howard Green et Anne Bell.

*A. Dimitri Lascaris*, *William V. Sasso*, *Michael Robb*, *Daniel E. H. Bach* et *Serge Kalloghlian*, pour les intimés Marvin Neil Silver et Cliff Cohen.

*Kirk M. Baert* et *Celeste B. Poltak*, pour les intimés les Fiduciaires de la caisse de retraite en fiducie du Millwright Regional Council of Ontario, Nabil Berzi et Huacheng Xing.

Argumentation écrite seulement par *Margaret L. Waddell* et *Denise Cooney*, pour l'intervenante la Fondation canadienne pour l'avancement des droits des investisseurs.

*Bonnie Roberts Jones*, pour l'intervenante Shareholder Association for Research and Education.

*Anna Perschy* et *Amanda Heydon*, pour l'intervenante la Commission des valeurs mobilières de l'Ontario.

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*Alan L. W. D'Silva*, *Daniel S. Murdoch* and *Sinziana R. Hennig*, for the intervener the Insurance Bureau of Canada.

The reasons of McLachlin C.J. and Rothstein and Côté JJ. were delivered by

CÔTÉ J. —

I. Introduction

[1] These appeals are the result of competing interpretations of the interaction between two pieces of Ontario legislation: Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 ("*OSA*"), and s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[2] Part XXIII.1 *OSA* provides, at s. 138.3, for a claim for secondary market misrepresentation. An action with respect to this statutory claim may be commenced only with leave of the court as prescribed by s. 138.8 and within the limitation period specified in s. 138.14, that is, three years after the date of the alleged misrepresentations in the instant cases.

[3] As for s. 28 *CPA*, it operates to suspend the limitation period for "a cause of action asserted in a class proceeding" in favour of the members of a class "on the commencement of the class proceeding".

[4] At issue in the court below was the meaning of the word "asserted" in s. 28 *CPA*. Initially, a panel of three judges of the Court of Appeal ruled unanimously in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, that the statutory claim for secondary market misrepresentation cannot be "asserted" until a court has granted leave to do so. As a result, the court held that the *CPA* could not operate to suspend the limitation period for class members (including for the representative plaintiff) until leave was obtained.

*Alan L. W. D'Silva*, *Daniel S. Murdoch* et *Sinziana R. Hennig*, pour l'intervenant le Bureau d'assurance du Canada.

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Côté rendus par

LA JUGE CÔTÉ —

I. Introduction

[1] Les présents pourvois découlent d'interprétations divergentes au sujet de l'interaction entre deux textes de loi de l'Ontario : la partie XXIII.1 de la *Loi sur les valeurs mobilières*, L.R.O. 1990, c. S.5 (« *LVM* »), et l'art. 28 de la *Loi de 1992 sur les recours collectifs*, L.O. 1992, c. 6 (« *LRC* »).

[2] La partie XXIII.1 de la *LVM* permet, à l'art. 138.3, d'intenter un recours pour déclaration inexacte de faits sur le marché secondaire (appelée « présentation inexacte des faits » dans la *LVM*). Ce recours ne peut être intenté qu'avec la permission du tribunal, comme le prévoit l'art. 138.8, et dans le délai de prescription fixé à l'art. 138.14, en l'espèce trois ans après la date des déclarations inexactes alléguées.

[3] Quant à l'art. 28 de la *LRC*, il a pour effet de suspendre le délai de prescription applicable à « une cause d'action invoquée dans un recours collectif » en faveur des membres du groupe « à l'introduction du recours collectif ».

[4] Le débat devant la Cour d'appel de l'Ontario portait sur le sens du mot « invoquée » figurant à l'art. 28 de la *LRC*. Initialement, trois juges de la Cour d'appel ont statué à l'unanimité dans l'arrêt *Sharma c. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, que le recours statutaire pour déclaration inexacte de faits sur le marché secondaire ne peut être « invoqué » avant que le tribunal n'ait accordé la permission. Par conséquent, la Cour d'appel a conclu que la *LRC* ne pouvait avoir pour effet de suspendre le délai de prescription pour les membres du groupe (y compris le représentant des demandeurs) avant que la permission n'ait été accordée.

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[5] The ruling in *Timminco* was handed down in the midst of three class action suits for secondary market misrepresentations in Ontario: *Canadian Imperial Bank of Commerce et al. v. Green and Bell* ("*CIBC*"); *IMAX Corp. et al. v. Silver and Cohen* ("*IMAX*"); and *Celestica Inc. et al. v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* ("*Celestica*").

[6] In each of those cases, the plaintiffs[1] had pleaded a common law cause of action together with an intention to seek leave to assert a statutory claim under s. 138.3 *OSA* within the statutory limitation period, but leave was not granted before the limitation period expired. It should be noted however that in *CIBC*, a motion for leave was filed before the expiry of the limitation period, and that in *IMAX*, a motion for leave was both filed and argued before the limitation period expired. It is fair to say that *Timminco* came as a surprise to the litigants.

[7] In the Superior Court, the motion judges considering the issue of leave to commence the statutory action found that they were bound by *Timminco*, although relief was granted in the form of a *nunc pro tunc* order in *IMAX*, and by applying the doctrine of special circumstances in *Celestica*. No relief was granted to the plaintiffs in *CIBC*. The appeals in the three cases were subsequently heard together by a five-judge panel of the Court of Appeal, which unanimously overruled the interpretation of *Timminco*: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402. The Court of Appeal found that a representative plaintiff who pleads an intention to seek leave in respect of a s. 138.3 claim within the limitation period has "asserted" a cause of action within the meaning of s. 28 *CPA* even before the filing of a motion seeking leave.

[1] For the sake of clarity, I will consistently refer to the respondents in the instant cases as the "plaintiffs" and to the appellants in the instant cases as the "defendants".

[5] L'arrêt *Timminco* fut rendu alors que trois recours collectifs pour déclaration inexacte de faits sur le marché secondaire étaient pendants en Ontario : *Banque Canadienne Impériale de Commerce et autres c. Green et Bell* (« *CIBC* »); *IMAX Corp. et autres c. Silver et Cohen* (« *IMAX* »); *Celestica Inc. et autres c. Fiduciaires de la caisse de retraite en fiducie du Millwright Regional Council of Ontario et autres* (« *Celestica* »).

[6] Dans chacune de ces affaires, les demandeurs[1] ont invoqué une cause d'action en common law et indiqué leur intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 de la *LVM* dans le délai fixé par la loi, mais aucune telle permission n'a été accordée avant l'expiration du délai. Il convient toutefois de souligner qu'avant l'expiration du délai de prescription, une requête demandant telle permission (aussi appelée « motion en autorisation » dans la version française de la *LVM*) a été déposée dans l'affaire *CIBC* et, dans l'affaire *IMAX*, une requête demandant la permission a été déposée et débattue avant l'expiration du délai de prescription. Il est juste de dire que l'arrêt *Timminco* a surpris les parties.

[7] En Cour supérieure, les juges saisis des demandes de permission d'intenter le recours statutaire se sont estimés liés par l'arrêt *Timminco*, bien qu'un redressement ait été accordé sous la forme d'une ordonnance *nunc pro tunc* dans l'affaire *IMAX*, et que la doctrine des circonstances spéciales ait été appliquée dans l'affaire *Celestica*. Aucun redressement n'a été accordé aux demandeurs dans *CIBC*. Les appels dans les trois dossiers ont été entendus subséquemment par une formation de cinq juges de la Cour d'appel, laquelle, à l'unanimité, a infirmé l'interprétation donnée dans l'arrêt *Timminco* : *Green c. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402. La Cour d'appel a conclu qu'un représentant des demandeurs qui indique son intention de demander la permission d'intenter un recours en vertu

[1] Par souci de clarté, je désignerai systématiquement les intimés dans les cas présents comme les « demandeurs » et les appelants dans les cas présents comme les « défendeurs ».

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As a result, the court held that in all three cases, the plaintiffs' statutory claims for secondary market misrepresentation were not statute-barred.

[8] In my opinion, pleading an intention to seek leave in respect of a s. 138.3 *OSA* claim in a class proceeding together with a common law cause of action amounts to neither the assertion of the statutory cause of action nor the commencement of a class proceeding for that statutory cause of action under s. 28 *CPA*. Not only is this interpretation consistent with the fundamental principles and structure of class proceedings in Canada, but it is also the only one that is consistent with the wording of the provisions and the ordinary and grammatical meaning of the words used as well as with the rigorous and exhaustive legislative balancing that produced Part XXIII.1 *OSA*.

[9] Moreover, I am of the view that neither the doctrine of *nunc pro tunc* nor that of special circumstances can be of any avail to the plaintiffs in *CIBC* and *Celestica*. With regard to *IMAX*, relief should be granted to the plaintiffs in the form of a *nunc pro tunc* order, but only in relation to the defendants who were parties to the original statement of claim: IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

[10] Accordingly, I would allow the appeals in *CIBC* except in respect of the Court of Appeal's conclusion that five of the seven issues proposed by the plaintiffs should be certified. I would allow the appeal and issue a partial *nunc pro tunc* order in *IMAX*, and I would allow the appeal in *Celestica*.

de l'art. 138.3 à l'intérieur du délai de prescription a, dans les faits, « invoqué » une cause d'action au sens de l'art. 28 de la *LRC*, et ce, même avant d'avoir déposé une requête demandant cette permission. Par conséquent, la Cour d'appel a conclu que dans les trois cas, les recours statutaires intentés par les demandeurs pour déclaration inexacte de faits sur le marché secondaire n'étaient pas prescrits.

[8] À mon avis, indiquer une intention de demander une permission à l'égard d'un recours fondé sur l'art. 138.3 de la *LVM* dans un recours collectif en plus de plaider une cause d'action en common law ne revient ni à invoquer la cause d'action statutaire ni à introduire un recours collectif pour cette cause d'action au sens de l'art. 28 de la *LRC*. Non seulement cette interprétation s'accorde-t-elle avec les principes fondamentaux et la structure des recours collectifs au Canada, mais elle est la seule compatible avec le texte même des dispositions et le sens ordinaire et grammatical des mots employés ainsi qu'avec l'équilibre législatif rigoureux et exhaustif établi par la partie XXIII.1 de la *LVM*.

[9] Je suis également d'avis que ni la doctrine de *nunc pro tunc* ni celle des circonstances spéciales ne sont utiles pour les demandeurs dans les affaires *CIBC* et *Celestica*. Dans l'affaire *IMAX*, j'estime qu'il y a lieu d'accorder un redressement aux demandeurs sous la forme d'une ordonnance *nunc pro tunc*, mais seulement à l'égard des défendeurs parties à la déclaration initiale : IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler et Francis T. Joyce.

[10] Par conséquent, je suis d'avis d'accueillir les pourvois dans *CIBC*, sauf en ce qui concerne la conclusion de la Cour d'appel selon laquelle il y a lieu d'autoriser cinq des sept questions proposées par les demandeurs. Je suis également d'avis d'accueillir le pourvoi et de rendre une ordonnance *nunc pro tunc* partielle dans *IMAX*, ainsi que d'accueillir le pourvoi dans *Celestica*.

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II. Legislation

A. *Ontario Securities Act*

[11] Part XXIII.1 *OSA* sets out a scheme of civil liability for secondary securities market misrepresentation in Ontario. Section 138.3 creates a statutory cause of action for a misrepresentation made in a document or a public oral statement, or a failure to make timely disclosure, against a range of parties potentially implicated in the misrepresentation. This statutory cause of action accrues to those who acquired or disposed of the issuer's security between the time of the misrepresentation and that of its correction. Explicitly not required for a finding of liability is proof of a plaintiff's reliance on the misrepresentation, which is essential to a common law cause of action based on misrepresentation. Furthermore, as s. 138.13 makes plain, this statutory right of action is in addition to any other rights of action the plaintiff may have.

[12] Two components of this scheme are of particular relevance to these appeals.

[13] First, s. 138.8 imposes a requirement that leave be granted before the statutory action based on a secondary market misrepresentation may be commenced:

**138.8** (1) No action may be commenced under section 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.

[14] Second, s. 138.14 imposes a limitation period for statutory actions based on s. 138.3:

II. La législation

A. *La Loi sur les valeurs mobilières de l'Ontario*

[11] La partie XXIII.1 de la *LVM* établit un régime de responsabilité civile relativement à la déclaration inexacte de faits sur le marché secondaire des valeurs mobilières en Ontario. L'article 138.3 crée une cause d'action pour la déclaration inexacte de faits dans des documents ou des déclarations orales publiques, ou pour défaut de respecter une obligation de divulgation en temps utile (ou une obligation d'information occasionnelle dans la version française de la *LVM*), contre différentes parties potentiellement impliquées dans la déclaration inexacte de faits. Cette cause d'action statutaire peut être invoquée par ceux qui ont acquis ou aliéné la valeur mobilière de l'émetteur, entre le moment de la déclaration inexacte de faits et sa correction. Pour conclure à la responsabilité, il n'est pas nécessaire de prouver que le demandeur s'est fié à la déclaration inexacte de faits, alors que cette preuve est essentielle à une cause d'action fondée sur une déclaration inexacte en common law. De plus, comme l'indique clairement l'art. 138.13, ce droit d'action statutaire s'ajoute aux autres droits d'action dont peut jouir le demandeur.

[12] Deux des éléments de ce régime revêtent une importance particulière en l'espèce.

[13] Premièrement, l'art. 138.8 impose l'obligation d'obtenir une permission avant d'intenter le recours statutaire fondé sur la déclaration inexacte de faits sur le marché secondaire :

**138.8** (1) Une action ne peut être intentée en vertu de l'article 138.3 qu'avec l'autorisation du tribunal, accordée sur motion avec préavis à chaque défendeur, et que si le tribunal est convaincu de ce qui suit :

a) l'action est intentée de bonne foi;

b) il est raisonnablement possible que l'action soit réglée au moment du procès en faveur du demandeur.

[14] Deuxièmement, l'art. 138.14 impose un délai de prescription dans le cas des recours fondés sur l'art. 138.3 :

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**138.14** No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

[15] Section 138.14 thus requires that the statutory action be commenced within the earlier of three years after the date of the misrepresentation and six months after a news release discloses that leave has been granted to commence a statutory action in Ontario, or under parallel legislation elsewhere in Canada. It should be noted that the scheme contains no internal mechanism for suspending the limitation period before or pending the granting of leave.

B. *Class Proceedings Act*

[16] Section 28 *CPA* provides for the suspension of any limitation period in a class proceeding as follows:

**28.** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

**138.14** Aucune action ne doit être intentée en vertu de l'article 138.3 :

a) dans le cas de la présentation inexacte de faits dans un document, après le premier en date des jours suivants :

(i) trois ans après la date à laquelle le document contenant la présentation inexacte des faits a été publié pour la première fois,

(ii) six mois après la délivrance d'un communiqué portant qu'a été accordée une autorisation d'intenter une action en vertu de l'article 138.3 ou de dispositions législatives comparables d'autres provinces ou territoires du Canada à l'égard de la même présentation inexacte des faits;

[15] L'article 138.14 exige donc que le recours statutaire soit intenté dans les trois ans qui suivent la date de la déclaration inexacte de faits ou dans les six mois qui suivent la diffusion d'un communiqué portant qu'a été accordée la permission d'intenter un recours statutaire soit en Ontario, soit en vertu de dispositions législatives comparables ailleurs au Canada, selon la première de ces éventualités. Il est important de souligner que le régime ne prévoit aucun mécanisme interne permettant de suspendre le délai de prescription avant qu'une permission ne soit accordée ou à la condition qu'elle le soit.

B. *La Loi sur les recours collectifs*

[16] L'article 28 de la *LRC* prévoit ce qui suit relativement à la suspension de tout délai de prescription dans un recours collectif :

**28.** (1) Sous réserve du paragraphe (2), tout délai de prescription applicable à une cause d'action invoquée dans un recours collectif est suspendu en faveur d'un membre du groupe à l'introduction du recours collectif et reprend au détriment du membre au moment où, selon le cas :

a) ce membre se retire du recours collectif;

b) est apportée une modification de l'ordonnance certifiant le recours collectif qui a pour effet d'exclure du groupe le membre;

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(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

C. *Interaction Between Part XXIII.1 OSA and Section 28 CPA*

[17] The primary issue in these appeals is the interaction of the leave requirement in Part XXIII.1 *OSA* with the suspension of the limitation period for a class proceeding under s. 28 *CPA*. Typically, where leave is not required, the operation of s. 28 *CPA* is straightforward: the commencement of a class proceeding would coincide with a statement of claim asserting a cause of action to be certified as a class action (*Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (C.A.), at para. 21).

[18] Where leave is required, however, a statutory action cannot be commenced until leave is granted by the court. The issue in the cases at bar is whether s. 28 *CPA* operates to suspend the limitation period applicable to a statutory cause of action under s. 138.3 *OSA* at the time when an intention to seek leave under s. 138.8 *OSA* is pleaded in a class proceeding for a common law misrepresentation claim. This question has plagued the Ontario courts.

c) une ordonnance annulant l'ordonnance certifiant le recours collectif est rendue en vertu de l'article 10;

d) le recours collectif est rejeté sans décision sur le fond;

e) il y a désistement du recours collectif avec l'approbation du tribunal;

f) le recours collectif fait l'objet d'une transaction avec l'approbation du tribunal, à moins que la transaction ne prévoie autre chose.

(2) Lorsqu'il existe un droit d'appel à l'égard d'un des événements décrits aux alinéas (1) a) à f), le délai de prescription reprend dès l'expiration du délai d'appel, si aucun appel n'a été introduit, ou dès le règlement d'un appel.

C. *L'interaction entre la partie XXIII.1 de la LVM et l'art. 28 de la LRC*

[17] La question principale dans les présents pourvois vise l'interaction entre l'obligation d'obtenir une permission prévue à la partie XXIII.1 de la *LVM* et la suspension du délai de prescription prévue par l'art. 28 de la *LRC* dans le cas d'un recours collectif. Habituellement, en l'absence d'une exigence d'obtenir une permission, l'application de l'art. 28 de la *LRC* est simple : le commencement d'un recours collectif coïncide avec le dépôt d'une déclaration alléguant une cause d'action à autoriser comme recours collectif (*Logan c. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (C.A.), par. 21).

[18] Toutefois, lorsqu'une permission est nécessaire, un recours statutaire ne peut être intenté avant que le tribunal ne fasse droit à la demande de permission. La question dans les cas qui nous occupent est de savoir si l'art. 28 de la *LRC* a pour effet de suspendre le délai de prescription applicable au recours prévu à l'art. 138.3 de la *LVM*, dès le moment où le demandeur indique une intention de solliciter la permission du tribunal en vertu de l'art. 138.8 de la *LVM* dans le cadre d'un recours collectif pour déclaration inexacte en common law. Cette question a causé bien des soucis aux tribunaux de l'Ontario.

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III. Judicial History and Facts

A. *Timminco*

[19] These appeals trace back to the Court of Appeal's ruling in *Timminco*. The appeal in that case concerned misrepresentations that had allegedly occurred between March and November 2008. The plaintiff had initiated a class proceeding in the Ontario Superior Court in which he asserted a common law cause of action for secondary market misrepresentation. An intention to seek leave for a statutory claim under s. 138.3 *OSA* was also stated in the pleadings, but leave had not been sought as of February 2011. With the statutory claim in jeopardy because of the looming limitation period, the plaintiff moved, in March 2011, for an order declaring that the limitation period was suspended by reason of s. 28 *CPA*. The motion judge granted the order (2011 ONSC 8024), which was then appealed.

[20] This table illustrates the timeline of the events in *Timminco*:

| Alleged misrepresentations | March 17 to November 11, 2008 |
|---|---|
| Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and an intent to seek leave for s. 138.3 statutory action | May 14, 2009 |

III. Historique judiciaire et faits

A. *Timminco*

[19] Les présents pourvois tirent leur origine de l'arrêt *Timminco* de la Cour d'appel. Cet appel concernait des déclarations inexactes de faits qui auraient eu cours entre mars et novembre 2008. Le demandeur avait intenté en Cour supérieure de l'Ontario un recours collectif dans lequel il invoquait une cause d'action en common law pour déclaration inexacte de faits sur le marché secondaire. Une intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 de la *LVM* avait aussi été indiquée dans les actes de procédure, mais aucune telle permission n'avait été sollicitée jusqu'en février 2011. Comme le recours statutaire était compromis parce que le délai de prescription tirait à sa fin, le demandeur a sollicité, en mars 2011, une ordonnance portant que le délai de prescription était suspendu en application de l'art. 28 de la *LRC*. Le juge des requêtes a rendu l'ordonnance (2011 ONSC 8024), laquelle a été portée en appel par la suite.

[20] Le tableau ci-dessous illustre la chronologie des événements dans *Timminco* :

| Déclarations inexactes alléguées | 17 mars au 11 novembre 2008 |
|---|---|
| Dépôt, en vertu de la *LRC*, d'une déclaration dans laquelle le demandeur invoque une cause d'action en common law et indique son intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 | 14 mai 2009 |

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| | |
|---|---|
| Plaintiff requests case conference re limitation period | End of February, 2011 |
| Case conference | March 10, 2011 |
| Notice of motion filed seeking declaration that s. 138.14 limitation period is suspended and "conditional leave" to commence s. 138.3 action | March 14, 2011 |
| **Limitation period expires for statutory action** | **March 17 to November 11, 2011** |
| Leave motion heard | March 25, 2011 |
| Declaration of suspension granted by motion judge | March 31, 2011 |

| | |
|---|---|
| Le demandeur sollicite la tenue d'une conférence préparatoire pour débattre de la question de la prescription | Fin février 2011 |
| Conférence préparatoire | 10 mars 2011 |
| Avis de requête demandant un jugement déclarant que le délai de prescription prévu à l'art. 138.14 est suspendu et une « permission conditionnelle » pour intenter un recours en vertu de l'art. 138.3 | 14 mars 2011 |
| **Expiration du délai de prescription applicable à l'action statutaire** | **17 mars au 11 novembre 2011** |
| Audition de la requête | 25 mars 2011 |
| Déclaration de suspension accordée par le juge des requêtes | 31 mars 2011 |

[21] On February 16, 2012, Goudge J.A. held that under s. 28 *CPA*, a cause of action cannot be "asserted" until it can be enforced, and that in the case of a cause of action under Part XXIII.1 *OSA*, this is only possible after leave of the court is obtained. Goudge J.A. stressed that this interpretation of the provisions was the only one to produce textual coherence while also being consistent with the purposes of both the *OSA* and the *CPA*. To interpret "asserted" such that it includes a mere mention of an intention to seek leave, he concluded, would not be consistent with the ordinary meaning of the word and would produce results that the legislature could not have intended. For example, the limitation period would be suspended for the representative plaintiff in a class proceeding, but not for the same plaintiff in an individual proceeding. As a

[21] Le 16 février 2012, le juge Goudge concluait que, suivant l'art. 28 de la *LRC*, une cause d'action ne peut être « invoquée » avant de pouvoir être exercée et que dans le cas d'une cause d'action en vertu de la partie XXIII.1 de la *LVM*, on ne peut l'exercer qu'après avoir obtenu la permission du tribunal. Le juge Goudge soulignait que cette interprétation des dispositions était la seule cohérente sur le plan textuel tout en étant compatible avec les objets de la *LVM* et de la *LRC*. Il a donc conclu qu'interpréter le mot « invoquée » comme englobant la simple mention de l'intention de demander une permission ne s'accordait pas avec le sens ordinaire de ce mot et engendrerait des résultats que le législateur n'a pas pu souhaiter, comme la suspension du délai de prescription pour le représentant des demandeurs dans un recours collectif, alors

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result, Goudge J.A. ruled that leave must be granted before the Part XXIII.1 *OSA* statutory cause of action can be asserted within the meaning of s. 28 *CPA*, and that it is only then that the limitation period is suspended in favour of the representative plaintiff and the other class members.

B. *Post-Timminco Decisions of the Ontario Superior Court*

[22] The decision in *Timminco* seems to have taken the Ontario Bar by surprise, throwing a wrench in the works of three proceedings that were then pending before the Superior Court and are now being appealed to this Court. In each of these cases, the motion judge found that he or she was bound by *Timminco*, but the three judges then diverged entirely on whether relief was available to the plaintiffs either by way of an order made *nunc pro tunc* (a Latin expression meaning "now for then" that is used to indicate that an act has retroactive legal effect) or by application of the doctrine of special circumstances.

(1) *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225

(a) *Facts and Procedural Timeline*

[23] The plaintiffs allege that, between May 31 and December 6, 2007, the defendants failed to amply record and disclose the extent of CIBC's exposure to and position in the United States residential mortgage market as the subprime mortgage crisis unfolded. On July 22, 2008, the plaintiffs filed a statement of claim which contained a claim for a common law cause of action for misrepresentations and indicated that they intended to seek leave to proceed with the statutory action. After a series of case conferences and amendments to the statement of claim, the plaintiffs filed a motion seeking leave for the statutory claim on January 21, 2010 in which they stated that leave would be

que cette même personne ne pourrait pas bénéficier d'une telle suspension dans le cadre d'une instance individuelle. En conséquence, le juge Goudge a statué qu'une permission doit être accordée avant que la cause d'action en vertu de la partie XXIII.1 de la *LVM* puisse être invoquée au sens de l'art. 28 de la *LRC*, et que ce n'est qu'à ce moment-là que le délai de prescription est suspendu en faveur du représentant des demandeurs et des autres membres du groupe.

B. *Les décisions de la Cour supérieure de l'Ontario postérieures à l'arrêt Timminco*

[22] L'arrêt *Timminco* semble avoir pris le barreau de l'Ontario par surprise, portant un dur coup aux trois recours alors pendants devant la Cour supérieure et qui font maintenant l'objet des pourvois devant notre Cour. Dans toutes ces affaires, les juges des requêtes se sont estimés liés par l'arrêt *Timminco*, mais ils en sont venus à des conclusions entièrement différentes sur la possibilité ou non d'accorder un redressement aux demandeurs, soit au moyen d'une ordonnance *nunc pro tunc* — locution latine signifiant « maintenant pour alors » —, soit par application de la doctrine des circonstances spéciales.

(1) *Green c. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225

a) *Faits et chronologie des procédures*

[23] Les demandeurs allèguent que les défendeurs n'ont pas, entre le 31 mai et le 6 décembre 2007, dûment consigné et communiqué le niveau de vulnérabilité de CIBC et sa position sur le marché des hypothèques résidentielles aux États-Unis au moment où la crise des prêts hypothécaires à risque élevé est survenue. Le 22 juillet 2008, les demandeurs produisaient une déclaration fondée sur une cause d'action en common law, à savoir des déclarations inexactes, tout en indiquant leur intention de demander la permission d'aller de l'avant avec l'action statutaire. Après une série de conférences préparatoires et d'amendements apportés à

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sought *nunc pro tunc* if the limitation period were to expire. Discussions between counsel to schedule the leave and certification motions continued until it was settled after a case conference in March 2010 that the motions would be heard a year later. On January 15, 2011, after the plaintiffs had completed their record in support of their motions, it was agreed that the original hearing dates were impractical, and the hearing was accordingly rescheduled for February 2012.

[24] The ruling in *Timminco* was released on the penultimate day of the original hearing of the motions for leave and for certification in *CIBC*. As the defendants put it, the ruling was a "thunderbolt" in a case in which the limitation period had never been at issue (*CIBC*, at para. 475). Following *Timminco*, counsel made additional representations on the limitation period issue, and another hearing was held on April 5, 2012.

[25] This table illustrates the timeline of the events in *CIBC*:

| Alleged misrepresentations | May 31 to December 6, 2007 |
|---|---|
| Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and intent to seek leave for s. 138.3 statutory action | July 22, 2008 |

la déclaration, une requête visant à obtenir la permission d'intenter ce recours fut déposée le 21 janvier 2010, dans laquelle il était mentionné que la permission serait demandée *nunc pro tunc* advenant l'expiration du délai de prescription. Les pourparlers en vue de fixer l'audition de la requête pour permission et de celle en autorisation (aussi appelée « certification ») du recours collectif se sont poursuivis entre les avocats jusqu'à la tenue d'une conférence préparatoire en mars 2010, au cours de laquelle les dates d'audience ont été fixées pour l'année suivante. Le 15 janvier 2011, après que les demandeurs aient complété leur dossier à l'appui de leurs requêtes, il fut convenu que les dates d'audience initiales étaient peu pratiques, si bien que l'audience a été reportée en février 2012.

[24] L'arrêt *Timminco* fut rendu l'avant-dernier jour de l'audition initiale des requêtes pour permission et autorisation du recours collectif dans le dossier *CIBC*. Pour reprendre l'expression des défendeurs, la décision fut un [TRADUCTION] « coup de tonnerre » dans une cause où le délai de prescription n'avait jamais été un point contentieux (*CIBC*, par. 475). Après l'arrêt *Timminco*, les avocats formulèrent des observations supplémentaires sur le délai de prescription et une autre audience eut lieu le 5 avril 2012.

[25] Le tableau ci-dessous illustre la chronologie des événements dans *CIBC* :

| Déclarations inexactes alléguées | 31 mai au 6 décembre 2007 |
|---|---|
| Dépôt, en vertu de la *LRC*, d'une déclaration dans laquelle les demandeurs invoquent une cause d'action en common law et indiquent leur intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 | 22 juillet 2008 |

| | |
|---|---|
| Notice of motion seeking leave under s. 138.8 | January 21, 2010 |
| Case conference | March 17, 2010 |
| **Limitation period expires for statutory action** | **May 31 to December 6, 2010** |
| Plaintiffs' record completed | January 15, 2011 |
| Leave and certification motions heard | February 9, 10, 13-17; April 5, 2012 |
| *Timminco* released | February 16, 2012 |
| Hearing on limitation period issue | April 5, 2012 |

| | |
|---|---|
| Avis de requête sollicitant une permission en vertu de l'art. 138.8 | 21 janvier 2010 |
| Conférence préparatoire | 17 mars 2010 |
| **Expiration du délai de prescription applicable à l'action statutaire** | **31 mai au 6 décembre 2010** |
| Dossier des demandeurs complété | 15 janvier 2011 |
| Audition de la requête pour permission et de la requête en autorisation du recours collectif | 9, 10, 13-17 février; 5 avril 2012 |
| Arrêt *Timminco* | 16 février 2012 |
| Audience sur la question du délai de prescription | 5 avril 2012 |

(b) *Disposition*

[26] In his exhaustive ruling, Strathy J. (as he then was) considered the requirements for granting leave under s. 138.8 *OSA*: (1) that the action is being brought in good faith; and (2) that there is a reasonable possibility of success. Good faith, he held, requires an honest and reasonable belief that the claim has merit, and a genuine intent and capacity to pursue it. He found that the plaintiffs had met this requirement and that this had not been seriously challenged by the defendants. As to the reasonable possibility of success requirement, Strathy J. stated that it is a "relatively low threshold" (para. 373) and that the question to ask is "whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success" (para. 374). Had he applied this standard, Strathy J. would have granted the leave motion, but

b) *Décision*

[26] Dans un jugement exhaustif, le juge Strathy (maintenant Juge en chef de l'Ontario) a examiné les exigences à remplir pour qu'une permission visée à l'art. 138.8 de la *LVM* soit accordée : (1) l'action est intentée de bonne foi et (2) la possibilité raisonnable de succès. Il a conclu que l'exigence de la bonne foi consistait en une croyance honnête et raisonnable que le recours était fondé et comportait également une intention et une capacité véritables d'intenter et de mener à terme le recours; selon lui, les demandeurs respectaient cette exigence qui, toujours selon lui, n'a pas été sérieusement contestée par les défendeurs. Quant à l'exigence de la possibilité raisonnable de succès, le juge Strathy l'a décrite comme un [TRADUCTION] « critère préliminaire relativement peu exigeant » (par. 373), ajoutant que le tribunal devait se demander si, « eu égard à l'ensemble de la preuve présentée par les parties et compte tenu des limites du processus des requêtes,

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he found that he was bound by *Timminco*, as he saw no way to distinguish it from the case before him.

[27] Strathy J. went on to rule that he did not have jurisdiction to extend the limitation period either by issuing an order *nunc pro tunc* or by applying the doctrine of special circumstances. On the issue of *nunc pro tunc*, Strathy J. stated that the court has inherent jurisdiction to correct a slip or an oversight in the name of justice, but added that this case does not "strictly speaking" involve a slip, since the plaintiffs had recognized the possibility of the limitation period expiring and had assumed that their motion for leave would result in a *nunc pro tunc* order (para. 511). As regards both *nunc pro tunc* and the doctrine of special circumstances, Strathy J. found that he did not have jurisdiction, because (1) Part XXIII.1 *OSA* is designed to be a comprehensive code under which a limitation period begins to run upon the occurrence of objective events; (2) nothing in the legislation or in the judicial interpretation thereof suggests that the court has jurisdiction to make such an order; and (3) the general philosophy underlying the law of limitations in Ontario is one of clearly defined periods that are not subject to judge-made exceptions. As a result, he held that the limitation period for the plaintiffs' statutory action had expired and that no relief was available to them.

(2) *Silver v. IMAX*, 2012 ONSC 4881

(a) *Facts and Procedural Timeline*

[28] The plaintiffs allege that, between February 17 and March 9, 2006, the defendants made misrepresentations overstating IMAX Corp.'s revenue and

le recours des demandeurs est tellement faible ou a été réfuté par le défendeur avec tant de succès que le demandeur n'a aucune possibilité raisonnable de succès » (par. 374). S'il avait appliqué cette norme, le juge Strathy conclut qu'il aurait accordé la permission sollicitée. Il s'est toutefois estimé lié par l'arrêt *Timminco*, n'ayant vu aucun moyen de distinguer cet arrêt du dossier dont il était saisi.

[27] Le juge Strathy a également statué qu'il n'avait pas compétence pour proroger le délai de prescription, que ce soit en rendant une ordonnance *nunc pro tunc*, soit en appliquant la doctrine des circonstances spéciales. En ce qui a trait à la question de la doctrine *nunc pro tunc*, le juge Strathy a affirmé que le tribunal a compétence inhérente pour corriger une erreur ou un oubli au nom de la justice, mais a écrit que cette affaire ne concernait pas [TRADUCTION] « à proprement parler » une erreur, puisque les demandeurs avaient reconnu que le délai de prescription pouvait expirer et avaient présumé qu'une ordonnance *nunc pro tunc* serait rendue dans le cadre de leur requête pour permission (par. 511). Tant quant à la doctrine *nunc pro tunc* qu'à celle des circonstances spéciales, le juge Strathy a estimé qu'il n'avait pas compétence parce que : (1) la partie XXIII.1 de la *LVM* constitue un code complet, suivant lequel le délai de prescription commence à courir lorsque surviennent des faits objectifs; (2) rien dans la loi ou dans l'interprétation judiciaire de la loi ne suggère que les tribunaux auraient compétence pour rendre pareille ordonnance; (3) la philosophie générale sous-tendant les règles de la prescription en Ontario veut que les délais soient bien définis et qu'ils ne soient pas assujettis aux exceptions établies par les tribunaux. En conséquence, le juge Strathy a conclu que le délai de prescription applicable au recours statutaire des demandeurs était expiré et qu'aucun redressement ne pouvait leur être accordé.

(2) *Silver c. IMAX*, 2012 ONSC 4881

a) *Faits et chronologie des procédures*

[28] Les demandeurs allèguent qu'entre le 17 février et le 9 mars 2006, les défendeurs ont fait de fausses déclarations en gonflant les recettes et le

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net income for 2005. In their statement of claim, issued on September 20, 2006, the plaintiffs asserted a common law cause of action for misrepresentations and an intention to seek leave for a claim under s. 138.3 *OSA*. They served their motion for leave on November 28, 2006, and the motion record in February 2007. A hearing was originally scheduled for December 2007. However, delays ensued as the record became, in the motion judge's words, "complex and voluminous" (para. 9 (CanLII)). The parties requested that the leave motion be heard at the same time as the motion for certification and a motion under rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike certain common law causes of action from the statement of claim. Ultimately, the hearing on the three motions was concluded on December 19, 2008, though an additional attendance and further written submissions followed on the certification and rule 21 motions. It should be noted that as at December 19, 2008, 79 days remained of the three-year limitation period under s. 138.14.

bénéfice net d'IMAX Corp. pour l'année 2005. Dans leur déclaration déposée le 20 septembre 2006, les demandeurs ont invoqué une cause d'action fondée sur la common law pour déclarations inexactes, et ont indiqué leur intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 de la *LVM*. Ils ont signifié leur requête pour permission le 28 novembre 2006, puis leur dossier de requête en février 2007. L'audition devait initialement se tenir en décembre 2007. Toutefois, il y a eu des délais, le dossier étant devenu, pour reprendre les propos de la juge de première instance, [TRADUCTION] « complexe et volumineux » (par. 9 (CanLII)). Les parties ont demandé à ce que la requête pour permission soit instruite en même temps que la requête en autorisation du recours collectif et la requête en vertu de l'art. 21 des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, pour faire radier certaines des causes d'action en common law de la déclaration. Finalement, l'audition des trois requêtes s'est terminée le 19 décembre 2008, bien qu'une audition additionnelle ait eu lieu et que d'autres observations aient été présentées dans le cadre de la requête en autorisation du recours collectif et de celle fondée sur l'art. 21 des *Règles*. Il est important de noter qu'au 19 décembre 2008, il restait 79 jours à écouler au délai de trois ans imparti à l'art. 138.14.

[29] The judgment remained under reserve for nearly a year before van Rensburg J. (as she then was) granted leave in respect of the statutory cause of action on December 14, 2009. During that period, the motion judge had held a telephone conference in the course of which she raised the maxim *actus curiae neminem gravabit* — an act of the court will prejudice no one — in relation to the limitation period, and requested submissions from the parties, who agreed that the limitation period should be suspended while the decision was under reserve.

[29] Le délibéré sur ces requêtes s'est poursuivi pendant près d'un an jusqu'à ce que la juge van Rensburg (maintenant juge à la Cour d'appel) accorde, le 14 décembre 2009, la permission d'intenter le recours statutaire. Durant cette période, la juge de première instance a tenu une conférence téléphonique au cours de laquelle elle a soulevé la question de la doctrine de l'*actus curiae neminem gravabit* — un acte du tribunal ne doit pas porter préjudice à une partie au litige — relativement au délai de prescription et a demandé aux parties de lui présenter leurs observations. Les parties ont alors convenu qu'il y avait lieu de suspendre le délai de prescription pendant toute la durée du délibéré.

[30] After the granting of leave, it took another two years, until December 12, 2011, before the plaintiffs filed a fresh statement of claim in which they pleaded the statutory cause of action and added the following

[30] Après que la permission fut accordée, il a fallu deux autres années, soit jusqu'au 12 décembre 2011, avant que les demandeurs ne déposent une nouvelle déclaration dans laquelle ils

individuals as defendants: Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble. The defendants filed a statement of defence on February 6, 2012. This statement was amended on February 16, 2012, the day of *Timminco*'s release, to assert that the limitation period applicable to the plaintiffs' statutory right of action had expired.

[31] This table illustrates the timeline of the events in *IMAX*:

| Alleged misrepresentations | February 17 to March 9, 2006 |
|---|---|
| Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and intent to seek leave for s. 138.3 statutory action | September 20, 2006 |
| Notice of motion seeking leave under s. 138.8 | November 28, 2006 |
| Leave and certification motions heard | December 15-19, 2008 |
| **Limitation period expires for statutory action** | **February 17 to March 9, 2009** |
| Leave granted and class action certified | December 14, 2009 (the order was backdated to December 19, 2008 on August 27, 2012) |

plaidaient la cause d'action statutaire et par laquelle ils ajoutaient les personnes suivantes comme défendeurs : Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron et Kathryn A. Gamble. Les défendeurs déposaient une défense le 6 février 2012, laquelle fut modifiée le 16 février 2012, jour du prononcé de l'arrêt *Timminco*, pour prétendre que le délai de prescription applicable au droit d'action légal des demandeurs était expiré.

[31] Le tableau ci-dessous illustre la chronologie des événements dans *IMAX* :

| Déclarations inexactes alléguées | 17 février au 9 mars 2006 |
|---|---|
| Dépôt, en vertu de la *LRC*, d'une déclaration dans laquelle les demandeurs invoquent une cause d'action en common law et indiquent leur intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 | 20 septembre 2006 |
| Avis de requête sollicitant une permission en vertu de l'art. 138.8 | 28 novembre 2006 |
| Audition de la requête pour permission et de la requête en autorisation du recours collectif | 15-19 décembre 2008 |
| **Expiration du délai de prescription applicable à l'action statutaire** | **17 février au 9 mars 2009** |
| Permission accordée et recours collectif autorisé | 14 décembre 2009 (le 27 août 2012, l'ordonnance a été antidatée au 19 décembre 2008) |

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| | |
|---|---|
| Fresh statement of claim pleading statutory cause of action and adding new defendants filed | December 12, 2011 |
| *Timminco* released | February 16, 2012 |
| Leave order amended *nunc pro tunc*: leave effective December 19, 2008 | August 27, 2012 |

(b) *Disposition*

[32] In her decision to amend the leave order, van Rensburg J., too, found that she was bound by *Timminco*, but she parted company with Strathy J. by finding that she had an inherent jurisdiction to grant the motion for leave *nunc pro tunc*. She wrote that absent an explicit prohibition of a *nunc pro tunc* order, a statute must be understood to contemplate the possibility of such an order. Furthermore, she drew attention to the inclusion of s. 138.14 in Sch. B to the *Limitations Act, 2002*, S.O. 2002, c. 24, which according to her lists provisions in respect of which common law doctrines such as *nunc pro tunc* continue to apply. On her reading of the jurisprudence on *nunc pro tunc* orders, the case before her was clearly one in which the court has the ability to ensure that a plaintiff's rights will not be arbitrarily affected by matters outside his or her control, such as the court's schedule. Van Rensburg J. added that limitation periods are not meant to foreclose causes of action that have been "actively and vigorously pursued" (para. 85). She granted the plaintiffs leave *nunc pro tunc* effective December 19, 2008, the date argument was concluded on the leave motion, and authorized the plaintiffs to amend their statement of claim to assert the statutory claim, except against two of the proposed defendants, Mr. Utay and Mr. Fuchs. Van Rensburg J. excluded them from the *nunc pro tunc* order as a result of her finding in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.), at

| | |
|---|---|
| Dépôt de la déclaration amendée plaidant une cause d'action statutaire et ajoutant de nouveaux défendeurs | 12 décembre 2011 |
| Arrêt *Timminco* | 16 février 2012 |
| Ordonnance modifiée accordant la permission *nunc pro tunc* : la permission prend effet le 19 décembre 2008 | 27 août 2012 |

b) *Décision*

[32] Dans sa décision de modifier l'ordonnance accordant la permission, la juge van Rensburg s'est elle aussi estimée liée par l'arrêt *Timminco*, mais s'est dissociée du juge Strathy en concluant qu'elle avait compétence inhérente pour accueillir la requête pour permission *nunc pro tunc*. Elle a écrit que, sauf disposition expresse interdisant le prononcé d'une ordonnance *nunc pro tunc*, la loi devait être comprise comme permettant de rendre pareille ordonnance. De plus, elle a souligné l'ajout de l'art. 138.14 à l'ann. B de la *Loi de 2002 sur la prescription des actions*, L.O. 2002, c. 24, laquelle, de l'avis de la juge, contient une liste des dispositions à l'égard desquelles les doctrines de common law comme celle de *nunc pro tunc* subsistent. Selon sa compréhension de la jurisprudence sur les ordonnances *nunc pro tunc*, l'affaire dont elle était saisie en était clairement une où le tribunal pouvait intervenir afin que les droits du demandeur ne soient pas arbitrairement compromis par des questions indépendantes de la volonté de ce dernier comme le calendrier du tribunal. La juge van Rensburg a ajouté que les délais de prescription ne visent pas à faire obstacle aux causes d'action [TRADUCTION] « activement et vigoureusement invoquées » (par. 85). Elle a accordé aux demandeurs la permission *nunc pro tunc* au 19 décembre 2008, le jour de la conclusion du débat sur la requête, et leur a permis d'amender leur déclaration pour invoquer le recours statutaire,

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para. 24, that the plaintiffs had no reasonable possibility of success against them.

[33] Additionally, van Rensburg J. held that the doctrine of special circumstances was not applicable in this case. In her estimation, the doctrine is meant to allow amendments to an existing statement of claim which add new causes of action where the limitation period has been suspended by the commencement of the action, whereas the plaintiffs in the case before her were seeking to amend their statement of claim to add a claim which stemmed from the same facts but required leave. She found that the doctrine was "analytically irrelevant", since it did not "fit within the framework of a limitation period such as that provided for in s. 138.14" (para. 77).

(3) *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264

(a) *Facts and Procedural Timeline*

[34] The defendant Celestica Inc. is an electronics manufacturer incorporated in Ontario that trades shares on both the Toronto Stock Exchange ("TSX") and the New York Stock Exchange. The plaintiffs Trustees of the Millwright Regional Council of Ontario Pension Trust Fund ("Millwright Trustees") purchased Celestica shares on both exchanges, whereas the plaintiffs Nabil Berzi and Huacheng Xing purchased Celestica shares only on the TSX. The alleged misrepresentations relate to the progress and success of a $225 to $275 million restructuring of the company that took place between January 27, 2005 and January 30, 2007.

sauf à l'égard de deux des défendeurs proposés, MM. Utay et Fuchs. La juge van Rensburg a refusé d'inclure ces défendeurs dans l'ordonnance *nunc pro tunc* en raison de la conclusion qu'elle a tirée au par. 24 de la décision *Silver c. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (C.S.J. Ont.), selon laquelle les demandeurs n'avaient aucune possibilité raisonnable de succès contre eux.

[33] De plus, la juge van Rensburg a conclu que la doctrine des circonstances spéciales ne s'appliquait pas dans cette affaire. Selon elle, cette doctrine vise à autoriser des modifications à une déclaration existante pour ajouter de nouvelles causes d'action lorsque la prescription a été suspendue en raison de l'introduction du recours, alors que les demandeurs en l'espèce cherchaient à insérer dans leur déclaration une réclamation qui découlait des mêmes faits, mais qui nécessitait une permission. Elle a estimé que la doctrine n'était [TRADUCTION] « pas pertinente sur le plan analytique » puisqu'elle « ne s'inscrivait pas dans le cadre d'un délai de prescription comme celui prévu à l'art. 138.14 » (par. 77).

(3) *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) c. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264

a) *Faits et chronologie des procédures*

[34] La défenderesse Celestica Inc. est un fabricant de produits électroniques constitué en société en Ontario, dont les actions sont transigées à la Bourse de Toronto (« TSX ») et à la Bourse de New York. Les demandeurs fiduciaires de la caisse de retraite du Millwright Regional Council of Ontario (« fiduciaires de Millwright ») ont acheté des actions de Celestica sur les deux bourses tandis que les demandeurs Nabil Berzi et Huacheng Xing n'ont acheté des actions de cette société que sur la TSX. Les déclarations inexactes de faits alléguées concernent l'évolution et le succès d'une restructuration de la société de 225 à 275 millions de dollars, et ces déclarations auraient été faites entre le 27 janvier 2005 et le 30 janvier 2007.

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[35] The Millwright Trustees launched a class action in the United States on March 2, 2007. On August 20, 2007, Mr. Xing filed a statement of claim in Ontario for a class proceeding concerning a common law cause of action for misrepresentation in which he pleaded an intention to seek leave in respect of a statutory claim under s. 138.3 *OSA*; Mr. Berzi did the same on August 27, 2008. The Millwright Trustees' U.S. class action was dismissed in District Court on October 14, 2010 after a pivotal ruling in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to the effect that "foreign plaintiffs who purchased securities on foreign exchanges where there was no trading of those securities on any domestic U.S. exchange could no longer pursue actions under the U.S. *Securities and Exchange Act of 1934*, 15 U.S.C. § 78a" (*Celestica*, at para. 33). In response, the Millwright Trustees filed a statement of claim for a class proceeding concerning a common law cause of action for misrepresentation in Ontario on April 8, 2011, alleging the same misrepresentations in Celestica's public disclosure documents as in their U.S. case. On December 29, 2011, the U.S. Second Circuit Court of Appeals unanimously reversed the dismissal of the Millwright Trustees' action and remanded that action for further proceedings. At that time, the pending actions of Mr. Xing and Mr. Berzi in Ontario remained inactive.

[35] Les fiduciaires de Millwright ont intenté un recours collectif aux États-Unis le 2 mars 2007. Le 20 août 2007, M. Xing déposait en Ontario une déclaration dans le cadre d'un recours collectif pour déclaration inexacte en common law, où il indiquait son intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 de la *LVM*. Monsieur Berzi faisait de même le 27 août 2008. Le recours collectif intenté par les fiduciaires de Millwright aux É.-U. fut rejeté en cour de district le 14 octobre 2010, après le prononcé de l'arrêt clé *Morrison c. National Australia Bank Ltd.*, 561 U.S. 247 (2010), dans laquelle le juge a conclu que [TRADUCTION] « les demandeurs étrangers qui ont acheté des valeurs mobilières sur les bourses étrangères — du fait que celles-ci n'étaient négociées sur aucune bourse américaine interne — ne pouvaient désormais plus instituer de recours sur le fondement de la *Securities and Exchange Act of 1934*, 15 U.S.C. § 78a, des États-Unis » (*Celestica*, par. 33). Les fiduciaires de Millwright réagirent en déposant le 8 avril 2011 une déclaration dans le cadre d'un recours collectif pour déclaration inexacte en common law en Ontario, dans laquelle ils alléguaient les mêmes informations inexactes contenues dans les documents dévoilés publiquement par Celestica que dans leur dossier américain. Le 29 décembre 2011, la Cour d'appel du deuxième circuit des É.-U. infirmait à l'unanimité le rejet du recours des fiduciaires de Millwright et renvoyait l'affaire pour qu'elle suive son cours. Pendant ce temps, les recours de MM. Xing et Berzi pendants en Ontario étaient restés au point mort.

[36] The release of *Timminco* on February 16, 2012 spurred the plaintiffs into action on the Canadian front. The Millwright Trustees filed a motion for leave under s. 138.8 *OSA* on February 24, 2012. Perell J. then ordered the consolidation of the Millwright Trustees, Xing and Berzi cases on April 13, 2012. A motion to strike all claims as statute-barred was heard in October of that year.

[36] L'arrêt *Timminco* rendu le 16 février 2012 a incité les demandeurs à agir du côté canadien. Le 24 février 2012, les fiduciaires de Millwright déposaient une requête pour permission en vertu de l'art. 138.8 de la *LVM*. Le juge Perell a alors ordonné le regroupement des actions des fiduciaires de Millwright, de M. Xing et de M. Berzi le 13 avril 2012. Une requête demandant le rejet de toutes les actions au motif qu'elles étaient prescrites fut entendue en octobre 2012.

[37] This table illustrates the timeline of the events in *Celestica*:

[37] Le tableau ci-dessous illustre la chronologie des événements dans *Celestica* :

| | |
|---|---|
| Alleged misrepresentations | January 27, 2005 to January 30, 2007 |
| Millwright Trustees file class action in U.S. | March 2, 2007 |
| Xing files pursuant to the *CPA* a statement of claim for common law cause of action and pleading intent to seek leave for s. 138.3 statutory action | August 20, 2007 |
| Defendants in U.S. class action bring motion to strike | March 17, 2008 |
| Berzi files statement of claim for common law cause of action and pleading intent to seek leave for s. 138.3 action | August 27, 2008 |
| **Limitation period expires for statutory action** | **January 27, 2008 to January 30, 2010** |
| U.S. Supreme Court decision in *Morrison* | June 24, 2010 |
| District Court dismisses Millwright Trustees' U.S. class proceeding | October 14, 2010 |

| | |
|---|---|
| Déclarations inexactes alléguées | 27 janvier 2005 au 30 janvier 2007 |
| Dépôt d'un recours collectif par les fiduciaires de Millwright aux É.-U. | 2 mars 2007 |
| Dépôt par M. Xing, en vertu de la *LRC*, d'une déclaration dans laquelle il invoque une cause d'action en common law et indique son intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 | 20 août 2007 |
| Les défendeurs américains présentent une requête en rejet | 17 mars 2008 |
| Dépôt par M. Berzi, en vertu de la *LRC*, d'une déclaration dans laquelle il invoque une cause d'action en common law et indique son intention de demander la permission d'intenter un recours en vertu de l'art. 138.3 | 27 août 2008 |
| **Expiration du délai de prescription applicable à l'action statutaire** | **27 janvier 2008 au 30 janvier 2010** |
| Arrêt *Morrison* de la Cour suprême des É.-U. | 24 juin 2010 |
| La Cour de district rejette le recours collectif intenté par les fiduciaires de Millwright aux É.-U. | 14 octobre 2010 |

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| | |
|---|---|
| Millwright Trustees file statement of claim for common law cause of action | April 8, 2011 |
| U.S. Court of Appeals reverses dismissal of U.S. class action | December 29, 2011 |
| *Timminco* released | February 16, 2012 |
| Notice of motion seeking leave under s. 138.8 *OSA* filed by Millwright Trustees | February 24, 2012 |
| Xing, Berzi and Millwright Trustees actions consolidated | April 13, 2012 |

(b) *Disposition*

[38] Perell J. ruled that as a result of *Timminco*, the statutory claim was time-barred, but he found that the doctrine of special circumstances could be applied so as to grant leave *nunc pro tunc* were it necessary to do so. Broadly, in his view, the doctrine is not limited to the addition of new causes of action, as van Rensburg J. had suggested, but is, rather, a discretionary doctrine that can be adapted to the factual circumstances of a particular case. In addition, he wrote, the doctrine of special circumstances is a common law doctrine which is applicable to the s. 138.14 *OSA* limitation period as a result of that provision's inclusion in Sch. B to the *Limitations Act, 2002*. Perell J. then held that the following special circumstances existed in the case before him:

| | |
|---|---|
| Dépôt par les fiduciaires de Millwright d'une déclaration invoquant une cause d'action en common law | 8 avril 2011 |
| La Cour d'appel des É.-U. infirme le rejet du recours collectif américain | 29 décembre 2011 |
| Arrêt *Timminco* | 16 février 2012 |
| Dépôt par les fiduciaires de Millwright d'un avis de requête sollicitant la permission en vertu de l'art. 138.8 de la *LVM* | 24 février 2012 |
| Regroupement des actions de M. Xing, de M. Berzi et des fiduciaires de Millwright | 13 avril 2012 |

b) *Décision*

[38] Le juge Perell a statué que, selon *Timminco*, le recours statutaire était prescrit, mais il a conclu que la doctrine des circonstances spéciales pouvait s'appliquer de façon à accorder la permission *nunc pro tunc* quand il était nécessaire de le faire. De façon générale, selon le juge Perell, la doctrine ne se limite pas à l'ajout de nouvelles causes d'action, comme le suggérait la juge van Rensburg, mais constitue plutôt une doctrine discrétionnaire adaptable aux faits propres à une affaire donnée. Il ajoute que cette doctrine en est aussi une de common law, applicable au délai imparti à l'art. 138.14 de la *LVM* puisque cette disposition figure à l'ann. B de la *Loi de 2002 sur la prescription des actions*. Le juge Perell a ensuite conclu que les circonstances spéciales suivantes étaient présentes dans le cas dont il était saisi :

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. . . (1) the defendants have known of the factual allegations against them since 2007, including the Part XXIII.1 claims; (2) the defendants have had a full opportunity to investigate the claims against them; (3) there is no prejudice to the defendants; (4) the law has changed unexpectedly — twice — each time to the plaintiffs' and class' detriment; (5) the plaintiffs' Part XXIII.1 claims do not raise new factual allegations; and (6) the defendants did not raise limitation periods in any of the class proceedings until now. [para. 145]

[39] Perell J. therefore ruled that these special circumstances would justify granting leave for the statutory action *nunc pro tunc* were it to be granted at a later date. Leave was eventually granted to the plaintiffs with respect to some of the alleged misrepresentations a year and a half later: 2014 ONSC 1057, 49 C.P.C. (7th) 12.

C. *Ontario Court of Appeal Decision (2014 ONCA 90)*

[40] The Ontario Court of Appeal convened a panel of five judges to consider the appeals from the decisions on the motions in the three cases and to determine whether *Timminco* should be overturned.

[41] Feldman J.A., writing for a unanimous court, held that for the purposes of s. 28 *CPA*, asserting a claim should be understood to mean "to invoke a legal right" rather than solely to "enforce" one, particularly considering that any ambiguity in interpreting a limitation provision must be resolved in favour of the plaintiff (paras. 45-47). The court found that this interpretation would not produce an indefinite suspension, which was a concern Goudge J.A. had raised in *Timminco*, because the diligence of the defendants and the class action case management judge would ensure that stalled proceedings are dismissed. Feldman J.A. reasoned that although this reading of s. 28 *CPA* produces the "unusual, if not anomalous effect" (para. 51) that the limitation period will be suspended if a s. 138.3 statutory

[TRADUCTION] . . . (1) les défendeurs connaissaient les allégations de fait formulées contre eux depuis 2007, de même que les réclamations fondées sur la partie XXIII.1; (2) les défendeurs avaient eu amplement l'occasion d'examiner les réclamations présentées contre eux; (3) les défendeurs n'ont subi aucun préjudice; (4) le droit a changé de manière inattendue — deux fois — chaque fois au détriment des demandeurs et du groupe; (5) les réclamations des demandeurs fondées sur la partie XXIII.1 ne soulèvent aucune nouvelle allégation de fait; (6) les défendeurs n'ont invoqué les délais de prescription dans aucun des recours collectifs avant aujourd'hui. [par. 145]

[39] Le juge Perell a en conséquence statué que ces circonstances spéciales justifieraient l'octroi *nunc pro tunc* de la permission d'intenter le recours statutaire, si elle devait être accordée à une date ultérieure. La permission fut finalement accordée aux demandeurs relativement à certaines des déclarations inexactes alléguées un an et demi plus tard : 2014 ONSC 1057, 49 C.P.C. (7th) 12.

C. *La décision de la Cour d'appel de l'Ontario (2014 ONCA 90)*

[40] La Cour d'appel de l'Ontario a convoqué une formation de cinq juges pour instruire les appels interjetés contre les décisions sur les requêtes dans les trois dossiers et pour décider si l'arrêt *Timminco* devait être infirmé.

[41] S'exprimant au nom de la Cour d'appel à l'unanimité, la juge Feldman a conclu que le terme « invoquée » figurant à l'art. 28 de la *LRC* devait être compris comme signifiant [TRADUCTION] « invoquer un droit », et non simplement « le faire valoir », surtout en tenant compte du fait que toute ambiguïté dans l'interprétation d'un délai de prescription devait être résolue en faveur du demandeur (par. 45-47). La Cour d'appel a conclu que cette interprétation n'aurait pas comme conséquence la suspension indéfinie du recours collectif, comme le craignait le juge Goudge dans l'arrêt *Timminco*, puisque des défendeurs diligents et le juge chargé de la gestion de l'instance feraient en sorte que les recours frivoles soient rejetés. La juge Feldman a expliqué que même si cette interprétation de l'art. 28

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claim is asserted in a class proceeding, but not if it is asserted in an individual action, this effect followed from a statutory scheme that was optimized for class proceedings. Feldman J.A. also expressed concern for judicial economy, worrying that all members of a class would be required to start their own actions while waiting to see if leave would be granted in the class proceeding. Overall, the Court of Appeal ruled that its new interpretation was consistent with the purposes of the *CPA* and the *OSA*, and of limitation periods generally.

[42] As a result of the Court of Appeal's conclusion that *Timminco* had been wrongly decided, the statutory actions in *CIBC*, *IMAX* and *Celestica* were each held not to be statute-barred. Feldman J.A. also upheld the interpretation of the "reasonable possibility" threshold for granting leave under s. 138.8 *OSA* given by Strathy J. in *CIBC*.

D. *Legislative Amendment*

[43] Following the Court of Appeal's decision in the cases at bar, the Ontario legislature amended s. 138.14 *OSA* to include the following subs. (2):

(2) A limitation period established by subsection (1) in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court and resumes running on the date,

(a) the court grants leave or dismisses the motion and,

(i) all appeals have been exhausted, or

(ii) the time for an appeal has expired without an appeal being filed; or

(b) the motion is abandoned or discontinued.

de la *LRC* a pour conséquence que le délai de prescription soit suspendu dès qu'un recours visé par l'art. 138.3 est exercé par le biais d'un recours collectif, alors que ce ne serait pas le cas d'un recours individuel, cette conséquence « inhabituelle, voire anormale » (par. 51) est néanmoins conforme au régime législatif optimisé pour les recours collectifs. La juge Feldman a également indiqué se soucier de l'économie des ressources judiciaires, craignant que les membres du groupe soient tous tenus d'intenter leur propre action en attendant de voir si la permission sollicitée serait accordée. Dans l'ensemble, la Cour d'appel a jugé que cette nouvelle interprétation concordait avec les objets de la *LRC* et de la *LVM* ainsi qu'avec les délais de prescription en général.

[42] La Cour d'appel ayant conclu que l'arrêt *Timminco* était mal fondé, les recours statutaires intentés dans les dossiers *CIBC*, *IMAX* et *Celestica* ont tous été jugés non prescrits. La juge Feldman a également confirmé l'interprétation qu'avait donnée le juge Strathy dans *CIBC* du critère préliminaire de la « possibilité raisonnable » applicable en matière de permission suivant l'art. 138.8 de la *LVM*.

D. *Modification législative*

[43] À la suite de la décision de la Cour d'appel dans les présents dossiers, le législateur ontarien a modifié l'art. 138.14 de la *LVM* afin d'y ajouter le par. (2) ci-dessous :

(2) Le délai de prescription créé par le paragraphe (1) à l'égard d'une action est suspendu à la date où un avis de motion en autorisation visé à l'article 138.8 est déposé au tribunal et recommence à courir à la date où, selon le cas :

a) le tribunal accorde l'autorisation ou rejette la motion et l'une des conditions suivantes est remplie :

(i) toutes les voies d'appel ont été épuisées,

(ii) le délai d'appel a expiré sans qu'un appel ait été interjeté;

b) la motion fait l'objet d'un désistement.

IV. Issues

[44] There are two issues common to each of these appeals:

1. Does s. 28 *CPA* operate to suspend the limitation period applicable to a statutory claim under s. 138.3 *OSA* at the time when an intention to seek leave under s. 138.8 *OSA* is pleaded in a proposed class proceeding alleging a common law misrepresentation claim?

2. If not, can the plaintiffs obtain relief in the form of an order granting leave *nunc pro tunc* or pursuant to the doctrine of special circumstances?

[45] In addition, there are two issues raised only by the defendants in *CIBC* which I will discuss at the end of these reasons:

1. Was the threshold test for leave under s. 138.8 *OSA* properly interpreted and applied?

2. Can a class proceeding based on a common law cause of action be the preferable procedure for resolving a secondary market misrepresentation claim?

V. Analysis

A. *Interpretation of the Legislation*

[46] In *Timminco* and the cases at bar, the Ontario Court of Appeal advanced two different interpretations of s. 28 *CPA*. According to its decision in the cases at bar, pleading the relevant facts and an intention to seek leave for a statutory cause of action under s. 138.3 *OSA* is sufficient to trigger s. 28 *CPA* and suspend the limitation period for all class members, including the representative plaintiff. According to *Timminco*, leave must be granted under s. 138.8 *OSA* before the limitation period can be

IV. Questions en litige

[44] Deux questions en litige sont communes à chacun des pourvois :

1. L'article 28 de la *LRC* a-t-il pour effet de suspendre le délai de prescription applicable à un recours statutaire en vertu de l'art. 138.3 de la *LVM* à partir du moment où le demandeur indique son intention de demander la permission prévue à l'art. 138.8 de cette loi dans un recours collectif projeté pour déclaration inexacte en common law?

2. Dans la négative, le demandeur peut-il obtenir réparation sous forme d'une ordonnance accordant la permission *nunc pro tunc* ou par l'application de la doctrine des circonstances spéciales?

[45] De plus, deux questions sont soulevées uniquement par les défendeurs dans le dossier *CIBC*, questions analysées à la fin des présents motifs :

1. Le critère préliminaire applicable à la permission visée par l'art. 138.8 de la *LVM* a-t-il été dûment interprété et appliqué?

2. Un recours collectif fondé sur une cause d'action en common law est-il le meilleur moyen pour faire valoir un recours fondé sur une déclaration inexacte de faits sur le marché secondaire?

V. Analyse

A. *Interprétation de la législation*

[46] Dans *Timminco* et les affaires qui nous occupent, la Cour d'appel de l'Ontario a proposé deux interprétations différentes de l'art. 28 de la *LRC*. Suivant sa décision dans les présents dossiers, il suffit d'alléguer les faits pertinents et d'indiquer une intention de demander la permission d'exercer un recours en vertu de l'art. 138.3 de la *LVM* pour que l'art. 28 de la *LRC* opère et suspende le délai de prescription à l'égard de tous les membres du groupe, y compris leur représentant. Suivant la décision rendue

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suspended under s. 28 *CPA*. Neither of these interpretations matches the subsequent amendment to s. 138.14 *OSA*, which provides that the limitation period for a claimant is suspended upon the filing of a notice of motion seeking leave under s. 138.8.

(1) Ordinary and Grammatical Meaning of the Words

[47] In my opinion, there is no ambiguity in the interaction of s. 28 *CPA* with Part XXIII.1 *OSA*. The ordinary and grammatical meaning of the words clearly confirms the ruling in *Timminco* regarding the aforementioned provisions. Furthermore, an analysis of the legislative context does not support the Court of Appeal's decision in the cases at bar. Feldman J.A.'s interpretation of s. 28 *CPA* goes against the very purpose of s. 138.14 *OSA*, namely to impose an additional mechanism designed to screen out strike suits as early as possible in the litigation process.

[48] Section 28 *CPA* requires "a cause of action asserted" in order for the limitation period to be suspended in favour of the class members "on the commencement of the class proceeding". Section 138.8(1) *OSA* is clear, however: "No action may be commenced under s. 138.3 without leave of the court . . . ." On its face, the timing is clear. Unless leave is granted, a statutory action may not be commenced under Part XXIII.1 *OSA*, and it is not until the action commences that a limitation period can be suspended under s. 28 *CPA*. In short, I am of the view that, under s. 138.8(1) *OSA*, a statutory action commenced without having first obtained leave is a nullity and a statutory claim under Part XXIII.1 *OSA* cannot be validly commenced without leave of the court. Therefore, the limitation period cannot be suspended in favour of the class members under s. 28 *CPA* before leave is granted.

dans *Timminco*, il faut obtenir la permission visée à l'art. 138.8 de la *LVM* avant que le délai de prescription ne soit suspendu en vertu de l'art. 28 de la *LRC*. Aucune de ces interprétations ne concorde avec la modification apportée subséquemment à l'art. 138.14 de la *LVM*, à l'effet que le délai de prescription est suspendu dès le dépôt d'un avis de requête pour permission en vertu de l'art. 138.8.

(1) Sens ordinaire et grammatical des mots

[47] À mon avis, il n'y a aucune ambiguïté entre l'art. 28 de la *LRC* et la partie XXIII.1 de la *LVM*. Le sens ordinaire et grammatical des mots confirme clairement la décision rendue dans *Timminco* quant aux dispositions susmentionnées. De plus, l'analyse du contexte législatif n'appuie pas la décision de la Cour d'appel dans les présents dossiers. L'interprétation donnée par la juge Feldman à l'art. 28 de la *LRC* va à l'encontre de l'objet même de l'art. 138.14 de la *LVM*, soit d'établir un mécanisme supplémentaire de filtrage visant à écarter dès que possible dans le processus les poursuites opportunistes et dénuées de fondement.

[48] L'article 28 de la *LRC* exige « une cause d'action invoquée » pour que le délai de prescription soit suspendu en faveur des membres du groupe « à l'introduction du recours collectif ». Le paragraphe 138.8(1) de la *LVM* est toutefois clair : « Une action ne peut être intentée en vertu de l'article 138.3 qu'avec l'autorisation du tribunal . . . » À première vue, la chronologie est claire. Sans la permission, un recours ne peut être intenté en vertu de la partie XXIII.1 de la *LVM*, et ce n'est qu'après l'introduction du recours que le délai de prescription peut être suspendu en application de l'art. 28 de la *LRC*. Bref, j'estime que, suivant le par. 138.8(1) de la *LVM*, un recours statutaire intenté sans permission préalable est nul et qu'un recours prévu par la partie XXIII.1 de la *LVM* ne peut être introduit valablement sans la permission du tribunal. Le délai de prescription ne peut donc être suspendu en faveur des membres du groupe en application de l'art. 28 de la *LRC* avant que la permission n'ait été accordée.

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[49] The Court of Appeal's ruling in the instant cases, if accepted, would create unnecessary inconsistencies between the two pieces of legislation and within the *OSA* itself. The result of Feldman J.A.'s interpretation is that a plaintiff proceeding by way of a class action would have more rights than a plaintiff suing in his or her individual capacity. Yet class actions are merely procedural vehicles, designed to extend the substantive rights of the representative plaintiff to the entire class, not to create substantive rights for the class which an individual plaintiff would not otherwise enjoy since they do not exist.

[50] It is also quite troubling that the effect of the Court of Appeal's ruling in the instant cases is that a class proceeding asserting a statutory cause of action can commence before a judge has granted the initial leave to allow the statutory action itself to commence. This is plainly putting the cart before the horse: a class proceeding cannot commence before the action itself commences.

[51] I also agree with the interpretation of the meaning of the word "assert" in s. 28 *CPA* proposed by Goudge J.A. in *Timminco*. The plaintiffs argue that to trigger the application of s. 28 *CPA*, it is sufficient to merely plead the material facts of the claim which are common to the statutory and common law causes of action together with an intention to seek leave under s. 138.8 *OSA*. Although it is true that the definition of "cause of action" is the set of facts that give rise to a legal right of action, I am of the view that the *assertion* of a cause of action must be premised on the existence of a "right of action". In this sense, the meaning of the word "assert", plucked and isolated from the context of the provision, is a red herring. In *Méthot v. Montreal Transportation Commission*, [1972] S.C.R. 387, the relevant limitation provision required that a written notice be provided before an action was commenced. This Court held that "the notice which is required is not simply a procedural step. It is part of the very formation of the right of action" (p. 396). The same reasoning applies here with respect to the leave requirement, and I do not share Karakatsanis J.'s view that that case dealt

[49] Accepter la décision de la Cour d'appel dans les présents dossiers créerait des divergences non nécessaires entre les deux textes de loi et à l'intérieur de la *LVM* elle-même. Selon l'interprétation de la juge Feldman, le demandeur qui choisirait le véhicule (ou mécanisme) procédural qu'est le recours collectif aurait plus de droits que le demandeur engageant une poursuite individuelle. Or, les recours collectifs ne sont que des véhicules (ou mécanismes) procéduraux conçus pour étendre les droits substantiels du représentant des demandeurs au groupe, et non pour créer au bénéfice du groupe des droits substantiels dont un demandeur particulier ne pourrait jouir autrement, puisqu'inexistants.

[50] Il est aussi particulièrement troublant de constater que la décision de la Cour d'appel dans les présents dossiers permettrait l'introduction d'un recours collectif invoquant une cause d'action statutaire avant que le juge n'ait accordé la permission d'intenter le recours statutaire lui-même. Cela revient clairement à mettre la charrue devant les bœufs : un recours collectif ne peut être introduit avant que l'action puisse l'être.

[51] Je souscris en outre à l'interprétation que le juge Goudge propose, dans *Timminco*, de donner au mot « invoquée » figurant à l'art. 28 de la *LRC*. Les demandeurs soutiennent que, pour que l'art. 28 de la *LRC* s'applique, il suffit simplement d'alléguer les faits essentiels de la réclamation, tant ceux qui sont communs au recours statutaire qu'à la cause d'action en common law, en plus d'indiquer une intention de demander une permission en vertu de l'art. 138.8 de la *LVM*. S'il est vrai que la « cause d'action » s'entend des faits à l'origine du droit d'action, j'estime que l'*assertion* d'une cause d'action doit reposer sur l'existence d'un « droit d'action ». En ce sens, la signification du mot « invoquée », extrait et isolé du contexte de la disposition, n'est qu'une diversion. Dans *Méthot c. Commission de Transport de Montréal*, [1972] R.C.S. 387, la disposition pertinente en matière de prescription exigeait qu'on donne un avis écrit avant d'intenter une action. Selon la Cour, « l'avis qui est exigé ne constitue pas une simple mesure de procédure. Il fait partie de la formation même du droit d'action » (p. 396). Le même raisonnement vaut en l'espèce en ce qui

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with a different issue. Given the clear wording of s. 138.3 *OSA*, pleading a factual matrix and an intention to seek leave under s. 138.8 *OSA* cannot amount to the assertion of the statutory cause of action.

[52] Furthermore, as can be seen from the legislative history, the original draft of what is now s. 28 *CPA* read "a cause of action advanced in a proceeding" before it was later changed to "a cause of action asserted in a class proceeding" in the final piece of legislation: *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), at p. 47. In my opinion, this change is evidence that the legislature intended "assert" to represent a more forceful concept than a mere mention or advancement of a cause of action, since the change would otherwise have been unnecessary.

[53] Viewing these provisions together, there is no ambiguity to speak of in their interaction. Section 28 *CPA* does not operate to suspend the limitation period applicable to a cause of action until the commencement of a class proceeding in which the cause of action is asserted. This commencement cannot occur under Part XXIII.1 *OSA* until leave is granted. In this sense, the leave requirement of s. 138.8 *OSA* is a hurdle which must be cleared before s. 28 *CPA* can operate to suspend the limitation period. The necessity of the leave requirement is equally applicable for an individual plaintiff and for a representative plaintiff in a class proceeding. However, in the latter case, once leave has been granted to one plaintiff, the members of the group benefit from it and the limitation period is suspended for all.

[54] Finally, considering the entire context, I am also of the view that pleading an intention to seek leave under s. 138.8 *OSA* cannot have the effect of

concerne l'obligation d'obtenir une permission et je ne partage pas l'avis de la juge Karakatsanis selon lequel cette affaire portait sur une autre question. Vu le libellé clair de l'art. 138.3 de la *LVM*, alléguer un fondement factuel et indiquer une intention de demander la permission en vertu de l'art. 138.8 de la *LVM* ne peuvent signifier invoquer la cause d'action statutaire.

[52] Qui plus est, comme en témoigne l'historique législatif, le projet initial de l'actuel art. 28 de la *LRC* contenait l'expression [TRADUCTION] « une cause d'action alléguée dans une instance » avant que celle-ci ne soit ultérieurement remplacée par « une cause d'action invoquée dans un recours collectif » dans le texte de loi final : *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), p. 47. À mon sens, cette modification témoigne du fait que le législateur voulait que le terme « invoquer » exprime davantage qu'une simple mention ou allégation d'une cause d'action, puisqu'autrement, la modification aurait été inutile.

[53] Lorsque ces dispositions sont considérées dans leur ensemble, il n'y a aucune ambiguïté dans leur interaction. L'article 28 de la *LRC* n'a pas pour effet de suspendre le délai de prescription applicable à une cause d'action avant que le recours collectif invoquant la cause d'action ne soit introduit. Ce recours collectif ne peut être introduit en vertu de la partie XXIII.1 de la *LVM* jusqu'à ce que la permission soit accordée. En ce sens, l'obligation d'obtenir la permission visée à l'art. 138.8 de la *LVM* est un obstacle qui doit être franchi avant que l'art. 28 de la *LRC* puisse avoir pour effet de suspendre le délai de prescription. La nécessité d'obtenir une permission préalable s'applique tant au demandeur individuel qu'au représentant des demandeurs dans un recours collectif. Mais dans ce dernier cas, dès que la permission est accordée à un demandeur, les membres du groupe en bénéficient et le délai de prescription est suspendu à l'endroit de tous les membres du groupe.

[54] Enfin, compte tenu de l'ensemble du contexte, je suis également d'avis qu'indiquer une intention de demander la permission en vertu de

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suspending the limitation period prior to the time when leave is granted by the court. At that time, and only at that time, the representative plaintiff will have the benefit of suspension of the limitation period, and a class proceeding in respect of the statutory claim may be commenced.

(2) Legislative Purpose and Structure

[55] Even if we were to assume that there is an ambiguity in the wording of the relevant provisions — which there is not — the legislative purpose and structure of those provisions would nonetheless support my conclusion. In other words, "the scheme of the Act, the object of the Act, and the intention of Parliament" are consistent with the ordinary and grammatical meaning of the words, which is another reason not to depart from that meaning: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. To hold that s. 28 *CPA* operates to suspend a limitation period for a statutory claim under s. 138.3 *OSA* before leave is obtained would be to circumvent the carefully calibrated purposive balance struck by the limits to the statutory action provided for in Part XXIII.1 *OSA*. Such an interpretation would render s. 138.8 *OSA* ineffective, since the suspension of the limitation period, although not permanent, could nevertheless delay the decision on the merits of leave for several months or even for years, as the cases at bar demonstrate.

[56] In these appeals, the legislative context has three components that must be interwoven as seamlessly as possible: the purposes attributed to limitation periods generally; the *CPA*, which gives structure and form to class action proceedings; and Part XXIII.1 *OSA*, enacted subsequently to the *CPA*, which lays out the scheme for the statutory claim for secondary market misrepresentation. The goal of interpretation is to maximize the coherence of these

l'art. 138.8 de la *LVM* ne peut, selon moi, avoir pour effet de suspendre le délai de prescription avant que la permission n'ait été accordée par le tribunal. À ce moment-là, et à ce moment-là seulement, le représentant des demandeurs pourra bénéficier d'une suspension du délai de prescription, et un recours collectif fondé sur la cause d'action statutaire pourra être intenté.

(2) Objet et structure de la loi

[55] Même à supposer que le libellé des dispositions pertinentes comporte une ambiguïté — laquelle n'existe pas —, le but et la structure de ces dispositions étayent ma conclusion. En d'autres termes, [TRADUCTION] « l'économie de la loi, son objet et l'intention du législateur » sont compatibles avec le sens ordinaire et grammatical des mots, ce qui constitue une autre raison de ne pas s'en écarter : E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; voir *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21. Conclure que l'art. 28 de la *LRC* a pour effet de suspendre un délai de prescription applicable à un recours visé par l'art. 138.3 de la *LVM* avant que la permission n'ait été obtenue contournerait l'équilibre téléologique soigneusement atteint par les limites imposées au recours statutaire par la partie XXIII.1 de la *LVM*. Pareille interprétation rendrait inefficace l'art. 138.8 de la *LVM*, puisque la suspension du délai de prescription, quoique temporaire, pourrait néanmoins retarder la décision sur le bien-fondé de la demande de permission de plusieurs mois, voire des années, comme le démontrent les dossiers qui nous occupent.

[56] Dans les présents pourvois, le contexte législatif comporte trois éléments qui doivent coexister et s'agencer le plus harmonieusement possible : les objectifs des délais de prescription en général; la *LRC*, qui encadre la structure et la forme des recours collectifs; la partie XXIII.1 de la *LVM*, adoptée après la *LRC*, qui établit et encadre le mécanisme du recours pour déclaration inexacte de faits sur le marché secondaire. L'objectif de l'interprétation est

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three components to the extent possible within the range of ordinary and grammatical meaning of the text.

(a) *Limitation Periods*

[57] This Court has generally recognized that limitation periods have three purposes known as the certainty, evidentiary and diligence rationales: *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 64-67, per McLachlin J.; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-31, per La Forest J. Limitation periods serve "(1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion": P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123.

[58] Clearly, it is desirable that litigation be accurate and certain, given that the passage of time dims memories and erodes evidence, and also that the risk of error grows as an adjudicator is further removed from the cause of action. Furthermore, after a certain time, possible defendants may be unaware of the need to preserve potentially enlightening or even exonerating pieces of evidence. Finally, it is appropriate to expect plaintiffs to assert their claims diligently and to be cognizant of their circumstances and of the extent of their control over them. Modern limitations legislation is therefore based on a recognition that limitation periods, in order to be effective, need to be final. This is the other side of the coin, the practical consequence of limitation periods that can make the application of a limitations statute seem harsh: *Novak*, at para. 8, per Iacobucci and Major JJ., dissenting.

de maximiser la cohérence de ces trois éléments dans la mesure du possible en fonction du sens ordinaire et grammatical du texte.

a) *Délais de prescription*

[57] Notre Cour a généralement reconnu que les délais de prescription poursuivent trois objectifs, soit la certitude, la préservation de la preuve et la diligence : *Novak c. Bond*, [1999] 1 R.C.S. 808, par. 64-67, la juge McLachlin; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, p. 29-31, le juge La Forest. Les délais de prescriptions servent [TRADUCTION] « (1) à favoriser l'exactitude et la certitude dans le règlement des demandes; (2) à assurer l'équité aux personnes qui peuvent être contraintes de se défendre contre des réclamations fondées sur des éléments de preuve périmés; (3) à inciter les personnes qui pourraient vouloir intenter des recours à faire preuve de diligence en les intentant en temps opportun » : P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (2e éd. 2014), p. 123.

[58] Manifestement, il est souhaitable d'assurer l'exactitude et la certitude dans les litiges, non seulement parce que le passage du temps estompe la mémoire et fragilise la preuve mais aussi parce que le risque d'erreurs augmente lorsque le décideur s'éloigne dans le temps de la cause d'action. De plus, après un certain temps, les éventuels défendeurs deviennent peut-être moins conscients de la nécessité de conserver des éléments de preuve susceptibles d'éclairer le tribunal ou qui peuvent même être exonératoires. Enfin, il est approprié de s'attendre à ce qu'un demandeur exerce ses droits d'action avec diligence tout en étant conscient des circonstances et de la mesure dans laquelle il les contrôle. Les dispositions législatives modernes en matière de prescription sont fondées sur le principe que, pour être efficace, le délai de prescription doit être définitif. C'est là l'autre côté de la médaille; la conséquence pratique des délais de prescription peut faire paraître dure l'application de dispositions législatives sur la prescription des actions : *Novak*, par. 8, les juges Iacobucci et Major, dissidents.

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(b) *Class Proceedings Act*

[59] The Ontario Law Reform Commission identified three benefits of the class action procedure: judicial economy, increased access to the courts and modification of the behaviour of potential wrongdoers (*Report on Class Actions* (1982), vol. I, at pp. 117-46). Where there are multiple claims, the number of actions can be reduced via the consolidating mechanism of class proceedings. The aggregation of the class helps overcome social, psychological and economic barriers to redress. The possibility of a class action discourages unjust enrichment and encourages an internalization of costs. Finally, class proceedings extend the substantive rights of a representative plaintiff to the class in order to make the legal system more efficient, more accessible and more effective.

[60] The purpose of s. 28 *CPA* is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, 92 C.P.C. (6th) 301, at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108, 288 O.A.C. 355, at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.

[61] In *Logan v. Canada (Minister of Health)*, 2003 CanLII 20308 (Ont. S.C.J.), it was these goals which were held to justify a reading of s. 28 *CPA* to the effect that the commencement of a class proceeding is not delayed until the time of certification: paras. 14-24, aff'd *Logan* (Ont. C.A.), at paras. 21 and 24. *Logan* therefore confirms that the

b) *Loi sur les recours collectifs*

[59] La Commission de réforme du droit de l'Ontario a identifié trois avantages du recours collectif : l'économie des ressources judiciaires, un meilleur accès aux tribunaux et la modification des comportements de délinquants potentiels (*Report on Class Actions* (1982), vol. I, p. 117-146). Lorsqu'il existe plusieurs réclamations, leur nombre peut être réduit par le mécanisme de regroupement qu'est le recours collectif. Le regroupement des membres aide à surmonter les obstacles d'ordre social, psychologique et économique au redressement. La possibilité d'intenter un recours collectif décourage l'enrichissement injustifié et favorise la répartition des coûts. Enfin, les recours collectifs étendent en faveur du groupe les droits substantiels du représentant des demandeurs afin de rendre le système de justice plus efficace et accessible.

[60] Le but de l'art. 28 de la *LRC* est de mettre les membres éventuels du groupe à l'abri de l'expiration du délai de prescription jusqu'à ce que soit déterminée la possibilité d'intenter le recours collectif, écartant ainsi la nécessité pour chaque membre du groupe d'intenter une action individuelle afin de préserver ses droits : *Coulson c. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, 92 C.P.C. (6th) 301, par. 49, cité avec approbation en appel, 2012 ONCA 108, 288 O.A.C. 355, par. 11. Une fois que la protection du droit existe et est établie par le représentant éventuel du groupe au moment où il invoque une cause d'action, les membres du groupe bénéficient de cette protection aussi longtemps que la poursuite du droit en question demeure active. Cette disposition vise nettement à favoriser l'économie des ressources judiciaires tout en préservant l'accès aux tribunaux.

[61] Dans la décision *Logan c. Canada (Minister of Health)*, 2003 CanLII 20308 (C.S.J. Ont.), ce sont ces objectifs qui, selon le tribunal, justifient d'interpréter l'art. 28 de la *LRC* de manière à ce que la date de commencement d'un recours collectif ne soit pas reportée jusqu'à son autorisation : par. 14-24, conf. par *Logan* (C.A. Ont.), par. 21 et 24. Par

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time of commencement precedes that of certification.

[62] Most importantly, as this Court has repeatedly ruled, a class action provision cannot operate to create or modify substantive legal rights: *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 52; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 111; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 105-8. This principle forms a vital foundation for all class proceedings in Canada. Limitation periods and rights of action are such substantive legal rights.

(c) *Part XXIII.1 OSA*

[63] Part XXIII.1 *OSA* represents a carefully calibrated statutory head of liability for secondary market misrepresentation. Section 1.1 *OSA* provides that the *OSA*'s overall purposes are twofold: to protect investors "from unfair, improper or fraudulent practices", but also to guarantee fairness, efficiency and confidence in capital markets. Part XXIII.1 was developed progressively through a series of reports and other documents which ultimately culminated in the adoption of the statutory liability scheme in 2002. Three of the documents are vital to this appeal: (i) Toronto Stock Exchange Committee on Corporate Disclosure (the "Allen Committee"), *Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997) (the "*Allen Committee Report*"); (ii) Ontario Securities Commission, "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market — Notice and Request for Comment" (1998), 21 OSCB 3335 and 3367 (the "1998 Draft Legislation"); and (iii) Canadian Securities Administrators ("CSA"), "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383.

conséquent, la décision *Logan* confirme que la date de commencement du recours collectif précède son autorisation.

[62] Plus important encore, comme la Cour l'a conclu à maintes reprises, une disposition législative en matière de recours collectif ne peut servir à créer ou à modifier des droits juridiques substantiels : *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214, par. 52; *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392, par. 111; *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34, [2007] 2 R.C.S. 801, par. 105-108. Ce principe est à la base de tous les recours collectifs au Canada. Les délais de prescription et les droits d'action constituent de tels droits juridiques substantiels.

c) *Partie XXIII.1 de la LVM*

[63] La partie XXIII.1 de la *LVM* a instauré un régime de responsabilité statutaire soigneusement équilibré dans le cas de la déclaration inexacte de faits sur le marché secondaire. À son art. 1.1, la *LVM* indique qu'elle a deux objets généraux : protéger les investisseurs « contre les pratiques déloyales, irrégulières ou frauduleuses », mais aussi garantir l'équité et l'efficacité des marchés financiers et la confiance en ceux-ci. La partie XXIII.1 a vu le jour progressivement, à la suite d'une série de rapports et d'autres documents qui ont abouti à l'adoption du régime de responsabilité statutaire en 2002. Trois de ces documents sont extrêmement pertinents en l'espèce : (i) Committee on Corporate Disclosure de la Bourse de Toronto (le « comité Allen »), *Final Report — Responsible Corporate Disclosure : A Search for Balance* (1997) (le « *Rapport du comité Allen* »); (ii) Commission des valeurs mobilières de l'Ontario, « Proposal for a Statutory Civil Remedy for Investors in the Secondary Market — Notice and Request for Comment » (1998), 21 OSCB 3335 et 3367 (l'« avant-projet de loi de 1998 »); (iii) Autorités canadiennes en valeurs mobilières (« ACVM »), « Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change" », avis nº 53-302 des ACVM, reproduit dans (2000), 23 OSCB 7383.

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[64] In its report, the Allen Committee identified the failure by public corporations to comply with continuous disclosure requirements as a problem from the perspective both of actual incidents and of public perception. It concluded that the regulatory sanctions available at the time were an "inadequate deterrent" (conclusion (ii)) and that the common law remedies available to aggrieved investors for misleading disclosure in secondary trading markets were so onerous that they were "as a practical matter largely academic" (conclusion (iii)): p. vii.

[65] As a solution, the Allen Committee proposed a statutory scheme for secondary market misrepresentation liability in which it would not be necessary to prove reliance on the misrepresentation. Its recommendations were informed by two goals — deterrence of corporate non-disclosure and compensation for wronged investors — related to the identified problem, but it is important to recognize that the Committee knowingly struck a precise balance between these goals. Its report concluded as follows at p. vii:

> (v) Faced with the task of designing recommendations from the perspective of strengthening deterrence (conclusion (ii)) or creating a route to meaningful compensation of injured investors (conclusion (iii)), the Committee has adopted improved deterrence as its goal in the belief that effective deterrence will logically reduce the need for investor compensation.

This understanding would later be reiterated in CSA Notice 53-302, which includes the following comment: "The CSA accept that deterrence should outweigh compensation but, at the same time, any deterrent effect requires a plausible element of compensation" (p. 7391, fn. 23). In order to achieve this balance, the Committee proposed the establishment of a series of limits on damages and liability, as well as the creation of express statutory

[64] Dans son rapport, le comité Allen considérait le défaut de certaines sociétés ouvertes de respecter leurs obligations d'information continue comme un problème tant dans les faits que du point de vue de la perception du public. Le comité concluait que les sanctions réglementaires prévues à l'époque constituaient un [TRADUCTION] « moyen de dissuasion inadéquat » (conclusion (ii)), et que les recours offerts en common law aux investisseurs lésés pour communication d'information trompeuse sur les marchés secondaires étaient tellement contraignants qu'ils étaient, « en pratique, essentiellement théoriques » (conclusion (iii)) : p. vii.

[65] À titre de solution, le comité Allen a proposé un régime de responsabilité statutaire en matière de déclaration inexacte de faits sur le marché secondaire suivant lequel il ne serait pas nécessaire de prouver que le demandeur s'est fié aux déclarations qui lui ont été faites. Les recommandations du comité s'inspiraient de deux objectifs découlant du problème identifié — dissuader les sociétés de ne pas respecter leurs obligations d'information et indemniser les investisseurs lésés — mais il est important de noter que le comité a sciemment instauré un équilibre précis entre ces objectifs. Ainsi, dans son rapport, le comité Allen concluait comme suit à la p. vii :

[TRADUCTION]

> (v) Appelé à établir des recommandations dans le but de renforcer la dissuasion (conclusion (ii)) ou de créer un moyen d'indemniser adéquatement les investisseurs lésés (conclusion (iii)), le comité a pour objectif d'améliorer les moyens de dissuasion dans l'espoir que la dissuasion efficace réduira logiquement la nécessité d'indemniser les investisseurs.

Cette conclusion fut réitérée plus tard dans l'avis nº 53-302 des ACVM, où il est indiqué que [TRADUCTION] « [l]es ACVM reconnaissent que la dissuasion devrait l'emporter sur l'indemnisation, mais d'autre part, tout effet dissuasif exige un élément plausible d'indemnisation » : p. 7391, note 23. Afin d'atteindre cet équilibre, le comité a proposé une série de limites quant aux dommages-intérêts et à la responsabilité ainsi que la création de moyens de

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defences. To give priority to compensation would have led to a different set of recommendations and limits, as can be seen from the dissenting statement of Philip Anisman in the *Allen Committee Report*: pp. 85-124.

[66] The limitation period in s. 138.14 *OSA*, which was added by the CSA in 2000 through proposed amendments to legislation in response to the 1998 Draft Legislation (see App. C of the CSA Notice 53-302 (the "2000 Draft Legislation"), at p. 7429), was originally modeled upon the limitation period for general civil liability in s. 138 *OSA*. It was expressly designed to run without regard for the "plaintiff's knowledge of the facts giving rise to the cause of action": 1998 Draft Legislation, at p. 3384.

[67] The leave requirement for actions under Part XXIII.1 *OSA* was developed by the CSA and reported in CSA Notice 53-302. This requirement arose out of a concern for the potential of U.S.-style "strike suits" in Canada. Strike suits are meritless actions launched in order to coerce targeted defendants into unjust settlements. The Allen Committee had concluded that the legal environment in Canada was sufficiently different from the United States to prevent a flood of unmeritorious claims: pp. 26-27.

[68] The CSA nonetheless concluded that the depth of public concern and some examples of "entrepreneurial litigation" in Canada justified further measures to prevent strike suits: CSA Notice 53-302, at p. 7389. It proposed a screening mechanism that would require plaintiffs to obtain leave in order to assert a statutory cause of action under the *OSA* by satisfying the court that the action was being brought in good faith and had a reasonable possibility of success. The overriding policy concern was for long-term shareholders, who are unfairly affected by the volatility of share prices that results from spurious

défense expressément conférés par la loi. Accorder la priorité à l'indemnisation aurait donné lieu à un ensemble de recommandations et de restrictions différentes, comme le démontre la déclaration dissidente de Philip Anisman figurant dans le *Rapport du comité Allen* lui-même : p. 85-124.

[66] Ajouté par les ACVM en 2000 au moyen de modifications proposées à la loi en réponse à l'avant-projet de loi de 1998 (voir ann. C de l'avis nº 53-302 des ACVM (l'« avant-projet de loi de 2000 »), p. 7429), le délai de prescription prévu à l'art. 138.14 de la *LVM* était calqué au départ sur le délai de prescription relatif à la responsabilité civile générale fixé à l'art. 138 de la *LVM*. Ce délai devait expressément commencer à courir sans égard à la question de savoir si [TRADUCTION] « le demandeur connaît les faits à l'origine de la cause d'action » : avant-projet de loi de 1998, p. 3384.

[67] L'obligation d'obtenir une permission pour le recours visé à la partie XXIII.1 de la *LVM* a été créée par les ACVM et elle est consignée dans leur avis nº 53-302. Cette obligation découle de la crainte que des « poursuites opportunistes et dénuées de fondement » comme il en existe aux États-Unis soient intentées au Canada. Les poursuites opportunistes et dénuées de fondement sont des actions non fondées intentées en vue de contraindre des défendeurs ciblés à conclure un règlement injuste. Le comité Allen avait conclu que l'environnement juridique au Canada était suffisamment différent de celui des États-Unis pour prévenir une vague de demandes absolument non fondées : p. 26-27.

[68] Les ACVM ont néanmoins conclu que l'intérêt public et certains [TRADUCTION] « litiges entrepreneuriaux » au Canada justifiaient l'adoption de mesures additionnelles pour prévenir les poursuites opportunistes et dénuées de fondement : avis nº 53-302 des ACVM, p. 7389. Un mécanisme de filtrage a donc été proposé, suivant lequel le demandeur serait tenu d'obtenir une permission pour pouvoir intenter un recours en vertu de la *LVM*, en prouvant à la satisfaction du tribunal que le recours envisagé était de bonne foi et avait une chance raisonnable de succès. Les ACVM s'inquiétaient principalement

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claims. In setting out the nature and the components of this mechanism, the CSA stressed the importance of screening out unmeritorious actions *as early as possible* in the litigation process:

The CSA have also introduced in the 2000 Draft Legislation a new provision designed to screen out, as early as possible in the litigation process, unmeritorious actions (section 7 of the 2000 Draft Legislation). This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit.

The new screening provision would require a plaintiff to obtain leave of the court in order to bring an action. Before granting leave, the court must be satisfied that the action (i) is being brought in good faith and (ii) has a reasonable prospect of success at trial.

This screening mechanism, coupled with the new provision described earlier that would require court approval of a settlement agreement are procedural protections that supplement the "loser pays" cost and proportionate liability provisions retained from the 1998 Draft Legislation. Taken together, these elements of the 2000 Draft Legislation should ensure that any exercise of the statutory right of action occurs in a litigation environment different from that in the United States and less conducive to coercive strike suits. [Emphasis added; footnotes omitted; p. 7390.]

[69] In sum, Part XXIII.1 *OSA* strikes a delicate balance between various market participants. The interests of potential plaintiffs and defendants and of affected long-term shareholders have been weighed

des actionnaires à long terme, injustement touchés par la volatilité des prix des actions imputable aux demandes sans fondement. En exposant la nature et les composantes de ce mécanisme, les ACVM insistaient sur l'importance d'écarter les actions non fondées *dès que possible* dans le processus :

[TRADUCTION] Les ACVM ont aussi inséré dans l'avant-projet de loi de 2000 une nouvelle disposition visant à écarter les actions sans fondement dès le début de la procédure judiciaire (article 7 de l'avant-projet de loi de 2000). Ce mécanisme de filtrage vise non seulement à réduire les possibilités d'une décision judiciaire défavorable si la cause se révèle sans fondement, mais plus important encore, à faire en sorte d'éviter les recours non fondés, et d'éviter que les défendeurs y consacrent du temps et de l'argent, ou à faire en sorte que l'on mette fin au recours au début du processus. En faisant en sorte que les défendeurs puissent raisonnablement s'attendre à ce que la permission d'intenter toute action non fondée soit refusée, l'avant-projet de loi de 2000 devrait permettre aux défendeurs de repousser plus facilement les demandeurs qui tentent de les contraindre à négocier le règlement au comptant qui, bien souvent, est le véritable objectif d'une poursuite opportuniste et dénuée de fondement.

La nouvelle disposition sur le filtrage obligerait le demandeur à obtenir la permission du tribunal afin d'intenter une action. Avant d'accorder cette permission, le tribunal doit être convaincu que l'action (i) est intentée de bonne foi et (ii) a une possibilité raisonnable d'être accueillie au procès.

Ce mécanisme de filtrage, conjugué à la nouvelle disposition décrite auparavant qui rendrait obligatoire l'approbation par le tribunal d'un règlement et les mesures de protection procédurales qui complètent les dispositions portant imputation des dépens à la partie déboutée et responsabilité proportionnelle tirées de l'avant-projet de loi de 1998. Ensemble, ces éléments de l'avant-projet de loi de 2000 devraient faire en sorte que tout exercice du droit d'action légal se fasse dans un milieu judiciaire différent de celui des États-Unis et moins propice aux poursuites opportunistes, dénuées de fondement et coercitives. [Je souligne; notes de bas de page omises; p. 7390.]

[69] Bref, la partie XXIII.1 de la *LVM* instaure un équilibre délicat entre les différents acteurs du marché. Les intérêts des demandeurs et des défendeurs éventuels, ainsi que des actionnaires à long terme

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conscientiously and deliberately in light of a desired precise balance between deterrence and compensation. The legislative history reveals a long, meticulous development of this balance, one that found expression in all the limits built into the scheme.

(d) *Analysis*

[70] In my opinion, a careful consideration of the context of limitation periods, the *CPA* and Part XXIII.1 *OSA* reveals that the Court of Appeal's decision in the instant cases is not only at odds with the ordinary and grammatical meaning of the words of the provisions at issue but also broadly undermines the legislative structures and the purposes at stake in these appeals.

[71] It is particularly troubling to see the anomalous result produced by the decision of the Court of Appeal in these cases, namely that a plaintiff could improve his or her position by filing a class proceeding asserting the Part XXIII.1 *OSA* cause of action, thereby causing the limitation period to be suspended by s. 28 *CPA* where it would not otherwise have been possible to do so had the same plaintiff filed an individual lawsuit. The Court of Appeal justified this result on the basis that Part XXIII.1 *OSA* is optimized for class proceedings, but did so in quoting a passage from the *Allen Committee Report* which merely states that combining class actions with the statutory scheme would provide ample protection against extortionate actions. I accept that Part XXIII.1 *OSA* is optimized for class proceedings in the sense that the statutory action that Part creates does not require proof that the plaintiff relied on the misrepresentation. However, this should not be used to undermine the strict limitation period provided for in s. 138.14 *OSA*, which is not supposed to be suspended until leave is granted.

[72] The Court of Appeal wrote in the cases at bar that it was concerned about judicial economy

touchés, ont été soupesés consciencieusement et délibérément dans l'optique d'un équilibre précis et voulu entre la dissuasion et l'indemnisation. L'historique législatif révèle que cet équilibre est le résultat d'un exercice long et méticuleux, équilibre exprimé dans toutes les limites intégrées au régime.

d) *Analyse*

[70] Je suis d'avis qu'un examen attentif du contexte des délais de prescription, de la *LRC* et de la partie XXIII.1 de la *LVM* révèle que la décision de la Cour d'appel de l'Ontario dans les présents dossiers non seulement va à l'encontre du sens ordinaire et grammatical du texte des dispositions en cause, mais mine considérablement la structure et les objectifs du régime statutaire en jeu dans les présents pourvois.

[71] Il est particulièrement troublant de constater le résultat anormal produit par la décision de la Cour d'appel dans les présents dossiers : un demandeur pourrait améliorer son sort en déposant un recours collectif invoquant la cause d'action prévue à la partie XXIII.1 de la *LVM*, ce qui suspendrait le délai de prescription en application de l'art. 28 de la *LRC* alors que le même délai de prescription n'aurait pu être suspendu si le même demandeur avait engagé une poursuite individuelle. La Cour d'appel a justifié ce résultat en disant que la partie XXIII.1 de la *LVM* est optimisée pour les recours collectifs, mais elle l'a fait en citant un extrait du *Rapport du comité Allen* indiquant tout simplement que la combinaison des recours collectifs et du régime statutaire constituait une protection suffisante contre les actions ayant pour but de soutirer un règlement. Je conviens que la partie XXIII.1 de la *LVM* est optimisée pour les recours collectifs en ce sens que le droit d'action qu'elle crée n'oblige pas le demandeur à prouver qu'il s'est fié aux déclarations qui lui ont été faites. Toutefois, cette caractéristique ne devrait pas servir à miner le délai de prescription strict fixé à l'art. 138.14 de la *LVM*, lequel est censé courir sans suspension jusqu'à ce que la permission soit accordée.

[72] Dans les présents dossiers, la Cour d'appel s'est dite motivée par un souci d'économie des

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and access to justice; it noted that the ruling in *Timminco* would force potential class members to initiate their own individual actions in order to protect their rights before leave is obtained in the class proceeding. Although I accept the importance of judicial economy as articulated by the Court of Appeal in *Logan* and *Coulson*, the rationale for those decisions cannot extend beyond the fundamental limits of class proceedings.

[73] As I mentioned above, class actions are procedural mechanisms which can only *extend* the substantive rights of the representative plaintiff to the other class members. The only way s. 28 *CPA* can protect the other members is by affording them the substantive protection already enjoyed by the representative plaintiff. Before there is a right of action or a suspension of the limitation period flowing from the operation of the statutory scheme itself, the *CPA* cannot be interpreted in such a way as to create either one.

[74] Karakatsanis J. states that "[w]ithout s. 28, the commencement of a proceeding by a representative plaintiff would only suspend the limitation period with respect to that plaintiff; the limitation period governing other potential class members would continue to run during the certification proceedings" (para. 175). I agree, but in the case of class actions alleging secondary market misrepresentations, the representative plaintiff, acting on his or her own, must first obtain leave in order for the limitation period to be suspended. My reading of s. 28 *CPA* simply maintains this requirement for s. 138.3 *OSA* statutory claims, while extending the suspension to all other potential class members once leave is granted. In this sense, s. 28 *CPA* still "shelters the rights of potential class plaintiffs under the umbrella of the representative plaintiff's action" (para. 176), but it forces the representative plaintiff to proceed expeditiously to obtain leave. This interpretation promotes the purposes of the *CPA*, is compatible with the purpose and operation of Part XXIII.1 *OSA*

ressources judiciaires et d'accès à la justice; elle a fait remarquer que la décision dans *Timminco* obligerait les membres éventuels du groupe à intenter leur propre action individuelle afin de protéger leurs droits avant que la permission ne soit obtenue pour le recours collectif. Bien que je reconnaisse l'importance de l'économie des ressources judiciaires telle que l'a formulée la Cour d'appel dans les arrêts *Logan* et *Coulson*, le raisonnement adopté dans ces décisions ne peut avoir une portée dépassant les limites fondamentales des recours collectifs.

[73] Comme je l'ai déjà mentionné, les recours collectifs sont des véhicules (ou mécanismes) procéduraux qui peuvent uniquement *étendre* les droits substantiels du représentant des demandeurs aux autres membres du groupe. L'article 28 de la *LRC* ne protège les autres membres qu'en leur conférant la même protection substantielle dont jouit déjà le représentant. Avant qu'il n'y ait de droit d'action ou suspension du délai de prescription résultant de l'opération du régime statutaire lui-même, la *LRC* ne peut être interprétée de façon à créer l'un ou l'autre.

[74] La juge Karakatsanis souligne qu'en général, « [s]ans l'art. 28, l'introduction d'un recours par un représentant des demandeurs n'aurait pour effet de suspendre le délai de prescription que pour ce représentant seulement; le délai de prescription applicable aux autres membres éventuels du groupe continuerait de courir pendant l'instance de certification » (par. 175). Je suis d'accord mais, dans le cas des recours collectifs alléguant une cause d'action statutaire pour déclaration inexacte de faits sur le marché secondaire, le représentant des demandeurs agissant pour lui-même doit d'abord obtenir la permission pour que le délai de prescription soit suspendu. Mon interprétation de l'art. 28 de la *LRC* ne fait que maintenir cette exigence pour les réclamations fondées sur l'art. 138.3 de la *LVM*, tout en permettant à tous les autres membres éventuels du groupe de bénéficier de la suspension au moment où la permission est accordée. En ce sens, l'art. 28 de la *LRC* « abrite [toujours] les droits d'éventuels demandeurs du groupe sous le parapluie de l'action

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and allows the class proceeding to remain an effective vehicle for secondary market liability claims.

du représentant des demandeurs » (par. 176), mais oblige le représentant des demandeurs à procéder rapidement pour obtenir la permission. Cette interprétation favorise l'atteinte des objectifs de la *LRC*, s'harmonise avec l'objet et l'application de la partie XXIII.1 de la *LVM* et fait en sorte que le recours collectif demeure un véhicule efficace pour intenter les recours en responsabilité liés au marché secondaire.

[75] The interpretation proposed by my colleague and by the Court of Appeal in the cases at bar gives priority to the objectives of the *CPA* at the price of contradicting the ordinary and grammatical meaning of the words of the provisions and upsetting the specific balance struck in Part XXIII.1 *OSA* even though those objectives had already been taken into account in enacting the legislation providing for the statutory claim. Part XXIII.1 *OSA* is the more recent legislation; it creates a scheme that is intended to be comprehensive, and was crafted with the *CPA* in mind. The purposes associated with the *CPA* — judicial economy, access to the courts and behaviour modification — were each explicitly considered in developing the structure of Part XXIII.1 *OSA*. Policy concerns, as compelling as they are, do not override the plain meaning of the text and the intent of the Ontario legislature. This is not altered by the fact that both the *CPA* and Part XXIII.1 *OSA* are remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature's consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.

[75] L'interprétation proposée par ma collègue et la Cour d'appel dans les cas présents donne la priorité aux objectifs de la *LRC* au détriment du — et en contradiction avec le — sens ordinaire et grammatical du texte des dispositions, ainsi qu'au détriment de l'équilibre précis atteint dans la partie XXIII.1 de la *LVM*, et ce, même si ces objectifs ont déjà été pris en considération lors de l'adoption du régime statutaire en cause ici. La partie XXIII.1 de la *LVM* est le texte législatif le plus récent; elle a instauré un régime se voulant complet et a été rédigée alors que la *LRC* était déjà en vigueur. Les objectifs associés à la *LRC* — l'économie des ressources judiciaires, l'accès aux tribunaux et la modification des comportements — ont chacun été explicitement considérés lorsque la structure de la partie XXIII.1 de la *LVM* a été élaborée. Les considérations de principe, aussi impératives soient-elles, ne peuvent primer le sens clair du texte et l'intention du législateur ontarien. Le fait que la *LRC* et la partie XXIII.1 de la *LVM* soient toutes deux de nature réparatrice et doivent par le fait même recevoir une interprétation large et téléologique n'y change rien. Le résultat final de l'exercice auquel s'est livré le législateur est que le régime statutaire impose l'exigence d'obtenir une permission en guise de condition préalable à l'introduction d'un recours, un délai de prescription et l'absence de nécessité de prouver que le demandeur s'est fié à la déclaration inexacte. La combinaison de ces aspects contribue à l'efficacité et à l'équité envers les deux parties.

[76] The interpretation proposed by the Court of Appeal in these cases significantly affects the protection provided against strike suits. As I noted above, the preliminary leave requirement was added because the CSA believed that the usual measures

[76] L'interprétation proposée par la Cour d'appel dans les présents dossiers modifie de façon significative la protection accordée contre les poursuites opportunistes et dénuées de fondement. Tel qu'il est indiqué ci-dessus, l'obligation d'obtenir

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under the *CPA* did not provide appropriate safeguards. To supplement the *CPA*'s protection against unmeritorious actions, the CSA proposed a screening mechanism in which the granting of leave *as early as possible* in the litigation process was an essential component.

[77] Requiring merely that a statutory cause of action be mentioned in an existing class proceeding for the limitation period to be suspended can hardly be said to achieve that purpose. It might even hypothetically force some defendants to enter in an unjust settlement when the leave application is pending — potentially during many years — and thus negatively affect the corporate defendant's share value.

[78] In my view, the Court of Appeal's interpretation of s. 28 *CPA* not only contradicts the ordinary and grammatical meaning of the words used, but also displaces the balance struck by the legislature as reflected in Part XXIII.1 *OSA*. Thus, the Court of Appeal not only upset the carefully considered design of Part XXIII.1 *OSA*, but also inverted the statutory interpretation process, using an older provision of general application to alter a more recent, comprehensive scheme.

[79] The Court of Appeal wrote that the effect of *Timminco*, namely that a plaintiff does not unilaterally control whether his or her claim is brought within the limitation period (because of the starting point of the limitation period or because of delays caused by the defendant or the court), was "foreign to the concept of a limitation provision" (para. 27). In my view, the Court of Appeal failed to appreciate not only that modern limitation periods flow from an exercise in balancing the rights of plaintiffs and defendants, but also that the legislature undertook that balancing exercise in designing the limitation period in question. Section 138.14 *OSA* does not have an internal suspension mechanism, and the limitation period begins to run regardless of knowledge on the plaintiff's part, be it on when a document containing a misrepresentation is released, when an oral

la permission préalable a été ajoutée parce que les ACVM étaient d'avis que les mécanismes prévus par la *LRC* ne constituaient pas des garanties suffisantes. Pour compléter les mesures de protection prévues par la *LRC* contre les actions non fondées, elles ont proposé un mécanisme de filtrage, dont l'obtention d'une permission *aussitôt que possible* dans le processus est une composante essentielle.

[77] Accepter que la simple mention d'une cause d'action statutaire dans un recours collectif alors pendant suffit pour faire suspendre le délai de prescription ne permet guère d'atteindre cet objectif. Cela pourrait même théoriquement obliger certains défendeurs à conclure un règlement injuste pendant que la demande de permission est pendante, potentiellement pendant des années, ce qui ferait baisser la valeur de l'action de la société défenderesse.

[78] À mon sens, l'interprétation qu'a donnée la Cour d'appel à l'art. 28 de la *LRC* non seulement va à l'encontre du sens ordinaire et grammatical des mots, mais rompt aussi l'équilibre établi à la partie XXIII.1 de la *LVM* par le législateur. En conséquence, la Cour d'appel non seulement ébranle la structure réfléchie de la partie XXIII.1 de la *LVM*, mais inverse le processus d'interprétation en utilisant une disposition plus ancienne d'application générale pour redéfinir un régime plus récent et plus exhaustif.

[79] La Cour d'appel a écrit que le résultat de l'arrêt *Timminco*, dont le fait que le demandeur n'a pas de contrôle absolu sur la présentation de sa demande dans le délai de prescription (en raison du point de départ du délai de prescription ou de délais imputables au défendeur ou au tribunal), était [TRADUCTION] « étranger au concept de disposition en matière de prescription » (par. 27). À mon avis, la Cour d'appel ne tient pas compte non seulement du fait que les délais modernes de prescription comportent un équilibre établi entre les droits d'un demandeur et ceux d'un défendeur, mais aussi que le législateur a voulu atteindre cet équilibre dans l'établissement ou la détermination du délai de prescription en cause ici. L'article 138.14 de la *LVM* ne prévoit aucun mécanisme interne de suspension, le délai de prescription commençant à courir sans

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statement containing a misrepresentation is made, or when there is a failure to make timely disclosure. The scheme is exacting and even harsh, but it is structured in this manner to balance the interests of plaintiffs, defendants and long-term shareholders.

[80] The plaintiffs argue that the effect of *Timminco* is that leave is practically impossible to obtain. I disagree. The facts in *IMAX* suggest the opposite, given that the leave and certification motions were heard some three months before the limitation period expired. More importantly, even assuming that the plaintiffs are correct, *Timminco* does not cause this difficulty, but merely fails to relieve a specific group of litigants from the consequences of the *OSA* scheme. In other words, any adverse consequence flows naturally from the text of Part XXIII.1, which is not ambiguous.

[81] Like Goudge J.A. in *Timminco*, I am unwilling to rely upon an isolated purpose of limitation periods, taken out of context, in order to give priority to one stakeholder over others, particularly where the legislature was so clearly alive to these considerations in making the choices it made generally for Part XXIII.1 *OSA*, and more specifically for s. 138.14.

[82] Ultimately, in light of the underlying principle and the structure of class proceedings in Canada, the operation of s. 28 *CPA* must follow the granting of leave under s. 138.8 *OSA*. I should add that this interpretation is also compatible with the legislative choices embodied in Ontario's statutory scheme for secondary market misrepresentation. Above all, it is consistent with the ordinary and grammatical meaning of the words of the provisions.

égard à la connaissance du demandeur, que ce soit lors de la publication d'un document contenant une déclaration inexacte de faits, lors d'une déclaration orale contenant une déclaration inexacte de faits, ou en cas de défaut de divulgation en temps utile (« information occasionnelle » dans la *LVM*). Le régime est contraignant et même sévère, mais il est ainsi structuré pour concilier les intérêts des demandeurs, des défendeurs et des actionnaires à long terme.

[80] Les demandeurs soutiennent qu'en raison de l'arrêt *Timminco*, il sera pratiquement impossible d'obtenir la permission. Je ne partage pas cet avis. Les événements dans *IMAX* démontrent le contraire, car les requêtes pour permission et en autorisation du recours collectif furent entendues quelque trois mois avant l'expiration du délai de prescription. Plus important encore, même à supposer que les demandeurs aient raison, *Timminco* ne crée pas cette difficulté; la Cour d'appel y refuse uniquement de soustraire un groupe précis de parties aux conséquences du régime de la *LVM*. Autrement dit, toute conséquence négative découle naturellement du texte de la partie XXIII.1, qui n'est pas ambigu.

[81] À l'instar du juge Goudge dans *Timminco*, je ne suis pas disposée à m'en remettre à un objectif isolé des délais de prescription, pris hors contexte, pour favoriser un actionnaire au détriment des autres, surtout lorsque le législateur a été si manifestement sensible à ces considérations dans les choix qu'il a faits généralement en ce qui concerne la partie XXIII.1 de la *LVM*, plus particulièrement l'art. 138.14.

[82] Ultimement, à la lumière de la structure des recours collectifs au Canada et du principe qui les sous-tend, l'application de l'art. 28 de la *LRC* doit suivre l'octroi de la permission visée à l'art. 138.8 de la *LVM*. Je dois ajouter que cette interprétation est compatible avec la volonté du législateur exprimée dans le régime statutaire ontarien en matière de déclaration inexacte de faits sur le marché secondaire. Par-dessus tout, cette interprétation est conforme au sens ordinaire et grammatical des dispositions.

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(3) Conclusion

[83] After considering the ordinary and grammatical meaning of the words of the provisions as well as the entire legislative context, I am of the view that s. 28 *CPA* cannot operate to suspend the limitation period for a statutory claim for secondary market misrepresentation before leave for that claim has been granted under 138.8 *OSA*. Given my conclusion, which accords with the result in *Timminco*, there is no need to address the question whether the Court of Appeal erred in overturning its own precedent. I will now turn to the second issue of these appeals.

B. *Jurisdiction for Relief*

[84] The interposition of *Timminco* in the proceedings below upset the presumption on which the plaintiffs were operating. A presumption, I should add, that was based on an erroneous reading of the provisions at issue. Before the motion judges and in this Court, the plaintiffs therefore asked that equity be used to save their statutory claims. In this Court, the argument centred on whether the courts below could and should have relied upon the doctrine of *nunc pro tunc* or the doctrine of special circumstances. Although there is some confusion on this point in the motion judges' reasons, *nunc pro tunc* and special circumstances are two separate doctrines. As a result, they need to be addressed separately.

(1) Doctrine of *Nunc Pro Tunc*

[85] The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil Procedure*: "An order is effective from the date on which it is made, unless it provides otherwise."

(3) Conclusion

[83] Après avoir analysé le sens ordinaire et grammatical du texte des dispositions ainsi que l'ensemble du contexte législatif, je suis d'avis que l'art. 28 de la *LRC* ne peut avoir pour effet de suspendre le délai de prescription applicable à un recours statutaire pour déclaration inexacte de faits sur le marché secondaire avant que la permission d'intenter un tel recours n'ait été obtenue en vertu de l'art. 138.8 de la *LVM*. Vu ma conclusion, qui concorde avec le résultat atteint dans *Timminco*, point n'est besoin d'examiner si la Cour d'appel a erré en infirmant son propre précédent. Je me penche maintenant sur la deuxième question soulevée dans les présents pourvois.

B. *Compétence pour accorder un redressement*

[84] L'arrivée de l'arrêt *Timminco* dans les poursuites alors pendantes devant les tribunaux d'instance inférieure a ébranlé la prémisse sur laquelle s'appuyaient les demandeurs, une prémisse qui, dois-je ajouter, reposait sur une lecture erronée des dispositions en jeu. Devant la Cour supérieure de l'Ontario ainsi que devant notre Cour, les demandeurs ont donc demandé à ce qu'on recoure à l'equity pour sauvegarder leurs recours statutaires. Devant notre Cour, le débat portait principalement sur la question de savoir si les tribunaux d'instance inférieure auraient pu et auraient dû s'en remettre à la doctrine *nunc pro tunc* ou à celle des circonstances spéciales. Bien qu'il semble exister une certaine confusion sur ce point dans les motifs des juges de première instance, la doctrine *nunc pro tunc* et celle des circonstances spéciales sont distinctes. Je les aborde donc séparément.

(1) La doctrine *nunc pro tunc*

[85] Les tribunaux disposent d'une compétence inhérente pour rendre des ordonnances *nunc pro tunc*. En langage courant, on pourrait simplement dire que les tribunaux ont le pouvoir d'antidater leurs ordonnances. Ce pouvoir est confirmé par l'art. 59.01 des *Règles de procédure civile* : « L'ordonnance, à moins qu'elle ne contienne une disposition contraire, prend effet à compter de la date à laquelle elle est rendue. »

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[86] The history of the courts' inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.

[87] One of the oldest and most often cited cases, *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561, dealt with this very circumstance: the plaintiff had died after the hearing but before the court rendered its judgment. The court ordered that its judgment be entered *nunc pro tunc*, as of the day when the argument terminated, noting that this would not cause an injustice to the other party and that such a result was appropriate in a case in which the delay had resulted from an act of the court. A long line of Canadian cases has followed *Turner*, as courts have granted *nunc pro tunc* orders where parties have died after hearings: *Gunn v. Harper* (1902), 3 O.L.R. 693 (C.A.); *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467 (C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C.S.C.); *Monahan v. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109; *Medina v. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369.

[88] LeBel and Rothstein JJ. drew upon this line of cases in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, affirming "the correctness of this approach" and concluding that the estate of any class member in a class proceeding who was alive on the date that argument concluded was entitled to the benefit of the judgment: para. 77.

[89] In *CIBC*, Strathy J. suggested that a court has inherent jurisdiction to issue an order *nunc pro tunc*,

[86] L'historique de la compétence inhérente des tribunaux de rendre des ordonnances *nunc pro tunc* est intimement lié à la maxime *actus curiae neminem gravabit* (nul acte de la cour ne doit porter préjudice à une partie au litige). À l'origine, la nécessité d'accorder ce genre de redressement équitable est survenue lorsqu'une partie est décédée après l'instruction de son dossier mais avant que le jugement ne soit rendu. Dans les poursuites civiles, cette situation posait problème en raison de la règle de common law bien connue selon laquelle une cause d'action personnelle s'éteint avec le décès du demandeur.

[87] L'un des précédents les plus anciens et les plus souvent cités, *Turner c. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561, portait précisément sur une telle situation : le demandeur est décédé après la fin de l'audition mais avant que jugement soit rendu. Le tribunal a alors rendu son ordonnance *nunc pro tunc* à la date de conclusion des débats, faisant remarquer que cela ne constituerait pas une injustice pour l'autre partie et que c'était approprié dans un cas où le retard était attribuable à un acte de la cour. Un long courant jurisprudentiel canadien a suivi la décision *Turner* et les tribunaux ont rendu des ordonnances *nunc pro tunc* lorsqu'une partie est décédée après l'audition : *Gunn c. Harper* (1902), 3 O.L.R. 693 (C.A.); *Young c. Town of Gravenhurst* (1911), 24 O.L.R. 467 (C.A.); *Hubert c. DeCamillis* (1963), 41 D.L.R. (2d) 495 (C.S.C.-B.); *Monahan c. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109; *Medina c. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369.

[88] Les juges LeBel et Rothstein se sont fondés sur ce courant jurisprudentiel dans *Canada (Procureur général) c. Hislop*, 2007 CSC 10, [2007] 1 R.C.S. 429, où ils ont confirmé « la justesse de cette approche » et conclu que la succession de tout membre du groupe dans un recours collectif qui était vivant au moment de la conclusion des plaidoiries était en droit de bénéficier du jugement : par. 77.

[89] Dans *CIBC*, le juge Strathy a suggéré que le tribunal n'avait compétence inhérente pour rendre

but only in the case of a slip or oversight. In my opinion, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction, but is instead one example of a situation in which it may do so. To hold otherwise would run counter to the historical basis for the development of the doctrine.

[90] In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice (*Re New Alger Mines Ltd.* (1986), 54 O.R. (2d) 562 (C.A.), at pp. 570-71; *Gallo v. Beber* (1998), 116 O.A.C. 340, at paras. 7 and 10; *Krueger v. Raccah* (1981), 12 Sask. R. 130 (Q.B.), at paras. 11-15; *Parker v. Atkinson* (1993), 104 D.L.R. (4th) 279 (Ont. Unif. Fam. Ct.), at p. 286; *Hogarth v. Hogarth*, [1945] 3 D.L.R. 78 (Ont. H.C.), at pp. 78-79; *Montego Forest Products Ltd. (Re)* (1998), 37 O.R. (3d) 651 (C.A.), at p. 654; *Couture v. Bouchard* (1892), 21 S.C.R. 281, at p. 285; *Westman v. Gyselinck*, 2014 MBQB 174, 308 Man. R. (2d) 306, at para. 40, citing *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 28; *McKenna Estate v. Marshall* (2005), 37 R.P.R. (4th) 222 (Ont. S.C.J.), at paras. 23-24). None of these factors is determinative.

[91] Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a *nunc pro tunc* order, and is therefore an "insurmountable obstacle": *Holst v. Grenier* (1987), 65 Sask. R. 257 (Q.B.), at para. 10. According to the

une ordonnance *nunc pro tunc* que dans le cas d'une erreur ou d'un oubli. À mon avis, les cas d'erreur ou d'oubli ne sont pas les seuls où le tribunal peut exercer sa compétence inhérente; ce sont plutôt des exemples de situations dans lesquelles la compétence inhérente peut être exercée. Toute autre conclusion irait à l'encontre des origines historiques de la doctrine.

[90] En fait, à part les cas d'erreur ou de décès d'une partie, les tribunaux ont identifié les facteurs non exhaustifs suivants afin de décider d'exercer ou non leur compétence inhérente pour rendre pareille ordonnance : (1) l'ordonnance ne causera pas préjudice à la partie adverse; (2) l'ordonnance aurait été rendue si elle avait été sollicitée au moment propice, de sorte que le moment du prononcé de l'ordonnance est simplement une irrégularité; (3) l'irrégularité n'est pas intentionnelle; (4) l'ordonnance permettra effectivement d'obtenir le redressement demandé ou de remédier à l'irrégularité; (5) le retard est attribuable à un acte de la cour; (6) l'ordonnance faciliterait l'accès à la justice (*Re New Alger Mines Ltd.* (1986), 54 O.R. (2d) 562 (C.A.), p. 570-571; *Gallo c. Beber* (1998), 116 O.A.C. 340, par. 7 et 10; *Krueger c. Raccah* (1981), 12 Sask. R. 130 (B.R.), par. 11-15; *Parker c. Atkinson* (1993), 104 D.L.R. (4th) 279 (C. unif. fam. Ont.), p. 286; *Hogarth c. Hogarth*, [1945] 3 D.L.R. 78 (H.C. Ont.), p. 78-79; *Montego Forest Products Ltd. (Re)* (1998), 37 O.R. (3d) 651 (C.A.), p. 654; *Couture c. Bouchard* (1892), 21 R.C.S. 281, p. 285; *Westman c. Gyselinck*, 2014 MBQB 174, 308 Man. R. (2d) 306, par. 40, citant *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87, par. 28; *McKenna Estate c. Marshall* (2005), 37 R.P.R. (4th) 222 (C.S.J. Ont.), par. 23-24). Aucun de ces facteurs n'est déterminant en soi.

[91] Pour revenir à la question qui se pose dans les présents dossiers, on retrouve dans la jurisprudence deux écoles de pensée sur la question de savoir si le fait de ne pas obtenir la permission à l'intérieur du délai imparti entraîne la nullité de l'action ou constitue une simple irrégularité procédurale. D'aucuns estiment qu'un tel défaut entraîne la nullité de l'action et qu'il ne peut être corrigé par une ordonnance *nunc pro tunc*, ce qui en fait un [TRADUCTION] « obstacle insurmontable » : *Holst*

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second view, such a failure is merely a procedural irregularity that can be corrected by a *nunc pro tunc* order: see, e.g., *CIBC Mortgage Corp. v. Manson* (1984), 32 Sask. R. 303 (C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.

[92] In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant *nunc pro tunc* orders where leave is sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A *nunc pro tunc* order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.

[93] Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made *nunc pro tunc* where leave is sought prior to the expiry of the limitation period. One very important caveat, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.

[94] This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order: *McKenna*, at para. 27; *Parker*, at pp. 286-87; *New Alger Mines*, at pp. 570-71. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute.

*c. Grenier* (1987), 65 Sask. R. 257 (B.R.), par. 10. D'autres sont d'avis que le fait de ne pas obtenir la permission ne constitue qu'une irrégularité procédurale susceptible d'être corrigée par une ordonnance *nunc pro tunc* : voir p. ex. *CIBC Mortgage Corp. c. Manson* (1984), 32 Sask. R. 303 (C.A.), par. 8-11 et 33; *McKenna*, par. 22.

[92] À mon avis, la juge van Rensburg a correctement énoncé le droit sur ce point dans *IMAX*. Elle a fait observer que les tribunaux se sont montrés disposés à rendre des ordonnances *nunc pro tunc* lorsque la permission avait été sollicitée dans le délai fixé, mais obtenue après l'expiration du délai (comme dans *Montego Forest Products*). Elle a également souligné que, dans les décisions où il est indiqué que l'action introduite sans permission préalable est frappée de nullité, les délais de prescription applicables étaient expirés avant l'introduction de la demande de permission. Selon elle, une ordonnance *nunc pro tunc* dans de tels cas ne serait d'aucune utilité pour le demandeur, puisqu'elle rétroagirait à une date postérieure à l'expiration du délai de prescription.

[93] En conséquence, sous réserve des considérations d'équité mentionnées plus haut, une ordonnance accordant la permission d'intenter une action peut théoriquement être rendue *nunc pro tunc* lorsque la permission est sollicitée avant l'expiration du délai de prescription. Toutefois, il importe de souligner une mise en garde très importante faite par le juge Strathy : le tribunal ne devrait pas exercer sa compétence inhérente si cela aurait pour effet de miner l'objectif du délai de prescription ou de la loi en cause.

[94] Il en est ainsi parce que, comme pour toutes les doctrines et règles de common law, la compétence inhérente de rendre des ordonnances *nunc pro tunc* est circonscrite par l'intention du législateur. Vu la longue histoire de la doctrine et la règle 59.01 à laquelle j'ai fait référence, les tribunaux ont statué que le législateur est présumé avoir envisagé la possibilité qu'une ordonnance *nunc pro tunc* soit rendue : *McKenna*, par. 27; *Parker*, p. 286-287; *New Alger Mines*, p. 570-571. Toutefois, aucune ordonnance *nunc pro tunc* ne sera rendue si le libellé

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None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.

(2) Application of *Nunc Pro Tunc*

[95] I must now decide whether the doctrine applies to the cases at bar. Before doing so, I should briefly outline the applicable standard of review. The standard that ordinarily applies to a judge's discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion (*Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404). However, if the judge's discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54. In *CIBC*, Strathy J. found that he did not have jurisdiction to make the order *nunc pro tunc*. It follows that he did not actually exercise any discretion, and there is therefore no decision to defer to. But, even if he had done so, his reasoning on whether the order should be granted *nunc pro tunc* was based on an erroneous principle in that he conflated the doctrine of *nunc pro tunc* with that of special circumstances and erroneously concluded that an order can be made *nunc pro tunc* only in the event of a slip or oversight. His decision is therefore not entitled to deference on appeal.

[96] Having reached this conclusion, I must now consider whether the discretion to grant leave *nunc pro tunc* should be exercised. As I mentioned above, a court's exercise of its inherent jurisdiction to grant such an order has the potential to undermine the strict limitation period set out in s. 138.14 *OSA*. In particular, one of the clear objectives of Part XXIII.1 is to ensure that leave will be sought and obtained quickly. The requests of the plaintiffs

ou l'objet d'une loi ne l'autorise pas. Aucune des autres considérations d'équité énumérées ci-dessus, y compris le délai attribuable à un acte de la cour, ne peut servir à contourner ou à contrecarrer en fait la volonté expresse du législateur.

(2) Application de la doctrine *nunc pro tunc*

[95] Je dois maintenant décider si la doctrine *nunc pro tunc* s'applique en l'espèce. Avant de ce faire, j'exposerai brièvement la norme d'intervention applicable. La norme qui s'applique en temps normal à la décision discrétionnaire du juge de rendre ou non une ordonnance *nunc pro tunc* est celle de la déférence : si le juge de première instance a accordé suffisamment d'importance à toutes les considérations pertinentes, une cour d'appel doit s'en remettre à l'exercice du pouvoir discrétionnaire du juge (*Reza c. Canada*, [1994] 2 R.C.S. 394, p. 404). Cependant, si le juge de première instance a exercé son pouvoir discrétionnaire en se fondant sur un principe erroné, une cour d'appel peut intervenir : *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 54. Dans le dossier *CIBC*, le juge Strathy a conclu qu'il n'avait pas compétence pour rendre l'ordonnance *nunc pro tunc*. Il s'ensuit qu'il n'a pas exercé de pouvoir discrétionnaire et que la déférence n'est pas de mise. En outre, même si le juge Strathy avait exercé telle discrétion, son analyse de la question de savoir si l'ordonnance devrait être rendue *nunc pro tunc* était fondée sur un principe erroné, car il a confondu la doctrine de *nunc pro tunc* et celle des circonstances spéciales et il a conclu à tort qu'une ordonnance pouvait être rendue *nunc pro tunc* uniquement en cas d'erreur ou d'oubli. Partant, il n'y a pas lieu de faire preuve de déférence en appel à l'égard de sa décision.

[96] Ayant conclu ainsi, je dois maintenant décider si le pouvoir discrétionnaire d'accorder la permission *nunc pro tunc* doit être exercé. Comme je l'ai mentionné précédemment, l'exercice de cette compétence inhérente par un tribunal pour rendre pareille ordonnance risque de miner le délai de prescription strict fixé à l'art. 138.14 de la *LVM*. Plus particulièrement, un des objectifs clairs de la partie XXIII.1 est de faire en sorte que la permission

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in *CIBC* and *Celestica* for a *nunc pro tunc* order sit uneasily with this objective. As for *IMAX*, a *nunc pro tunc* order, if appropriate, can only be applicable in respect of the defendants who were parties to the original statement of claim, as I will discuss later.

[97] In *CIBC*, Strathy J. wrote that he had no jurisdiction to relieve the plaintiffs from the application of s. 138.14 *OSA*. However, a close reading of his reasons suggests that he was of the opinion that he had inherent jurisdiction, but that he could not exercise his discretion, because this case did not involve a slip or oversight. As I mentioned above, however, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction to grant an order *nunc pro tunc*, but is instead one example of a situation in which it may do so. Strathy J. therefore erred in limiting the exercise of his inherent jurisdiction to a case involving a slip or oversight.

[98] Had he reached a different conclusion, Strathy J. would have exercised his discretion to issue the order for "several reasons": para. 540. One of the reasons he gave was that "the plaintiffs have been diligently pursuing the motion for leave on their own behalf and on behalf of the Class", although it is clear from his comments that this finding of fact is inextricably linked to the idea that "[t]his is not a case in which the suspension of the limitation period would have left the parties, Class Members and the court without any guarantee that the action would be prosecuted": para. 541. Yet lack of prejudice to the defendants and diligence are two different things. Strathy J. also stated that, had he concluded that he could exercise his inherent jurisdiction, the fact that the plaintiffs were surprised by *Timminco* would have played an important role in his decision on whether to grant the order.

[99] With all due respect, what I find particularly problematic is that the plaintiffs' request for a *nunc*

soit sollicitée et obtenue rapidement. Les demandes des demandeurs dans *CIBC* et *Celestica* visant à obtenir une ordonnance *nunc pro tunc* cadrent mal avec cet objectif. Dans *IMAX*, il n'est justifié de rendre une ordonnance *nunc pro tunc* qu'à l'égard des défendeurs parties à la déclaration initiale, tel que je l'expliquerai plus loin.

[97] Dans *CIBC*, le juge Strathy a écrit qu'il n'avait pas compétence pour soustraire les demandeurs à l'application de l'art. 138.14 de la *LVM*. Une lecture attentive de ses motifs donne toutefois à penser qu'il estimait avoir compétence inhérente mais que, comme il n'était pas en présence d'une erreur ou d'un oubli, il ne pouvait exercer son pouvoir discrétionnaire. Comme je l'ai mentionné plus haut, cependant, les cas d'erreur ou d'oubli ne sont pas les seuls où le tribunal peut exercer sa compétence inhérente pour rendre une ordonnance *nunc pro tunc*; ce sont plutôt des exemples de situations dans lesquelles il peut l'exercer. Le juge Strathy a donc commis une erreur en limitant l'exercice de sa compétence inhérente aux seuls cas d'erreur ou d'oubli.

[98] S'il avait tiré une conclusion différente, le juge Strathy aurait exercé son pouvoir discrétionnaire de rendre l'ordonnance pour [TRADUCTION] « plusieurs raisons » : par. 540. Parmi les raisons qu'il a mentionnées, figure celle selon laquelle « les demandeurs ont poursuivi avec diligence la requête pour permission en leur propre nom et au nom du groupe », mais il ressort de ses propos que cette conclusion de fait est inextricablement liée à l'idée que « [n]ous ne sommes pas en présence d'un cas où la suspension du délai de prescription aurait privé les parties, les membres du groupe et le tribunal de toute garantie que l'action serait poursuivie » : par. 541. Or, l'absence de préjudice subi par les défendeurs et la diligence sont deux choses distinctes. Toujours selon le juge Strathy, la surprise causée aux demandeurs par l'arrêt *Timminco* aurait aussi influé fortement sur sa décision de rendre ou non l'ordonnance s'il avait conclu à la possibilité d'exercer sa compétence inhérente pour ce faire.

[99] Avec beaucoup d'égards, il me semble particulièrement problématique que la demande des

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*pro tunc* order shows that they were aware of the requirement of obtaining leave, yet they made the choice to bring a motion for leave at the same time as their certification motion rather than expediting the leave motion. Their failure to obtain leave within the limitation period is therefore a result of their own decision. The fact that the plaintiffs were surprised by the decision in *Timminco* is of no help to them, since, as Strathy J. noted, not only were they mistaken in their interpretation of the law, but they also proceeded on the assumption "that the court had jurisdiction to extend the limitation period and that the discretion would be exercised in their favour by granting leave *nunc pro tunc*": para. 511.

demandeurs visant à obtenir une ordonnance *nunc pro tunc* démontre qu'ils étaient conscients de la nécessité d'obtenir la permission, mais qu'ils ont fait le choix de plaider leur requête pour permission en même temps que leur requête en autorisation de recours collectif, plutôt que de procéder plus rapidement avec leur requête pour permission. Leur défaut d'obtenir la permission dans le délai imparti résulte donc de leur propre décision. Le fait que l'arrêt *Timminco* ait pris les demandeurs par surprise ne leur est d'aucun secours car, comme l'a signalé le juge Strathy, non seulement les demandeurs ont-ils erré dans leur interprétation de la loi, mais ils ont aussi tenu pour acquis [TRADUCTION] « que le tribunal avait compétence pour proroger le délai de prescription et qu'il exercerait son pouvoir discrétionnaire en leur faveur en leur accordant la permission *nunc pro tunc* » : par. 511.

[100] My colleague Cromwell J. says that "[t]he plaintiffs reasonably thought that they could be granted leave after the expiry of the limitation period" (para. 139). Although the plaintiffs' belief that they *could be* granted leave might be considered reasonable, it was not reasonable for them to assume that they *would be* granted leave. A plaintiff cannot simply assume that he or she will be granted relief, doing nothing although knowing that the limitation period is going to expire. In the instant cases, the plaintiffs could have requested an expedited hearing, but they did not even raise the issue, ultimately presenting the judge with a *fait accompli*. As Strathy J. wrote, "Had [the issue] been raised, the parties might have considered a tolling agreement. Had the parties not reached an agreement, I would have considered whether the hearing could be scheduled at an early date or whether some other order could be made to prevent potential injustice": para. 539. Strathy J. went further, adding that "[t]he lack of prejudice to the defendants and the irreparable prejudice to Class Members as a result of the loss of their cause of action would have militated strongly in favour of some action": para. 539. In *CIBC*, more than a year and a half passed between the filing of the first statement of claim and the filing of the notice of motion seeking leave under s. 138.8. Granting an extension of

[100] Mon collègue le juge Cromwell affirme que « [l]es demandeurs croyaient raisonnablement qu'ils pourraient obtenir l'autorisation après l'expiration du délai de prescription » (par. 139). Bien que l'on puisse considérer raisonnable la croyance des demandeurs que la permission *pouvait* leur être accordée, il n'était pas raisonnable pour eux de présumer qu'elle leur *serait* accordée. En effet, un demandeur ne peut simplement tenir pour acquis qu'un redressement lui sera accordé et ne rien faire tout en sachant que le délai de prescription expirera. Dans les présents dossiers, les demandeurs auraient pu réclamer une audition accélérée, mais ils n'ont même pas soulevé la question, plaçant ultimement le juge devant un fait accompli. Comme l'a écrit le juge Strathy, [TRADUCTION] « [s]i [la question] avait été soulevée, les parties auraient peut-être envisagé de conclure un accord sur le délai de prescription. Si elles n'étaient pas parvenues à s'entendre, j'aurais examiné si l'on pouvait tenir l'audition dans un avenir rapproché ou rendre quelque autre ordonnance pour prévenir une éventuelle injustice » : par. 539. Le juge Strathy est allé plus loin en précisant que « [l]'absence de préjudice subi par les défendeurs et le préjudice irréparable que causerait aux membres du groupe la perte de leur cause d'action aurait milité fortement en faveur d'un redressement » :

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the limitation period, in the form of a *nunc pro tunc* leave order, in this context would defeat the very purpose of s. 138.14 *OSA* and would amount to an unreasonable exercise of discretion.

[101] While the courts do have inherent jurisdiction to issue *nunc pro tunc* orders in relation to leave to commence claims under s. 138.3 *OSA*, that jurisdiction is not unlimited. It should be exercised bearing in mind that the leave requirement, and its interaction with the limitation period, are central to the delicate balance struck in Part XXIII.1 *OSA*. Strathy J. wrote that "extending the limitation period in this particular case would not do violence to the purposes of limitation periods, including the need of parties to order their affairs after reasonable periods of repose and to avoid evidence becoming stale or lost": para. 543. This comment, which focuses on limitation periods in general, disregards the delicate balance achieved in Part XXIII.1 *OSA* in particular. Strathy J. correctly observed that he should refrain from undermining the strict limitation period set out in s. 138.14 *OSA*, but, with respect, he did not act accordingly in concluding that he would have issued the *nunc pro tunc* order.

[102] Cromwell J. also refers to Strathy J.'s view that there is a duty to protect the rights of unrepresented putative class members and that that could justify the issuance of a *nunc pro tunc* order. I cannot subscribe to this argument, since class members do not have more rights than the representative plaintiff.

[103] I would also add that the last of the reasons Strathy J. gave in support of his conclusion that he would have granted such an order was premised

par. 539. Dans *CIBC*, plus d'un an et demi s'est écoulé entre le dépôt de la première déclaration et celui de l'avis de requête visant à obtenir la permission en vertu de l'art. 138.8. Proroger le délai de prescription dans ce contexte par le prononcé d'une ordonnance *nunc pro tunc* accordant la permission sollicitée contrecarrerait l'objet même de l'art. 138.14 de la *LVM* et constituerait un exercice déraisonnable du pouvoir discrétionnaire.

[101] Bien que les tribunaux aient compétence inhérente pour rendre des ordonnances *nunc pro tunc* visant la permission d'intenter un recours en vertu de l'art. 138.3 de la *LVM*, cette compétence n'est pas illimitée. Ils doivent l'exercer en gardant à l'esprit que l'obligation d'obtenir la permission et son interaction avec le délai de prescription sont essentiels à l'équilibre délicat qui est au centre de la partie XXIII.1 de la *LVM*. Le juge Strathy a écrit que [TRADUCTION] « la prorogation du délai de prescription en l'espèce ne porterait pas atteinte aux objectifs des délais de prescription, dont la nécessité pour les parties d'organiser leurs affaires après une période raisonnable de répit et d'éviter la désuétude ou la perte d'éléments de preuve » : par. 543. Ce commentaire, axé sur les délais de prescription en général, fait abstraction de l'équilibre délicat atteint par la partie XXIII.1 de la *LVM* en particulier. Le juge Strathy a fait remarquer, avec raison, qu'il devait éviter de miner le délai de prescription strict fixé à l'art. 138.14 de la *LVM* mais, avec beaucoup d'égards, je suis d'avis qu'il n'a pas agi en conséquence lorsqu'il a conclu qu'il aurait rendu l'ordonnance *nunc pro tunc*.

[102] Le juge Cromwell se réfère également à l'avis du juge Strathy selon lequel il existe un devoir de protéger les droits des membres du groupe non représentés dans le recours collectif projeté et que ce devoir pourrait justifier le prononcé d'une ordonnance *nunc pro tunc*. Je ne puis me rallier à cet argument car les membres du groupe n'ont pas plus de droits que leur représentant.

[103] J'ajouterais aussi que la dernière raison mentionnée par le juge Strathy à l'appui de sa conclusion selon laquelle il aurait rendu pareille ordonnance est

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on an erroneous interpretation of the law: he found that the plaintiffs' statutory claim had a reasonable possibility of success, but as I will explain below, this finding was based on the wrong threshold.

[104] In my opinion, Strathy J., although in a very good position to assess and weigh all the relevant considerations, failed to proceed with the necessary caution in considering whether he would have exercised the court's discretion in the plaintiffs' favour. If a *nunc pro tunc* order could be made where a limitation period has expired even though the plaintiffs did absolutely nothing to prevent its expiry, the effect would be that it is very easy to override the legislature's intent.

[105] Similar considerations apply in *IMAX*. The plaintiffs waited nearly two years after leave was granted before filing a statement of claim pleading the statutory cause of action and adding defendants, even though 79 days had remained in the limitation period after leave was granted, in view of the parties' agreement that the limitation period be suspended while the leave motion was under reserve. As a result, in my opinion, the plaintiffs' delay in filing their action far outweighed any delays caused by acts of the court in respect of which a *nunc pro tunc* order might be justified. In this sense, the irregularity in their case is also tied to their own deliberate and informed acts.

[106] Nevertheless, I am inclined to grant the *nunc pro tunc* order in relation to the defendants — IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce — who were parties to the original statement of claim. I am of the view that with respect to those defendants, van Rensburg J. exercised her discretion correctly. However, as regards the other defendants (Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble), who

fondée sur une mauvaise interprétation du droit : en effet, il a conclu que le recours statutaire des demandeurs avait une possibilité raisonnable de succès. Toutefois, comme je l'expliquerai plus loin, il a tiré cette conclusion en appliquant le mauvais critère.

[104] À mon avis, même s'il était fort bien placé pour évaluer et soupeser l'ensemble des considérations pertinentes, le juge Strathy n'a pas fait montre de la prudence qui s'imposait en se prononçant sur l'opportunité d'exercer le pouvoir discrétionnaire du tribunal en faveur des demandeurs. Si une ordonnance *nunc pro tunc* peut être prononcée après l'expiration d'un délai de prescription alors que les demandeurs n'ont absolument rien fait pour prévenir son expiration, cela aurait pour conséquence qu'il est très facile de passer outre à l'intention du législateur.

[105] Des considérations similaires s'appliquent dans l'affaire *IMAX*. Les demandeurs ont attendu près de deux ans après avoir obtenu la permission avant de déposer une déclaration invoquant la cause d'action statutaire et d'y ajouter des défendeurs, même s'il restait encore 79 jours au délai de prescription lorsqu'ils ont obtenu la permission sollicitée — en raison de l'entente intervenue entre les parties pour suspendre le délai de prescription pendant le délibéré. J'estime donc que le retard des demandeurs à intenter leur action dépasse largement tout délai occasionné par un acte de la cour en raison duquel il serait peut-être justifié de rendre une ordonnance *nunc pro tunc*. En ce sens, l'irrégularité dans leur dossier est également liée à leurs propres gestes délibérés et éclairés.

[106] Néanmoins, je suis portée à rendre l'ordonnance *nunc pro tunc* à l'endroit des défendeurs parties à la déclaration initiale : IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler et Francis T. Joyce. À mon avis, la juge van Rensburg a exercé correctement son pouvoir discrétionnaire quant à ces défendeurs. Mais dans le cas des autres défendeurs (Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron et Kathryn A. Gamble), qui n'étaient parties à aucune instance

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were not defendants in any proceeding at the time when argument on the leave application was concluded, the plaintiffs, who waited more than two years after leave was granted before issuing a first statement of claim against them as defendants and provided no valid explanation for this delay, certainly cannot be said to have acted diligently. Granting relief to the plaintiffs against those defendants in this context would undermine the strict limitation period set out in s. 138.14 *OSA* and the balance struck in the legislation.

[107] Indeed, here, the plaintiffs had two things to do: obtain leave and issue a fresh statement of claim (to include the statutory cause of action and to add new defendants). The leave application was under reserve when the limitation period technically expired. However, as mentioned before, the parties had agreed to suspend that period while the application remained under reserve. Therefore, a period of 79 days was still available, when leave was granted, to issue the fresh statement of claim. Yet, the amendment to include the statutory cause of action — even made outside the 79 days period — by nature, would have operated retroactively to the date of the initial statement of claim. In any event, as van Rensburg J. correctly noted : "An order for the effective date of an amendment is within the scope of rule 26.01, which provides that a court shall grant leave to amend a pleading 'on such terms as are just' at any stage of an action . . . " (para. 99). However, I am of the view that the situation is different regarding the addition of the new defendants. Since, strictly speaking, there was no statement of claim pending against these defendants, the amendment cannot operate retroactively. It can only apply for the future. In my opinion, adding a statutory cause of action based on the same facts as the common law claim through a technical amendment, and adding new defendants, are two different things and should be treated accordingly. In exercising her discretion, van Rensburg J. failed to address or distinguish the situation of these additional defendants. She simply concluded that a *nunc pro tunc* order was enough to relieve the plaintiffs from the expiry of the limitation period. I

pendante lorsque le débat sur la demande de permission s'est terminé, les demandeurs ayant attendu plus de deux ans après l'octroi de la permission avant de déposer une première déclaration contre eux à titre de défendeurs et n'ayant fourni aucune explication valable pour ce délai, on ne peut assurément pas dire qu'ils ont fait preuve de diligence. Accorder un redressement aux demandeurs aux dépens de ces défendeurs dans ces circonstances minerait le délai de prescription strict établi à l'art. 138.14 de la *LVM* et compromettrait l'équilibre établi par la loi.

[107] En effet, dans le cas présent, les demandeurs avaient deux choses à faire : obtenir la permission et produire une nouvelle déclaration (pour y ajouter la cause d'action statutaire et de nouveaux défendeurs). La demande de permission était en délibéré lorsque le délai de prescription a en principe expiré. Toutefois, comme je l'ai mentionné précédemment, les parties avaient convenu de suspendre ce délai pendant le délibéré. En conséquence, lorsque la permission fut accordée, il restait encore 79 jours pour présenter une nouvelle déclaration. Or, l'ajout de la cause d'action statutaire — même après la période de 79 jours — aurait produit, de par sa nature, ses effets rétroactivement à la date de la déclaration initiale. Quoi qu'il en soit, tel que l'a fait remarquer à juste titre la juge van Rensburg : [TRADUCTION] « Une ordonnance exécutoire à la date d'une modification relève de la règle 26.01, qui prévoit que le tribunal accorde l'autorisation de modifier un acte de procédure "à des conditions justes" à toute étape d'une action . . . » (par. 99). J'estime cependant que la situation est différente en ce qui concerne l'ajout des nouveaux défendeurs. Puisqu'il n'y a, à proprement parler, aucune déclaration existante contre ces défendeurs, la modification ne peut produire ses effets rétroactivement. Elle ne peut avoir d'effets que pour l'avenir. À mon avis, ajouter une cause d'action statutaire fondée sur les mêmes faits que la réclamation de common law par une modification technique et ajouter de nouveaux défendeurs sont deux choses différentes et doivent être traitées en conséquence. Dans l'exercice de son pouvoir discrétionnaire, la juge van Rensburg n'a pas traité de la situation de ces défendeurs additionnels ni fait de distinction

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am of the view that this question should have been addressed.

[108] Moreover, van Rensburg J. found that the facts of the case before her did not allow for the doctrine of special circumstances to be applied. She wrote the following, at para. 68: ". . . I do not believe that the doctrine of special circumstances has any actual or potential application to the operation of the limitation period under s. 138.14 of the *OSA* or is relevant to the relief sought by the plaintiffs in this case." It is worth noting that s. 21(1) of the *Limitations Act, 2002* provides that, "[i]f a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding." Some judges have said that s. 21(1) has abolished the doctrine of special circumstances for limitation periods to which the *Limitations Act, 2002* applies. See *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401. If that is true, it would be another reason why the *nunc pro tunc* order should not be granted in respect of the defendants who were added after the expiry of the limitation period. I note, however, that the case law is contradictory as regards the scope of s. 21(1) of the *Limitations Act, 2002*. See, e.g., *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764.

[109] My colleague, Cromwell J., writes that "the wiser course for us . . . is not to address this issue in disposing of the *IMAX* appeal" (para. 154). I agree with him on this point. However, one may conclude that his reasons necessarily imply that s. 21 does not apply to the case at bar since he comes to the conclusion that relief *can* be granted to add defendants despite the expiry of the limitation period. Since the parties have not made complete submissions on this

entre leur situation et celle des défendeurs initiaux. Elle a simplement conclu qu'une ordonnance *nunc pro tunc* suffisait pour permettre aux demandeurs d'échapper à l'expiration du délai de prescription. J'estime que cette question aurait dû être abordée.

[108] Toujours selon la juge van Rensburg, les faits de cette affaire ne permettaient pas d'appliquer la doctrine des circonstances spéciales. Elle a écrit d'ailleurs au par. 68 : [TRADUCTION] « . . . je ne crois pas que la doctrine des circonstances spéciales s'applique de quelque façon que ce soi ou peut s'appliquer au délai de prescription fixé à l'art. 138.14 de la *LVM* ou touche le redressement sollicité par les demandeurs en l'espèce. » Il vaut la peine de signaler que le par. 21(1) de la *Loi de 2002 sur la prescription des actions*, prévoit que : « En cas d'expiration du délai de prescription relatif à une réclamation contre une personne, la réclamation ne peut être formée par jonction de cette personne comme partie à une instance déjà en cours. » D'après certains juges, le par. 21(1) a aboli la doctrine des circonstances spéciales en ce qui concerne les délais de prescription auxquels s'applique la *Loi de 2002 sur la prescription des actions*. Voir *Joseph c. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401. Si cela est exact, ce serait une autre raison pour laquelle il convient de ne pas rendre l'ordonnance *nunc pro tunc* à l'égard des défendeurs qui ont été ajoutés après l'expiration du délai de prescription. Je signale toutefois que la jurisprudence est contradictoire quant à la portée du par. 21(1) de la *Loi de 2002 sur la prescription des actions*. Voir p. ex. *Bikur Cholim Jewish Volunteer Services c. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401; *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1764.

[109] Mon collègue le juge Cromwell écrit qu'« il est plus sage pour nous . . . de ne pas nous prononcer sur ce point en tranchant le pourvoi *IMAX* » (par. 154). Je suis d'accord avec lui sur ce point. Cependant, l'on pourrait conclure que ses motifs supposent nécessairement que l'art. 21 ne s'applique pas en l'espèce car il parvient à la conclusion qu'un redressement *peut* être accordé, soit l'ajout de défendeurs, et ce, malgré l'expiration du délai

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point and since I conclude that relief regarding the addition of new defendants should not be granted for other reasons, it is not necessary for me to address the issue of s. 21(1). I would nevertheless highlight that, at the very least, s. 21 is an explicit recognition by the Ontario legislature that amendments aiming to add parties to an existing procedure are different in nature than other types of amendments and should be made promptly. At the risk of repeating myself, for a period of almost five years and three months, the only defendants to the existing statement of claim were IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

[110] To sum up, given the agreement between the parties to suspend the limitation period while the decision was under reserve, which had the effect of leaving a period of 79 days available in the limitation period when leave was granted, and given the existence of the original statement of claim, I am of the view that a *nunc pro tunc* order is justified in relation to the defendants who were parties to that statement of claim. As regards the defendants who were not parties to any statement of claim at the time when argument on the leave application was concluded, however, the discretion to grant leave *nunc pro tunc* should not be exercised, nor do the facts of this case justify the application of the doctrine of special circumstances — assuming that it has not been abolished by s. 21(1) of the *Limitations Act, 2002*. I would therefore not issue the order in relation to Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble, but would issue it in respect of IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

[111] As for *Celestica*, because no motion for leave was filed before the expiry of the limitation period, a *nunc pro tunc* order, assuming one were available, could not remedy that expiry. This is sufficient to deny a *nunc pro tunc* order. Moreover, for reasons which I will explain below, I am of the opinion, with

de prescription. Puisque les parties n'ont pas présenté d'argumentation complète sur ce point et que je conclus qu'un redressement concernant l'ajout de nouveaux défendeurs ne devrait pas être octroyé pour d'autres motifs, je n'ai pas à trancher la question du par. 21(1). Je soulignerais néanmoins que l'art. 21 constitue à tout le moins une reconnaissance explicite par le législateur ontarien que les modifications visant à ajouter des parties à une instance pendante diffèrent d'autres types de modification et devraient être apportées promptement. Au risque de me répéter, pendant presque cinq ans et trois mois, les seuls défendeurs parties à la déclaration existante étaient IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler et Francis T. Joyce.

[110] En somme, vu que les parties se sont entendues pour suspendre le délai de prescription alors que la décision était en délibéré, ce qui a eu pour effet de laisser une période de 79 jours à l'intérieur du délai de prescription quand la permission a été accordée, et vu l'existence de la déclaration initiale, je suis d'avis qu'il y a lieu de rendre une ordonnance *nunc pro tunc* à l'endroit des défendeurs parties à cette déclaration initiale. Mais en ce qui concerne les défendeurs qui n'étaient pas parties à une déclaration existante au moment où le débat sur la demande de permission s'est conclu, le pouvoir discrétionnaire d'accorder la permission *nunc pro tunc* ne doit pas être exercé, et les faits de la présente espèce ne justifient pas non plus l'application de la doctrine des circonstances spéciales, à supposer que celle-ci n'ait pas été abolie par le par. 21(1) de la *Loi de 2002 sur la prescription des actions*. Je suis donc d'avis de ne pas rendre l'ordonnance sollicitée à l'égard de Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron et Kathryn A. Gamble, mais de le faire à l'endroit d'IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler et Francis T. Joyce.

[111] Quant à l'affaire *Celestica*, comme aucune requête pour permission n'a été déposée avant l'expiration du délai de prescription, une ordonnance *nunc pro tunc*, à supposer qu'on puisse y recourir, ne pourrait remédier à l'expiration de ce délai. Cette raison suffit pour refuser de rendre une ordonnance

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all due respect, that it was not open to Perell J. to apply the doctrine of special circumstances to salvage the plaintiffs' claim.

(3) Doctrine of Special Circumstances

[112] Although pinpointing the origin of an equitable doctrine is generally an exercise fraught with peril, it can be said with a limited degree of certainty that the doctrine of special circumstances originated in Lord Esher M.R.'s ruling in *Weldon v. Neal* (1887), 19 Q.B.D. 394 (C.A.). In that case, Lord Esher stated that an amendment adding a cause of action to a statement of claim after the expiry of the limitation period for that cause of action will generally be unfair and prejudice a defendant. He therefore held that a court should allow such an amendment only in "very peculiar circumstances": p. 395. It is this narrow exception which has evolved into what is now known as the doctrine of special circumstances.

[113] In essence, the doctrine allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. I hasten to add that, as the Court recognized in *Basarsky v. Quinlan*, [1972] S.C.R. 380, and as the word "special" — or "peculiar" — suggests, the circumstances warranting such an amendment will not often occur.

[114] As an offspring of equity, the doctrine of special circumstances is naturally concerned with fairness to the parties. Indeed, this concern was at the forefront of Lord Esher's mind in *Weldon*. Unsurprisingly, no exhaustive list of the circumstances that qualify as "special" has been proposed by the courts, and I believe it would be risky and unwise to do so. I note however that, concerned with not prejudicing a defendant, this Court has paid particular attention to whether the facts relevant to the

*nunc pro tunc*. De plus, pour les motifs que j'exposerai plus loin, j'estime avec beaucoup d'égards qu'il n'était pas loisible au juge Perell de s'en remettre à la doctrine des circonstances spéciales pour sauvegarder la réclamation des demandeurs.

(3) La doctrine des circonstances spéciales

[112] Cerner l'origine d'une doctrine en equity est généralement un exercice parsemé d'embûches, mais on peut affirmer avec un certain niveau de certitude que la doctrine des circonstances spéciales a vu le jour dans la décision *Weldon c. Neal* (1887), 19 Q.B.D. 394 (C.A.), du maître des rôles lord Esher. Dans cette affaire, lord Esher a affirmé qu'un amendement ajoutant une cause d'action à une déclaration après l'expiration du délai de prescription applicable à cette cause d'action est généralement injuste et cause préjudice à un défendeur. En conséquence, le juge a conclu que le tribunal ne devrait pas autoriser pareil amendement, à moins d'être en présence de [TRADUCTION] « circonstances très particulières » : p. 395. Il s'agit là de l'exception limitée qui est devenue ce qu'on appelle désormais la doctrine des circonstances spéciales.

[113] Essentiellement, cette doctrine autorise le tribunal à modérer les effets potentiellement sévères et injustes des délais de prescription en permettant à un demandeur d'ajouter une cause d'action ou une partie à sa déclaration après l'expiration du délai de prescription applicable. Je m'empresse d'ajouter que, comme l'a reconnu la Cour dans *Basarsky c. Quinlan*, [1972] R.C.S. 380, et tel que l'évoquent les mots « spécial » ou « particulier », les circonstances justifiant une telle modification se présentent rarement.

[114] Issue de l'equity, la doctrine des circonstances spéciales implique naturellement l'équité envers les parties. En effet, cette préoccupation était celle de lord Esher dans *Weldon*. Comme on pouvait s'y attendre, les tribunaux n'ont proposé aucune liste exhaustive des circonstances qui pourraient être qualifiées de « spéciales », et j'estime qu'il serait périlleux et peu judicieux de le faire. Je signale toutefois que, soucieuse de ne pas causer préjudice à un défendeur, la Cour a porté une

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extinguished action were pleaded in the original statement of claim and whether the defendant was aware of them during discovery: *Basarsky*; see also *Dugal*, at paras. 60-68. The factors enumerated by the Ontario Court of Appeal in *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 23, which were reiterated by van Rensburg J. in *IMAX*, are also helpful guides:

> As such, "special circumstances" include factors such as: the relationship between the proposed claim and the existing action; the true nature of all of the claims; the progress of the action; and the knowledge of the parties . . . . [*IMAX*, at para. 71]

[115] Here, the legislature specifically barred a plaintiff from commencing a statutory action under s. 138.3 *OSA* without first obtaining leave of the court. This leave requirement, and its interaction with the limitation period, is central to the delicate balance which Part XXIII.1 *OSA* strikes between the various participants in the market.

[116] The doctrine of special circumstances is of no avail to any of the plaintiffs in the three cases before us. This is because neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3. In all three cases, this doctrine does not provide the plaintiffs with an effective remedy, since it cannot on its own overcome the leave requirement of s. 138.8 *OSA*.

[117] In the case of *Celestica*, in which the limitation period expired before a motion for leave was even brought, applying the special circumstances doctrine to grant relief to the plaintiffs would necessarily provide judges with general authority to extend limitation periods, which would frustrate the purpose of s. 138.14 *OSA*. It is also striking that

attention particulière à la question de savoir si les faits pertinents quant à l'action éteinte avaient été allégués dans la déclaration initiale et si le défendeur avait connaissance de ceux-ci au moment de l'interrogatoire préalable : *Basarsky*; voir également *Dugal*, par. 60-68. Les facteurs énumérés par la Cour d'appel de l'Ontario dans *Frohlick c. Pinkerton Canada Ltd.*, 2008 ONCA 3, 88 O.R. (3d) 401, par. 23, et réitérés par la juge van Rensburg dans l'arrêt *IMAX* nous éclairent également :

> [TRADUCTION] Par conséquent, les « circonstances spéciales » comprennent des facteurs comme : le rapport entre la réclamation projetée et l'action en cours; la véritable nature de toutes les réclamations; l'évolution de l'action; les connaissances des parties . . . [*IMAX*, par. 71]

[115] En l'espèce, le législateur a expressément prévu l'impossibilité pour un demandeur d'intenter un recours au titre de l'art. 138.3 de la *LVM* sans avoir d'abord obtenu la permission du tribunal. Cette obligation d'obtenir une permission préalable et son interaction avec le délai de prescription sont au cœur de l'équilibre délicat établi par la partie XXIII.1 de la *LVM* entre les différents acteurs du marché.

[116] La doctrine des circonstances spéciales n'est d'aucune utilité pour l'un ou l'autre des demandeurs dans les trois dossiers dont nous sommes saisis. Il en est ainsi parce qu'on ne peut faire obstacle au délai prescrit à l'art. 138.14 de la *LVM* ou à la permission exigée à l'art. 138.8 de cette loi en amendant les actes de procédure pour y inclure le recours de l'art. 138.3. Dans les trois cas, cette doctrine ne permet pas aux demandeurs d'obtenir un redressement efficace car elle ne peut contrer à elle seule l'exigence de permission prévue par l'art. 138.8 de la *LVM*.

[117] Dans l'affaire *Celestica*, où le délai de prescription a expiré avant même qu'une requête pour permission soit présentée, appliquer la doctrine des circonstances spéciales pour accorder un redressement aux demandeurs conférerait nécessairement aux juges le pouvoir général de proroger les délais de prescription, ce qui irait à l'encontre de l'objet de

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Perell J., in discussing the "special circumstances" justifying this discretionary remedy, did not conclude that the plaintiffs had been diligent, but focused instead on the absence of prejudice to the defendants.

C. *Threshold of Reasonable Possibility of Success*

[118] In *CIBC*, the defendants challenged the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA*. One of the conditions that must be met to obtain leave is that the court must be satisfied that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 138.8(1)(b) *OSA*. Strathy J. interpreted this statutory language as establishing a relatively low threshold according to which leave will be denied only if, "having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success": para. 374. The Court of Appeal upheld this interpretation of s. 138.8(1)(b).

[119] The defendants in *CIBC* argued in this Court that the threshold articulated by Strathy J. is too low.

[120] I will address the point briefly, given the Court's recent decision in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106.

[121] In *Theratechnologies*, the Court was asked to interpret s. 225.4 of the *Securities Act*, CQLR, c. V-1.1 ("*QSA*"), the Quebec counterpart to s. 138.8 *OSA*. That section, which introduces a leave requirement for a statutory claim based on a secondary market misrepresentation in Quebec, provides that

l'art. 138.14 de la *LVM*. Il est aussi remarquable que le juge Perell, dans son analyse des « circonstances spéciales » justifiant ce redressement discrétionnaire, n'ait pas conclu que les demandeurs avaient fait preuve de diligence. Il a plutôt insisté sur l'absence de préjudice subi par les défendeurs.

C. *Le critère préliminaire de la possibilité raisonnable de succès*

[118] Dans l'affaire *CIBC*, les défendeurs ont contesté le critère préliminaire auquel doit satisfaire un demandeur lorsqu'il demande la permission au titre de l'art. 138.8 de la *LVM*. L'une des conditions que le demandeur doit respecter pour pouvoir obtenir cette permission consiste à démontrer à la satisfaction du tribunal qu'« il est raisonnablement possible que l'action soit réglée au procès en faveur du demandeur » : al. 138.8(1)b) de la *LVM*. Selon le juge Strathy, ces mots établissent un critère relativement peu élevé suivant lequel la permission ne sera pas accordée seulement si, [TRADUCTION] « eu égard à l'ensemble de la preuve présentée par les parties et compte tenu des limites inhérentes au processus des requêtes, la preuve du demandeur est tellement faible ou a été réfutée par le défendeur avec tant de succès qu'il n'a aucune possibilité raisonnable de succès » : par. 374. La Cour d'appel a confirmé cette interprétation de l'al. 138.8(1)b).

[119] Les défendeurs dans le dossier *CIBC* ont fait valoir devant la Cour que le critère préliminaire formulé par le juge Strathy n'est pas assez lourd ou élevé.

[120] Je traiterai brièvement de ce point compte tenu de l'arrêt récent de la Cour dans *Theratechnologies inc. c. 121851 Canada inc.*, 2015 CSC 18, [2015] 2 R.C.S. 106.

[121] Dans *Theratechnologies*, la Cour était appelée à interpréter l'art. 225.4 de la *Loi sur les valeurs mobilières*, RLRQ, c. V-1.1 (« *LVMQ* »), l'équivalent québécois de l'art. 138.8 de la *LVM*. Cet article, qui établit l'obligation d'obtenir la permission d'intenter un recours pour déclaration inexacte de

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there must be a "reasonable possibility that [the action] will be resolved in favour of the plaintiff" for leave to be granted. The Court stated that for an action to have a "reasonable possibility" of success under s. 225.4, there must be a "reasonable or realistic chance that [it] will succeed": *Theratechnologies*, at para. 38. Claimants must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": *Theratechnologies*, at para. 39.

[122] There is no difference between the language of s. 138.8 *OSA* and that of s. 225.4 *QSA*. Moreover, both provisions relate to leave applications for statutory claims based on secondary market misrepresentation, albeit in different jurisdictions. Accordingly, the threshold test under s. 225.4 *QSA* articulated in *Theratechnologies* applies in the context of s. 138.8 *OSA*.

[123] Although there may be differences in the records that need to be produced in support of the leave applications in Quebec and Ontario (*Theratechnologies inc. v. 121851 Canada inc.*, 2013 QCCA 1256, at paras. 125-26 (CanLII)), this does not affect the threshold a plaintiff must meet.

D. *Preferability*

[124] In *CIBC*, the plaintiffs sought certification for seven common issues relating to a common law misrepresentation claim. Strathy J. held that reliance, a necessary element of a common law misrepresentation claim, "is not an issue that is capable of resolution on a common basis": para. 600. He added that "a class proceeding would not be the preferable procedure for resolving a reliance-based claim, as it would give rise to individual issues of causation and reliance that would be unmanageable": para. 610. In

faits sur le marché secondaire au Québec, indique qu'il doit exister une « possibilité raisonnable que le demandeur ait gain de cause » pour que la permission soit accordée. La Cour a affirmé que la « possibilité raisonnable » d'avoir gain de cause au sens de l'art. 225.4 s'entend d'une « possibilité raisonnable ou réaliste que le demandeur ait gain de cause » : *Theratechnologies*, par. 38. Ainsi, le demandeur doit « offrir une analyse plausible des dispositions législatives applicables, et il doit également présenter des éléments de preuve crédibles à l'appui de sa demande » : *Theratechnologies*, par. 39.

[122] Il n'y a pratiquement aucune différence entre le libellé de l'art. 138.8 de la *LVM* de l'Ontario et celui de l'art. 225.4 de la *LVMQ*. De plus, ces deux dispositions touchent les demandes de permission visant à intenter un recours statutaire pour déclaration inexacte de faits sur le marché secondaire, quoique dans des provinces différentes. Par conséquent, le critère préliminaire formulé dans l'arrêt *Theratechnologies* à l'égard de l'art. 225.4 de la *LVMQ* s'applique dans le contexte de l'art. 138.8 de la *LVM* ontarienne.

[123] Bien qu'il puisse y avoir des différences en ce qui concerne les documents à produire au Québec et en Ontario respectivement à l'appui des demandes de permission (*Theratechnologies inc. c. 121851 Canada inc.*, 2013 QCCA 1256, [2013] R.J.Q. 1128, par. 125-126), cela n'a aucune incidence sur le critère préliminaire auquel doit satisfaire le demandeur.

D. *Le meilleur moyen*

[124] Dans le dossier *CIBC*, les demandeurs ont sollicité une autorisation de recours collectif quant à sept questions communes relatives à une réclamation pour déclaration inexacte en common law. Le juge Strathy a conclu que la question de savoir si une personne s'est fiée aux informations inexactes, élément nécessaire du recours de common law pour déclaration inexacte, [TRADUCTION] « n'est pas une question susceptible d'être traitée collectivement » : par. 600. Le juge Strathy a ajouté

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the result, he refused to certify all seven issues relating to the common law negligent misrepresentation claim.

[125] The Court of Appeal upheld the motion judge's decision not to certify the issues relating to reliance and damages. However, it held that five out of the seven issues proposed by the plaintiffs related to the intent and conduct of the defendant CIBC, and should be certified as against CIBC in order to advance the litigation against it. The Court of Appeal therefore allowed the appeal in part and certified those five issues.

[126] In this Court, the defendants argued that none of the issues relating to the common law misrepresentation claim should be certified in this case. The defendants further argued that the common law misrepresentation claim fails the preferability analysis required under s. 5(1)(d) *CPA*, because the common law cause of action is not preferable to the statutory cause of action under Part XXIII.1 *OSA*. The defendants raised several arguments to the effect that the procedure created by Part XXIII.1 was specifically intended by the legislature to be the preferable procedure for class actions: CIBC's factum, at paras. 89-111.

[127] CIBC's argument is premised in part on *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, in which this Court stated that the preferability analysis focuses not just on the alternative procedure, but also on the effect that the procedure may have on the achievement of substantive results: para. 34.

[128] I am unable to accept CIBC's arguments. First, they run counter to the language of s. 138.13

qu'« un recours collectif ne serait pas le meilleur moyen de régler une action fondée sur le fait que le demandeur s'est fié aux déclarations, puisque cela soulèverait des questions individuelles de lien de causalité et de fiabilité qui seraient impossibles à gérer » : par. 610. Par conséquent, il a refusé d'autoriser les sept questions relatives à l'action en common law pour déclaration inexacte faite par négligence.

[125] La Cour d'appel a confirmé la décision du juge des requêtes de ne pas autoriser les questions relatives à la causalité et aux dommages-intérêts. Toutefois, elle a conclu que cinq des sept questions proposées par les demandeurs se rapportaient à l'intention et à la conduite de la défenderesse CIBC et devaient être autorisées à l'encontre de cette dernière pour que la poursuite engagée contre elle aille de l'avant. La Cour d'appel a donc accueilli l'appel en partie et autorisé ces cinq questions.

[126] Devant nous, les défendeurs ont fait valoir qu'aucune des questions liées à la réclamation de common law fondée sur la déclaration inexacte ne devrait être autorisée en l'espèce. Les défendeurs ont également affirmé que la réclamation de common law ne remplit pas la condition du meilleur moyen établie à l'al. 5(1)d) de la *LRC*, parce que la cause d'action en common law n'est pas meilleure que la cause d'action fondée sur la partie XXIII.1 de la *LVM*. Les défendeurs ont fait valoir plusieurs arguments selon lesquels le législateur voulait expressément que le recours créé par la partie XXIII.1 soit le meilleur pour les recours collectifs : mémoire de CIBC, par. 89-111.

[127] L'argument de CIBC s'appuie en partie sur l'arrêt *AIC Limitée c. Fischer*, 2013 CSC 69, [2013] 3 R.C.S. 949, dans lequel la Cour a mentionné que l'analyse du meilleur moyen s'attache non seulement à l'autre recours, mais aussi à l'effet que la procédure utilisée peut avoir sur l'atteinte de résultats concrets : par. 34.

[128] Je ne puis retenir les arguments de CIBC. Premièrement, ils vont à l'encontre du libellé de

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*OSA*, which provides that the statutory right of action under s. 138.3 *OSA* is meant to be "in addition to, and without derogation from, any other rights". Moreover, the preferability analysis under s. 5(1)(d) *CPA* requires a court to assess whether a class proceeding is the preferable *procedure*. The Court's dictum in *Fischer* does not stand for the proposition, essentially advanced by the defendants, that a cause of action must be the preferable one in order for a claim based on it to be certified as a class proceeding. It merely indicates that the effect of a procedure on substantive rights is relevant to its preferability for the pursuit of a given cause of action. In short, the defendants' argument confuses procedure with substantive causes of action.

l'art. 138.13 de la *LVM*, lequel indique que le droit d'action conféré par l'art. 138.3 de la *LVM* « ne port[e] pas atteinte aux autres droits [. . .] mais s'y ajout[e] ». De plus, l'analyse du meilleur moyen fondée sur l'al. 5(1)d) de la *LRC* exige du tribunal qu'il évalue si un recours collectif est le meilleur *moyen*. La remarque de la Cour dans *Fischer* ne permet pas d'affirmer, comme le font essentiellement les défendeurs, qu'une cause d'action doit être la meilleure pour être autorisée comme recours collectif. La Cour précise simplement que l'effet d'une procédure sur les droits substantiels est pertinent lorsqu'il s'agit de déterminer si c'est le meilleur moyen de poursuivre une cause d'action donnée. Bref, l'argument des défendeurs confond la procédure et les causes d'action sur le fond.

## VI. Conclusion

[129] For the reasons stated above:

- In *CIBC*, I would allow the appeal except in respect of the Court of Appeal's conclusion that five of the seven issues proposed by the plaintiffs should be certified.

- In *IMAX*, I would allow the appeal and only issue a *nunc pro tunc* order granting leave to commence the statutory action in relation to the defendants who were parties to the original statement of claim, that is, IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

- In *Celestica*, I would also allow the appeal.

- Finally, in *CIBC* and *Celestica*, I would award costs to the appellants throughout. In *IMAX*, I would also award costs to the appellants throughout regardless of my decision to grant a *nunc pro tunc* order for some defendants.

## VI. Conclusion

[129] Pour les motifs qui précèdent :

- Dans *CIBC*, je suis d'avis d'accueillir le pourvoi, sauf en ce qui concerne la conclusion de la Cour d'appel selon laquelle il y a lieu d'autoriser cinq des sept questions proposées par les demandeurs.

- Dans *IMAX*, je suis d'avis d'accueillir le pourvoi et de rendre une ordonnance *nunc pro tunc* accordant la permission d'intenter le recours statutaire seulement à l'égard des défendeurs parties à la déclaration initiale, en l'occurrence IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler et Francis T. Joyce.

- Dans *Celestica*, je suis également d'avis d'accueillir le pourvoi.

- Enfin, dans *CIBC* et *Celestica*, je suis d'avis d'accorder aux appelants leurs dépens devant toutes les cours. Dans *IMAX*, je suis également d'avis d'accorder aux appelants leurs dépens devant toutes les cours malgré ma décision de rendre une ordonnance *nunc pro tunc* à l'endroit de certains défendeurs.

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The following are the reasons delivered by

CROMWELL J. —

I. Introduction

[130] I agree with my colleague Côté J.'s interpretation of the limitation and leave provisions which leads to the conclusion that the actions in these appeals were commenced after expiry of the limitation period. I also agree that the Ontario Superior Court of Justice has a discretionary power to grant leave, *nunc pro tunc*, after the expiry of that period, to commence a statutory claim for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 ("*OSA*"). I part company with my colleague, however, on the question of whether the appeals in *Canadian Imperial Bank of Commerce et al. v. Green and Bell* ("*CIBC*") and *IMAX Corp. et al. v. Silver and Cohen* ("*IMAX*") are proper cases in which to exercise that discretion. In my view they are and I would dismiss the appeals. As for the appeal in *Celestica Inc. et al. v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* ("*Celestica*"), I agree with Côté J.'s reasons and disposition, including as to costs.

[131] The possible limitation period problem was not on anyone's radar before the Ontario Court of Appeal's decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, in February 2012. These proceedings had been underway for years before that, since 2006 in the case of the *IMAX* action and 2008 in the case of the *CIBC* action. In both matters, the motion judges found that the plaintiffs had prosecuted their claims with diligence, that the claims had a reasonable prospect of success, that the defendants had been well aware of the nature of the claims from the beginning and that there was no hint of prejudice to them resulting from the passage of time. The record suggests that the defendants were as surprised as the plaintiffs to learn that they

Version française des motifs rendus par

LE JUGE CROMWELL —

I. Introduction

[130] Je souscris à l'interprétation que donne ma collègue la juge Côté des dispositions relatives au délai de prescription et à l'autorisation et qui mène à la conclusion que les actions en l'espèce ont été intentées après l'expiration du délai de prescription. Je partage aussi son avis que la Cour supérieure de justice de l'Ontario a le pouvoir discrétionnaire d'accorder, après l'expiration de ce délai, l'autorisation *nunc pro tunc* d'exercer un recours pour présentation inexacte des faits sur le marché secondaire en vertu de la partie XXIII.1 de la *Loi sur les valeurs mobilières* de l'Ontario, L.R.O. 1990, c. S.5 (« *LVM* »). Je diverge toutefois d'opinion avec ma collègue sur le point de savoir si les affaires *Banque Canadienne Impériale de Commerce et autres c. Green et Bell* (« *CIBC* ») et *IMAX Corp. et autres c. Silver et Cohen* (« *IMAX* ») sont des cas où il est opportun d'exercer ce pouvoir discrétionnaire. J'estime qu'ils le sont et je suis d'avis de rejeter les pourvois. Pour ce qui est du pourvoi dans *Celestica Inc. et autres c. Fiduciaires de la caisse de retraite en fiducie du Millwright Regional Council of Ontario et autres* (« *Celestica* »), je souscris aux motifs et au dispositif de la juge Côté, y compris sur la question des dépens.

[131] Personne ne croyait que le délai de prescription risquait de poser problème avant que la Cour d'appel de l'Ontario ne rende son arrêt *Sharma c. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, en février 2012. Ces procédures étaient alors en cours depuis des années, soit depuis 2006 dans l'affaire *IMAX* et depuis 2008 dans l'affaire *CIBC*. Dans les deux dossiers, les juges des motions ont conclu que les demandeurs avaient poursuivi leurs réclamations avec diligence, que les réclamations avaient une possibilité raisonnable d'être accueillies, que les défendeurs connaissaient fort bien leur nature depuis le début et qu'aucun indice ne portait à croire que le temps écoulé leur avait causé préjudice. Le dossier révèle que les défendeurs ont été aussi étonnés que

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might have a limitation defence when *Timminco* was released. Failing to exercise the *nunc pro tunc* discretion in these cases permits the defendants to avoid facing the merits of the plaintiffs' claims on purely technical grounds that even the defendants did not assert until after the fact.

les demandeurs d'apprendre qu'ils disposaient peut-être d'un moyen de défense fondé sur la prescription lorsque *Timminco* a été rendu. L'omission d'exercer le pouvoir discrétionnaire *nunc pro tunc* dans les présentes affaires permet aux défendeurs d'éluder le bien-fondé des réclamations des demandeurs pour des motifs purement techniques que même les défendeurs n'ont invoqués qu'après coup.

II. *CIBC*

II. *CIBC*

[132] The motion judge in the *CIBC* appeals, Strathy J. (as he then was), found that the plaintiffs' secondary market misrepresentation claim brought under Part XXIII.1 of the *OSA* was time-barred because they had not obtained leave of the court to commence it within the three-year limitation period found at s. 138.14 of the *OSA*: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225. I agree with this conclusion. Strathy J. also found, however, that he had no authority to grant the plaintiffs leave *nunc pro tunc* in order to avoid dismissing the plaintiffs' action as time-barred. I agree with Côté J. that this conclusion was wrong and that the motion judge in fact had a discretion to grant the order *nunc pro tunc*.

[132] Le juge des motions dans l'affaire *CIBC*, le juge Strathy (maintenant Juge en chef de l'Ontario), a conclu que le recours intenté par les demandeurs pour présentation inexacte des faits sur le marché secondaire en vertu de la partie XXIII.1 de la *LVM* était prescrit parce que le tribunal ne leur avait pas accordé l'autorisation de l'intenter dans le délai de trois ans fixé à l'art. 138.14 de cette loi : *Green c. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225. Je fais mienne cette conclusion. Par contre, le juge Strathy a aussi conclu qu'il ne disposait pas du pouvoir d'accorder aux demandeurs l'autorisation *nunc pro tunc* en vue d'éviter d'avoir à rejeter l'action des demandeurs pour cause de prescription. À l'instar de la juge Côté, j'estime que cette conclusion était erronée et que le juge des motions pouvait effectivement rendre l'ordonnance *nunc pro tunc* dans l'exercice de son pouvoir discrétionnaire.

[133] The question then becomes whether that discretion ought to be exercised in the plaintiffs' favour. The motion judge stated that if he had jurisdiction to extend the limitation period by granting leave *nunc pro tunc*, he would do so. Before turning to his reasons for reaching that conclusion, it is worth noting how well placed he was to assess the factors relevant to this question. Any legal errors that he made were irrelevant to his assessment of the equities in relation to whether or not to allow the claim to proceed.

[133] Il faut donc déterminer si ce pouvoir discrétionnaire devrait être exercé en faveur des demandeurs. Le juge des motions a affirmé qu'il aurait prorogé le délai de prescription en accordant l'autorisation *nunc pro tunc* s'il était compétent pour le faire. Avant de passer aux motifs pour lesquels le juge des motions est parvenu à cette conclusion, il convient de noter à quel point il était bien placé pour évaluer les facteurs pertinents à cet égard. Toute erreur de droit qu'il aurait commise, le cas échéant, n'avait rien à voir avec son évaluation du caractère équitable de la décision de permettre ou non que la réclamation aille de l'avant.

[134] The motion judge had been the case management judge assigned to this file since the fall of

[134] Le juge des motions était chargé de la gestion de l'instance dans ce dossier depuis l'automne

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2009. He had conducted the 8-day hearing which led to his decision. The record before him was voluminous. It consisted of some 25 affidavits, excerpts from thousands of documents, 29 days of cross-examination and the evidence of 18 witnesses. The reasons for decision demonstrate that the motion judge had an encyclopedic grasp of this material. He was, therefore, ideally placed to assess and weigh all of the many considerations that are relevant to the question of whether the court's discretion should be exercised in the plaintiffs' favour. His assessment of those considerations and the weight to be given to them should, in my view, be treated with deference on appeal.

[135] The motion judge gave five reasons why he would exercise his discretion to grant leave *nunc pro tunc* in the plaintiffs' favour. I see no error in the principles that he applied, in the factors that he considered relevant or in his assessment of the evidence. In short, I see no basis to interfere with his conclusion that this is a proper case to exercise the *nunc pro tunc* discretion in the plaintiffs' favour.

[136] The motion judge began by finding that the plaintiffs had been diligent in pursuing their action:

> First, unlike the situation in *Timminco Ltd.*, the plaintiffs have been diligently pursuing the motion for leave on their own behalf and on behalf of the Class. This is not a case in which the suspension of the limitation period would have left the parties, Class Members and the court without any guarantee that the action would be prosecuted. [para. 541]

He reviewed the history of the litigation in detail: para. 494. He found that while the action had moved slowly, there had never been any doubt about the plaintiffs' intention to seek leave and that a "great deal of time, effort and resources ha[d] been expended to develop a substantial record": para. 495. He noted that the plaintiffs had faced some challenges along the way and that "[t]heir

2009. Il avait présidé l'audience de huit jours qui a débouché sur sa décision. Le dossier porté à sa connaissance était volumineux. Il se composait de quelque 25 affidavits, extraits de milliers de documents, 29 jours de contre-interrogatoire et dépositions de 18 témoins. Le juge des motions a démontré dans ses motifs de décision qu'il avait une connaissance encyclopédique de cette preuve. Il se trouvait donc dans une situation idéale pour évaluer et soupeser l'ensemble des multiples considérations se rapportant au point de savoir si le tribunal doit exercer son pouvoir discrétionnaire en faveur des demandeurs. J'estime qu'il faut faire preuve de déférence en appel à l'égard de son analyse de ces considérations et du poids à leur attribuer.

[135] Le juge des motions a donné cinq raisons pour lesquelles il était d'avis d'exercer son pouvoir discrétionnaire pour accorder l'autorisation *nunc pro tunc* en faveur des demandeurs. Je ne relève aucune erreur dans les principes qu'il a appliqués, les facteurs qu'il a jugé pertinents ou son appréciation de la preuve. Bref, je ne vois aucune raison de modifier sa conclusion qu'il y a lieu en l'espèce d'exercer le pouvoir discrétionnaire *nunc pro tunc* en faveur des demandeurs.

[136] Le juge des motions a d'abord conclu que les demandeurs avaient poursuivi leur action avec diligence :

> [TRADUCTION] Tout d'abord, contrairement à la situation qui prévalait dans *Timminco Ltd.*, les demandeurs ont poursuivi avec diligence la motion en autorisation en leur propre nom et au nom du groupe. Nous ne sommes pas en présence d'un cas où la suspension du délai de prescription n'aurait donné aux parties, aux membres du groupe et au tribunal aucune garantie que l'action suivrait son cours. [par. 541]

Il a étudié en détail l'historique du litige : par. 494. Selon lui, bien que l'action ait avancé lentement, l'intention des demandeurs de solliciter l'autorisation n'a jamais fait de doute et [TRADUCTION] « beaucoup de temps, d'efforts et de ressources avaient été consacrés au montage d'un dossier substantiel » : par. 495. Il a souligné que les demandeurs avaient connu certaines difficultés en cours

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conduct [could not] be described as dilatory": para. 495. He observed that the action had been under case management from the outset. I see no basis on which we could reach a different assessment of the plaintiffs' diligence than did the motion judge who had been immersed for several years in this file.

[137] The motion judge then noted that the limitation issue came as a surprise to the bar when the *Timminco* decision was released in February 2012:

> Second, *Timminco Ltd.* was a case of first impression. It is fair to say that it came as a surprise to the bar. There are other decisions of this court, specifically those of Perell J. in *Timminco Ltd.*, of Rady J. in *Nor-Dor Developments Ltd.* and of van Rensburg J. in *Silver v. Imax Corp.*, that suggested that the course of action proposed by the plaintiffs was appropriate. [para. 542]

[138] The motion judge elaborated on this point by noting that, until the *Timminco* decision, the limitation period issue had not been the subject of discussion between the parties or counsel: "There is nothing in the communications between counsel, leading up to the certification and leave motions, to suggest that either party had considered the possibility that the limitation period . . . might expire if the certification and leave hearing did not occur and leave was not granted before December 6, 2010" (para. 497). He observed that *Timminco* was released on the second to last day of the original hearing of the motion (i.e. February 16, 2012) and that counsel for the individual *defendants* described it at the time as a "thunderbolt": para. 475. It was only then that counsel requested an opportunity to make further submissions on the issue of whether this action was time-barred and additional factums and authorities were delivered and further argument heard in April 2012: para. 476.

[139] The plaintiffs reasonably thought that they could be granted leave after the expiry of the

de route et que « [l]eur conduite [ne pouvait] être qualifiée de dilatoire » : par. 495. Il a ajouté que l'instance avait été gérée par un juge depuis le début. Je ne vois pas pourquoi nous pourrions tirer un autre constat sur la diligence des demandeurs que celui du juge des motions, qui a étudié à fond ce dossier pendant des années.

[137] Le juge des motions a alors fait remarquer que la question du délai de prescription avait pris le barreau par surprise lorsque l'arrêt *Timminco* a été rendu, en février 2012 :

> [TRADUCTION] Deuxièmement, *Timminco Ltd.* constituait une première. Il est juste de dire que cet arrêt a pris de court le barreau. D'autres décisions de notre cour, tout particulièrement celles du juge Perell dans *Timminco Ltd.*, du juge Rady dans *Nor-Dor Developments Ltd.* et de la juge van Rensburg dans *Silver c. Imax Corp.*, donnaient à penser que la démarche proposée par les demandeurs était appropriée. [par. 542]

[138] Le juge des motions a fourni des précisions sur ce point en soulignant que, jusqu'à l'arrêt *Timminco*, les parties ou les avocats n'avaient pas débattu de la question du délai de prescription : [TRADUCTION] « Les communications échangées entre les avocats avant la motion en certification du recours collectif et celle en autorisation ne portent aucunement à croire que l'une ou l'autre des parties n'avait envisagé la possibilité que le délai de prescription [. . .] expire si l'audience sur la certification et l'autorisation n'avait pas eu lieu et si l'autorisation n'avait pas été accordée avant le 6 décembre 2010 » (par. 497). Il a fait observer que *Timminco* avait été rendu l'avant-dernier jour de l'audition initiale de la motion (soit le 16 février 2012) et que les avocats des *défendeurs* individuels l'avaient décrit à l'époque comme un « coup de tonnerre » : par. 475. Ce n'est qu'à ce moment-là que les avocats des défendeurs ont demandé la permission de présenter d'autres observations sur la question de savoir si l'action en cause était prescrite, et des mémoires et sources supplémentaires ont été déposés et d'autres plaidoiries ont été entendues en avril 2012 : par. 476.

[139] Les demandeurs croyaient raisonnablement qu'ils pourraient obtenir l'autorisation après

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limitation period. The defendants did not suggest otherwise until after *Timminco* was released. The "thunderbolt" remark suggests that the defendants were as surprised by the ruling — and the possibility that the claim was irremediably statute-barred — as everyone else. The point is not whether, with the benefit of hindsight, we think that these views were wrong. Neither is the point that the plaintiffs' decision to seek leave *nunc pro tunc* was an intentional strategic choice. The point, in my view, is that this strategic choice had a reasonable basis at the time it was made. No one apparently had ever thought otherwise. The motion judge concluded that this was a factor favouring exercising his discretion in favour of the plaintiffs. I see no reason to differ from that conclusion.

[140] The motion judge next turned to the fact that exercising his discretion would not undermine the purposes of limitation periods:

> Third, extending the limitation period in this particular case would not do violence to the purposes of limitation periods, including the need of parties to order their affairs after reasonable periods of repose and to avoid evidence becoming stale or lost. The defendants have known of the action from an early stage and have mounted a full evidentiary response. The limitation period could have been extended without unfairness to the defendant and without impairing public confidence in the administration of justice. [para. 543]

[141] This is a proper consideration and I see no error in the motion judge's reliance on it here. I would put the point more bluntly. Holding that the plaintiffs' claim is irremediably statute-barred is to defeat that claim by allowing the defendants to take advantage of an after-the-fact "gotcha" — a technical defence, the application of which in this case does not further either the purpose of the limitation defence or reinforce public confidence in the administration of justice.

l'expiration du délai de prescription. Les défendeurs n'ont prétendu le contraire qu'après le prononcé de l'arrêt *Timminco*. L'emploi de l'expression « coup de tonnerre » donne à penser que les défendeurs étaient aussi surpris que les autres par l'arrêt et la possibilité que la réclamation soit irrémédiablement prescrite. Il n'importe pas de savoir si, en rétrospective, nous croyons que ces points de vue étaient erronés. Il n'importe pas non plus de savoir si la décision des demandeurs de solliciter l'autorisation *nunc pro tunc* constituait un choix stratégique délibéré. Ce qui importe, selon moi, c'est que ce choix stratégique avait un fondement raisonnable au moment où il a été fait. Personne n'avait jamais apparemment pensé le contraire. Le juge des motions a conclu que ce facteur favorisait l'exercice de son pouvoir discrétionnaire en faveur des demandeurs. Je ne vois aucune raison de m'écarter de cette conclusion.

[140] Le juge des motions a affirmé ensuite que l'exercice de son pouvoir discrétionnaire ne minerait pas les objectifs des délais de prescription :

> [TRADUCTION] Troisièmement, la prorogation du délai de prescription dans l'affaire qui nous occupe ne porterait pas atteinte aux objectifs des délais de prescription, notamment la nécessité pour les parties d'organiser leurs affaires après des périodes raisonnables de répit et d'éviter la désuétude ou la perte d'éléments de preuve. Les défendeurs sont au courant de l'action depuis le début et ont monté un dossier complet de preuve en réplique. Le délai de prescription aurait pu être prorogé sans que les défendeurs en subissent une injustice et sans miner la confiance du public dans l'administration de la justice. [par. 543]

[141] C'est là une considération pertinente et j'estime que le juge des motions n'a commis aucune erreur en s'appuyant sur celle-ci en l'espèce. Je serai plus direct. Juger que la réclamation des demandeurs est irrémédiablement prescrite revient à éteindre ce droit d'action en permettant aux défendeurs de tirer profit après coup d'un moyen de défense technique « je vous ai eu », dont l'application en l'espèce ne favorise pas l'atteinte de l'objectif du moyen de défense fondé sur la prescription, ni ne renforce la confiance du public dans l'administration de la justice.

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[142] The motion judge next considered the duty to protect unrepresented putative class action members:

> Fourth, this is a proposed class action and the court has a duty to the unrepresented putative Class Members to ensure that their rights are protected. At least up until the decision in *Timminco Ltd.*, it was reasonable for unrepresented Class Members to assume that their rights could shelter under the umbrella of this action. Their rights will now be lost as a result of the expiry of the limitation period. [para. 544]

[143] I see no basis to object to the motion judge's reasoning on this point.

[144] The final basis for exercising discretion in the plaintiffs' favour was that their claim has a reasonable prospect of success:

> Finally, I have found that the plaintiffs' statutory claim has a reasonable possibility of success. In the next section of these reasons, I will set out my conclusion that the statutory claim would be suitable for certification under the *C.P.A.* As a result of the expiry of the limitation period, this class action, which has a reasonable possibility of success, will not be resolved on its merits, an unfortunate conclusion, under the circumstances. [para. 545]

[145] There is no basis to interfere with the motion judge's assessment of the potential merit of the plaintiffs' claim or with his conclusion that this factor supported exercising discretion in their favour. I note that my colleague Côté J. does not take issue with the motion judge's conclusion that this action had a reasonable prospect of success.

[146] To conclude, the motion judge identified relevant considerations, weighed them carefully and decided that if he had jurisdiction to do so, he would exercise his discretion in the plaintiffs' favour. I see nothing wrong with his analysis, let alone anything that justifies second-guessing his conclusion on appeal.

[142] Le juge des motions est ensuite passé à l'obligation de protéger les demandeurs non représentés du recours collectif projeté :

> [TRADUCTION] Quatrièmement, il s'agit d'un recours collectif projeté et le tribunal est tenu envers les membres non représentés du groupe proposé de veiller à la protection de leurs droits. Il était raisonnable pour ces personnes, du moins jusqu'à l'arrêt *Timminco Ltd.*, de présumer que leurs droits pourraient être protégés par ce recours. Ils perdront désormais ces droits du fait de l'expiration du délai de prescription. [par. 544]

[143] Je ne vois aucune raison de m'opposer au raisonnement du juge des motions sur ce point.

[144] Le dernier motif pour lequel il convenait d'exercer le pouvoir discrétionnaire en faveur des demandeurs était que leur réclamation a une possibilité raisonnable d'être accueillie :

> [TRADUCTION] Enfin, j'ai conclu que la réclamation présentée par les demandeurs en vertu de la loi a une possibilité raisonnable d'être accueillie. Dans la prochaine section des présents motifs, j'exposerai ma conclusion que cette réclamation se prêterait à la certification au titre de la *LRC*. Vu l'expiration du délai de prescription, le recours collectif en question, qui a une possibilité raisonnable d'être accueilli, ne sera pas tranché sur le fond, un dénouement malheureux dans les circonstances. [par. 545]

[145] Il n'y a aucune raison de modifier l'évaluation qu'a faite le juge des motions du bien-fondé éventuel de la réclamation des demandeurs, ou sa conclusion que ce facteur étayait l'exercice de son pouvoir discrétionnaire en leur faveur. Je signale que ma collègue la juge Côté ne s'inscrit pas en faux contre la conclusion du juge des motions selon laquelle l'action en cause avait une possibilité raisonnable d'être accueillie.

[146] Pour terminer, le juge des motions a relevé des considérations pertinentes, les a soupesées avec soin et a décidé que, s'il était compétent pour le faire, il aurait exercé son pouvoir discrétionnaire en faveur des demandeurs. Je ne relève aucune lacune dans son analyse, encore moins une erreur qui justifie une remise en question de sa conclusion en appel.

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[147] Other issues were raised in the *CIBC* appeals. With respect to the threshold for leave under s. 138.8 of the *OSA*, I agree with my colleague Côté J.'s conclusion as to the applicable threshold and with my colleague Karakatsanis J. that the *CIBC* plaintiffs met it. I also agree with Côté J.'s analysis and disposition of the certification of common issues.

[148] In *CIBC*, therefore, I would apply the *nunc pro tunc* doctrine to grant leave to commence the statutory action, and dismiss the appeals.

III. *IMAX*

[149] Like my colleague Côté J., I agree that the motion judge in this matter, van Rensburg J. (as she then was), was correct to exercise her *nunc pro tunc* discretion. I part company with my colleague, however, in overturning the motion judge's decision to exercise her curative discretion in relation to the defendants whom she permitted to be added to the amended statement of claim.

[150] Like my colleague, I do not think that this case is an appropriate one to finally decide whether the limitation defence in relation to the claims against additional defendants is beyond the reach of the court's discretion by virtue of s. 21(1) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The point is an important one in Ontario law, the Ontario jurisprudence is not settled and we received no argument on it in this appeal, and only brief submissions in the appeal in *Celestica*.

[151] Section 21(1) of the *Limitations Act, 2002* prevents the addition of a party where a limitation period has expired with respect to the claim against that party. However, s. 20 provides that the *Limitations Act, 2002* (and therefore s. 21(1)) "does not

[147] D'autres questions ont été soulevées dans les pourvois du dossier *CIBC*. Pour ce qui est du critère préliminaire servant à déterminer s'il y a lieu d'accorder l'autorisation visée à l'art. 138.8 de la *LVM*, je fais mienne la conclusion de ma collègue la juge Côté relative au critère préliminaire applicable et je suis d'accord avec ma collègue la juge Karakatsanis que les demandeurs dans *CIBC* ont satisfait à ce critère. Je souscris également à l'analyse et à la décision de la juge Côté en ce qui concerne la certification des questions communes.

[148] Par conséquent, dans *CIBC*, je suis d'avis d'appliquer la doctrine *nunc pro tunc* pour accorder l'autorisation d'intenter l'action conférée par la loi, et de rejeter les pourvois.

III. *IMAX*

[149] À l'instar de ma collègue la juge Côté, j'estime que la juge des motions dans cette affaire, la juge van Rensburg (maintenant juge à la Cour d'appel), avait eu raison d'exercer son pouvoir discrétionnaire *nunc pro tunc*. Je diverge toutefois d'opinion avec ma collègue en infirmant la décision de la juge des motions d'exercer son pouvoir discrétionnaire réparateur à l'endroit des défendeurs dont elle a autorisé l'ajout à la déclaration modifiée.

[150] Tout comme ma collègue, je ne crois pas qu'il y a lieu en l'espèce de décider de façon définitive si le moyen de défense fondé sur la prescription des poursuites engagées contre d'autres défendeurs outrepasse le pouvoir discrétionnaire du tribunal suivant le par. 21(1) de la *Loi de 2002 sur la prescription des actions*, L.O. 2002, c. 24, ann. B. Il s'agit d'un enjeu important en droit ontarien. Or, la jurisprudence de cette province en la matière n'est pas établie et nous n'avons reçu aucun argument à ce sujet en l'espèce. Seules de brèves observations ont été présentées dans l'affaire *Celestica*.

[151] Le paragraphe 21(1) de la *Loi de 2002 sur la prescription des actions* empêche de joindre une partie en cas d'expiration du délai de prescription applicable à une réclamation contre cette partie. Par contre, l'art. 20 dispose que cette loi (et, du même

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affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act". The relevant limitation period here, of course, is found not in the *Limitations Act, 2002* but in the *OSA*. The limitation period is therefore "under another Act". The question that arises is whether the discretion which the motion judge exercised to make an amendment to add parties after expiry of a limitation period is an "extension, suspension or other variation of a limitation period . . . by or under another Act" and therefore not ousted by s. 21(1).

[152] The Ontario jurisprudence is not settled on this question. In *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401, the issue was whether the amendment powers under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, could be used so as to extend a limitation period under the *Limitations Act, 2002*. The court's conclusion in the negative does not precisely resolve the question in this case. Moreover, the Ontario Court of Appeal has held that the doctrine of special circumstances continues to be available with respect to limitation periods other than those set out in the *Limitations Act, 2002*: see, e.g., *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401. In the Ontario Superior Court of Justice, there are conflicting decisions in relation to the impact of ss. 20 and 21 on the court's inherent jurisdiction: see, e.g., the three motion judges' decision in the present appeals and *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764. Recent commentary takes the view that the discretionary jurisdiction may apply to other limitation periods contained in different legislation, such as the *OSA* in this case: C. Porretta and R. Punjani, "The Clock Strikes: A Review of the Limitations Act, 2002, A Decade Later" (2015), 44 *Adv. Q.* 346, at p. 375.

coup, le par. 21(1)) « n'a pas pour effet de porter atteinte à la prorogation, à la suspension ou à une autre modification d'un délai de prescription ou autre prévue sous le régime d'une autre loi ». Naturellement, le délai de prescription applicable en l'espèce figure non pas dans la *Loi de 2002 sur la prescription des actions*, mais dans la *LVM*. Le délai de prescription est donc prévu « sous le régime d'une autre loi ». Cela soulève la question de savoir si le pouvoir discrétionnaire qu'a exercé la juge des motions pour modifier la déclaration par adjonction de parties après l'expiration d'un délai de prescription constitue « [une] prorogation, [une] suspension ou [. . .] une autre modification d'un délai de prescription [. . .] prévue sous le régime d'une autre loi » et n'est donc pas écarté par le par. 21(1).

[152] La jurisprudence ontarienne n'est pas établie sur ce point. Dans *Joseph c. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401, il s'agissait de savoir si l'on pouvait recourir aux pouvoirs de modification établis par les *Règles de procédure civile*, R.R.O. 1990, Règl. 194, pour proroger un délai de prescription fixé dans la *Loi de 2002 sur la prescription des actions.* La conclusion négative de la Cour d'appel ne résout pas précisément la question en litige dans la présente affaire. De plus, la Cour d'appel de l'Ontario a décidé qu'il est toujours possible de se prévaloir de la doctrine des circonstances particulières à l'égard des délais de prescription qui ne sont pas impartis par la *Loi de 2002 sur la prescription des actions* : voir, p. ex., *Bikur Cholim Jewish Volunteer Services c. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401. La Cour supérieure de justice de l'Ontario a rendu des décisions contradictoires au sujet de l'incidence des art. 20 et 21 sur la compétence inhérente de la cour : voir, p. ex., la décision des trois juges des motions dans les présents dossiers ainsi que *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1764. Selon un commentaire récent, le pouvoir discrétionnaire peut s'appliquer aux autres délais de prescription que l'on trouve dans différentes lois telle la *LVM* en l'espèce : C. Porretta et R. Punjani, « The Clock Strikes : A Review of the Limitations Act, 2002, A Decade Later » (2015), 44 *Adv. Q.* 346, p. 375.

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[153] The motion judge reviewed the Ontario jurisprudence and concluded that the Superior Court of Justice continues to have discretion in relation to amendments that have the effect of overcoming the limitation period set out in the *OSA*: *Silver v. IMAX*, 2012 ONSC 4881, at paras. 67-88 (CanLII). She found that s. 20 of the *Limitations Act, 2002* preserved that jurisdiction: paras. 82-83. The Court of Appeal did not consider this aspect of the case, given its conclusion that the action was not statute-barred: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402. The appellants in this case did not rely on ss. 20 and 21 of the *Limitations Act, 2002*, although the appellants in the *Celestica* appeal did advance brief argument on this point: A.F., at paras. 76-78.

[154] In my view, the wiser course for us in these circumstances is not to address this issue in disposing of the *IMAX* appeal. The issue is an important point of Ontario limitations law on which the Ontario Court of Appeal has not definitively ruled. The point is also far from straightforward, as evidenced by the conflicting views of the motion judges in these cases. We have nothing in the reasons of the Court of Appeal in this case to assist our consideration of the question and the parties to the *IMAX* appeal did not address it. I would therefore dispose of this appeal without deciding this point. To be clear, I am treating this as an issue not before us for decision in this appeal and my reasons should not be understood as implying anything else.

[155] I focus, therefore, on the motion judge's exercise of the discretion, assuming that she had it to exercise. I find nothing to fault and no basis for reaching a different conclusion.

[156] The application to dismiss the statutory claim on the basis of the limitation period was heard more than two years after leave to proceed and certification had been granted. The motion judge noted that the defendants had actual notice of the nature of

[153] La juge des motions a passé en revue la jurisprudence de l'Ontario et conclu que la Cour supérieure de justice conserve son pouvoir discrétionnaire relativement aux modifications qui ont pour effet de contrer le délai de prescription établi dans la *LVM* : *Silver c. IMAX*, 2012 ONSC 4881, par. 67-88 (CanLII). Elle a conclu que l'art. 20 de la *Loi de 2002 sur la prescription des actions* maintenait ce pouvoir : par. 82-83. La Cour d'appel n'a pas examiné cet aspect de l'affaire, vu sa conclusion que l'action n'était pas prescrite : *Green c. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402. Les appelants dans cette affaire n'ont pas invoqué les art. 20 et 21 de la *Loi de 2002 sur la prescription des actions*, mais les appelants dans *Celestica* ont effectivement présenté un bref argument sur ce point : m.a., par. 76-78.

[154] À mon avis, il est plus sage pour nous dans les circonstances de ne pas nous prononcer sur ce point en tranchant le pourvoi *IMAX*. Il s'agit d'un enjeu important du droit ontarien des prescriptions sur lequel la Cour d'appel de l'Ontario n'a pas statué de manière définitive. L'enjeu est également loin d'être simple, comme en font foi les points de vue opposés des juges des motions dans les présentes affaires. Les motifs de la Cour d'appel en l'espèce ne nous aident aucunement à analyser la question et les parties au pourvoi *IMAX* ne l'ont pas abordée. Par conséquent, je suis d'avis de statuer sur ce pourvoi sans trancher ce point. Par souci de clarté, il ne s'agit pas, selon moi, d'une question qui nous a été soumise pour décision en l'espèce et on ne doit pas considérer que mes motifs laissent sous-entendre quoi que ce soit d'autre.

[155] Je m'attache donc à l'exercice, par la juge des motions, du pouvoir discrétionnaire, à supposer qu'elle en disposait. Je n'ai rien à lui reprocher et aucune raison de parvenir à une autre conclusion.

[156] La demande visant à faire rejeter le recours conféré par la loi sur le fondement du délai de prescription a été entendue plus de deux ans après que le tribunal eut accordé l'autorisation de procéder et certifié le recours collectif. La juge des motions a

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all of the claims against them well within the limitation period. She observed that, in fact, this actual notice "far exceeded the detail of what would have been pleaded in a statement of claim" by virtue of the requirement that the plaintiffs file affidavits in support of their leave motion: para. 89. The motion judge also found that the motion for leave was brought promptly and pursued vigorously without inappropriate delay.

[157] The motion judge also dismissed the defendants' argument that time continued to run until the plaintiffs actually filed their amended statement of claim, a step which did not occur until some two and one-half years after the expiry of the limitation period. Giving effect to this argument, she found, would be "arbitrary and unfair": para. 95. In her view, the plaintiffs had "moved promptly to make the amendments as soon as they reasonably could have done so": para. 95. She explained:

> The defendants sought to appeal the leave decision, such that it was only on February 14, 2011, with the release of the decision refusing leave to appeal, that the order granting leave under s. 138.8 became final. Any attempt to amend the Statement of Claim in the interim would have been premature. Considering the issues, and the attempt to obtain the defendants' approval to the amendments, many of which were in relation to aspects of the claim other than the pleading of the statutory cause of action, the plaintiffs moved promptly to make the amendments as soon as they reasonably could have done so. [Emphasis added; para. 95.]

[158] The motion judge was intimately familiar with the progress of this file with which she had been dealing over several years. I see no basis on which to interfere with her assessment of the equities of the situation or of the plaintiffs' diligence. In particular, there is nothing that permits us to second-guess on appeal her conclusion that the plaintiffs moved promptly to make the amendments to their statement of claim as soon as they reasonably could have done so.

fait remarquer que les défendeurs avaient bel et bien été avisés de la nature de toutes les réclamations contre eux bien avant la fin du délai de prescription. Elle a ajouté qu'en fait, cet avis [TRADUCTION] « dépassait de loin le détail de ce qui aurait été plaidé dans une déclaration » par suite de l'obligation pour les demandeurs de déposer des affidavits à l'appui de leur motion en autorisation : par. 89. La juge a également conclu que cette motion avait été présentée rapidement et poursuivie avec vigueur sans retard indu.

[157] La juge des motions a aussi rejeté l'argument des défendeurs selon lequel le délai continuait de courir jusqu'à ce que les demandeurs aient effectivement déposé leur déclaration modifiée, ce qu'ils n'ont fait que quelque deux ans et demi après l'expiration du délai de prescription. Il serait, selon elle, [TRADUCTION] « arbitraire et injuste » de retenir cet argument : par. 95. À son avis, les demandeurs ont « agi rapidement en vue d'apporter les modifications le plus tôt possible » : par. 95. Voici ses explications :

> [TRADUCTION] Les défendeurs ont demandé à interjeter appel de la décision d'accorder l'autorisation, si bien que ce n'est que le 14 février 2011, date où la Cour d'appel a refusé l'autorisation d'appel, que l'ordonnance accordant l'autorisation visée à l'art. 138.8 est devenue définitive. Il aurait été prématuré de tenter de modifier entre-temps la déclaration. Vu les questions et la tentative de faire approuver par les défendeurs les modifications, dont beaucoup touchaient d'autres aspects de la réclamation que la plaidoirie de la cause d'action légale, les demandeurs ont agi rapidement en vue d'apporter les modifications le plus tôt possible. [Je souligne; par. 95.]

[158] La juge des motions connaissait fort bien l'évolution de ce dossier dont elle s'est occupée pendant des années. À mon avis, il n'existe aucune raison de modifier son évaluation du caractère équitable de la situation ou de la diligence des demandeurs. Plus particulièrement, rien ne nous permet de remettre en question en appel sa conclusion que les demandeurs ont agi promptement en vue de modifier leur déclaration le plus tôt possible.

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IV. Disposition

[159] I would dismiss the appeals in *CIBC* and *IMAX*. I agree with Karakatsanis J.'s disposition as to costs.

The reasons of Moldaver, Karakatsanis and Gascon JJ. were delivered by

[160] Karakatsanis J. — These appeals concern class proceedings asserting both the statutory cause of action for secondary market misrepresentations and the common law tort of negligent misrepresentation. The question here is whether s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*CPA*), can suspend the limitation period for the statutory cause of action found in Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (*OSA*), where leave has not yet been granted under that Part. My colleague Côté J. concludes that it cannot. I disagree, and would hold that it can.

[161] As long as the class proceeding is properly commenced, s. 28 of the *CPA* will suspend the limitation periods applicable to all of the causes of action asserted (that is, fully pleaded) within the proceeding. As leave under s. 138.8 of the *OSA* is not a constituent element of the statutory cause of action set out in s. 138.3, the "assertion" of that cause of action does not require the prior obtaining of leave. Thus, I conclude that s. 28 of the *CPA* will suspend the limitation period in s. 138.14 of the *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.

[162] Neither the text nor the purpose of s. 28 supports my colleague Côté J.'s conclusion that this provision will not suspend the class members' limitation period until the representative plaintiff obtains leave

IV. Dispositif

[159] Je suis d'avis de rejeter les pourvois dans *CIBC* et *IMAX*. Je souscris à la décision de la juge Karakatsanis sur les dépens.

Version française des motifs des juges Moldaver, Karakatsanis et Gascon rendus par

[160] La juge Karakatsanis — Les présents pourvois portent sur des recours collectifs dans lesquels sont invoqués à la fois la cause d'action légale pour présentation inexacte des faits sur le marché secondaire et le délit de déclaration inexacte faite par négligence en common law. La question en l'espèce est de savoir si l'art. 28 de la *Loi de 1992 sur les recours collectifs*, L.O. 1992, c. 6 (*LRC*), peut suspendre le délai de prescription applicable à la cause d'action qui figure à la partie XXIII.1 de la *Loi sur les valeurs mobilières* de l'Ontario, L.R.O. 1990, c. S.5 (*LVM*), lorsque l'autorisation n'a pas encore été accordée en application de cette partie. Ma collègue la juge Côté conclut que l'art. 28 ne peut suspendre le délai en question. Je ne partage pas son point de vue et je suis d'avis de conclure qu'il le peut.

[161] Tant que le recours collectif est valablement introduit, l'art. 28 de la *LRC* suspend les délais de prescription qui s'appliquent à toutes les causes d'action invoquées (c'est-à-dire plaidées à fond) dans l'instance. Puisque l'autorisation visée à l'art. 138.8 de la *LVM* n'est pas un élément constitutif de la cause d'action prévue à l'art. 138.3, il n'est pas nécessaire d'obtenir au préalable l'autorisation pour « invoquer » cette cause d'action. J'en conclus que l'art. 28 de la *LRC* suspend le délai de prescription fixé à l'art. 138.14 de la *LVM* dès que le représentant des demandeurs introduit valablement un recours collectif fondé sur une cause d'action en common law et plaide la cause d'action légale et ses éléments constitutifs dans la déclaration.

[162] Ni le libellé ni l'objet de l'art. 28 n'appuient la conclusion de ma collègue la juge Côté selon laquelle cette disposition ne suspend pas les délais de prescription applicables aux membres du

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under s. 138.8 of the *OSA*. Such an interpretation is not consistent with the purposes of the *CPA* as a whole, nor is it harmonious with the purposes or text of Part XXIII.1 of the *OSA*, a statutory framework intended to operate effectively with the class proceeding vehicle. Concretely, excluding the statutory cause of action from s. 28 protection until leave has been granted removes compliance with the limitation period from the plaintiff's control. It would also necessarily oblige potential class members to file a multitude of individual motions for leave to commence the statutory claim, thus unnecessarily adding procedural steps and increasing costs and delays for all parties involved. Such an obligation is not required by the text of s. 28, nor by the context or purposes of the *CPA*. Such a result serves neither judicial economy nor access to justice. Rather, it undermines the harmonious operation of class proceedings in the securities context.

[163] In my view, the five-member panel of the Court of Appeal in this case (the *Green* panel) was correct to overturn that court's earlier interpretation of the application of s. 28 of the *CPA* to the s. 138.14 limitation period. For the reasons below, I would dismiss the appeals.

I. Facts and Judicial History

[164] The appeals in these three cases stem from motions in class proceedings brought before different judges of the Ontario Superior Court of Justice: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 (*CIBC*), per Strathy J.; *Silver v. IMAX*, 2012 ONSC 4881 (*IMAX*), per van Rensburg J.; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264 (*Celestica*), per Perell J. In each case, the plaintiffs claimed damages under the common law tort of

groupe jusqu'à ce que le représentant des demandeurs obtienne l'autorisation visée à l'art. 138.8 de la *LVM*. Une telle interprétation n'est pas compatible avec les objets de la *LRC* dans son ensemble, et elle ne s'harmonise pas non plus avec les objets ou le texte de la partie XXIII.1 de la *LVM*, un cadre législatif qui est censé coexister efficacement avec le mécanisme du recours collectif. Concrètement, exclure la cause d'action légale de la protection offerte par l'art. 28 jusqu'à ce que l'autorisation soit accordée fait en sorte que le respect du délai de prescription échappe à la volonté du demandeur. En outre, cela obligerait nécessairement les membres éventuels du groupe à déposer une multitude de motions individuelles en autorisation d'intenter l'action prévue par la loi, imposant ainsi inutilement à toutes les parties en cause des formalités procédurales supplémentaires, des coûts plus élevés et des délais plus longs. Pareille obligation n'est imposée ni par le libellé de l'art. 28 ni par le contexte ou les objets de la *LRC*. Un tel résultat ne favorise ni l'économie des ressources judiciaires ni l'accès à la justice. Il nuit plutôt au fonctionnement harmonieux des recours collectifs dans le contexte des valeurs mobilières.

[163] À mon avis, la formation de cinq juges de la Cour d'appel saisie de la présente affaire — *Green* — a eu raison d'infirmer l'interprétation que cette cour avait donnée précédemment à l'application de l'art. 28 de la *LRC* au délai fixé par l'art. 138.14. Pour les motifs qui suivent, je suis d'avis de rejeter les pourvois.

I. Faits et historique judiciaire

[164] Les pourvois dans les trois présentes affaires découlent tous de motions en certification de recours collectifs présentées devant des juges différents de la Cour supérieure de justice de l'Ontario : *Green c. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 (*CIBC*), le juge Strathy; *Silver c. IMAX*, 2012 ONSC 4881 (*IMAX*), la juge van Rensburg; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) c. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264 (*Celestica*), le juge Perell. Dans

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negligent misrepresentation and under the statutory cause of action in Part XXIII.1 of the *OSA* for alleged misrepresentations in respect of shares trading in the secondary market. None of the plaintiffs obtained leave to commence the statutory claim before commencing the class proceeding. In all of the cases, the limitation period, if not suspended, would have run out prior to leave being obtained: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402 (*Green ONCA*), at para. 2.

chacune des causes, les demandeurs réclamaient des dommages-intérêts fondés sur le délit de déclaration inexacte faite par négligence en common law et la cause d'action prévue à la partie XXIII.1 de la *LVM*, c'est-à-dire la présentation inexacte de faits à l'égard du commerce d'actions sur le marché secondaire. Aucun des demandeurs n'a obtenu l'autorisation d'intenter l'action prévue par la loi avant d'introduire le recours collectif. Dans tous les dossiers, le délai de prescription, s'il n'était pas suspendu, aurait expiré avant que les demandeurs n'obtiennent l'autorisation : *Green c. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402 (*Green, C.A. Ont.*), par. 2.

[165] During the course of these class proceedings, the Ontario Court of Appeal released its decision in another matter, *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, in which it interpreted the application of s. 28 of the *CPA* to the limitation period in s. 138.14 of the *OSA* for the first time. The panel (per Goudge J.A.) held that s. 28 did not suspend the s. 138.14 limitation period until leave was obtained: para. 20. Prior to this decision, the parties in the present appeals assumed that s. 28 suspended the limitation period whether or not leave had been granted. As Strathy J. noted, "Counsel for the individual defendants aptly described [*Timminco*], at that time, as a 'thunderbolt'": *CIBC*, at para. 475.

[165] Pendant que ces recours collectifs étaient en instance, la Cour d'appel de l'Ontario a rendu sa décision dans une autre affaire, *Sharma c. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, où elle a interprété pour la première fois l'application de l'art. 28 de la *LRC* au délai de prescription prévu à l'art. 138.14 de la *LVM*. La formation (sous la plume du juge Goudge) a statué que l'art. 28 ne suspendait pas ce délai de prescription jusqu'à ce que l'autorisation soit obtenue : par. 20. Avant cette décision, les parties aux présents pourvois tenaient pour acquis que l'art. 28 suspendait le délai de prescription, que l'autorisation ait été accordée ou non. Comme l'a signalé le juge Strathy, [TRADUCTION] « [l]es procureurs des défendeurs ont qualifié à juste titre [l'arrêt *Timminco*] à cette époque de "coup de tonnerre" » : *CIBC*, par. 475.

[166] The motion judges presiding over the present cases found that the panel's interpretation of s. 28 in *Timminco* governed the claims. Van Rensburg J. and Perell J. applied the common law doctrines of *nunc pro tunc* and special circumstances to save the *IMAX* and *Celestica* claims from being statute-barred. Strathy J. found that those doctrines were inapplicable, and that the statutory claim in *CIBC* could not be saved.

[166] Les juges des motions qui instruisaient les présentes affaires ont conclu que les réclamations devaient être tranchées suivant l'interprétation donnée à l'art. 28 par la formation dans *Timminco*. Les juges van Rensburg et Perell ont appliqué les doctrines de *nunc pro tunc* et des circonstances particulières, reconnues en common law, pour empêcher la prescription des réclamations dans les dossiers *IMAX* et *Celestica*. Le juge Strathy a conclu que ces doctrines ne s'appliquaient pas et que l'action intentée en vertu de la loi dans le dossier *CIBC* ne pouvait être sauvegardée.

[167] On appeal, all three cases were heard together by a five-member panel of the Ontario

[167] En appel, les trois affaires ont été instruites ensemble par une formation de cinq juges

Court of Appeal: *Green ONCA*, at para. 5. The panel overturned *Timminco*, holding that s. 28 of the *CPA* suspends the limitation period for all class members once the statutory cause of action is asserted in a class proceeding by a representative plaintiff, even if leave has not yet been granted, as long as the facts that found the action and the intent to seek leave to commence the action have been pleaded: *Green ONCA*, at paras. 6 and 78.

[168] Following these decisions, the Ontario legislature amended Part XXIII.1 of the *OSA* so that the limitation period is suspended on the filing of a motion for leave under s. 138.8 (s. 138.14(2), am. S.O. 2014, c. 7, Sch. 28, s. 15). Despite this amendment, the question at issue in these appeals requires determination for the parties before us and for other class proceedings brought prior to the amendment of the *OSA*.

## II. Analysis

### A. *The Issues*

[169] Section 28 of the *CPA* is engaged upon the "commencement of the class proceeding" and operates to suspend "any limitation period applicable to a cause of action asserted" in the class proceeding. Part XXIII.1 of the *OSA* provides, first, that an action under that Part cannot be commenced "without leave of the court granted upon motion with notice": s. 138.8(1). Second, it provides that "[n]o action shall be commenced" after the expiration of the applicable limitation period: s. 138.14.

[170] The combined operation of these provisions in the context of these class proceedings raises the following questions in relation to s. 28 of the *CPA*:

1. Is leave required in order for the plaintiff to "assert" the Part XXIII.1 statutory cause of action?

de la Cour d'appel de l'Ontario : *Green, C.A. Ont.*, par. 5. La formation a infirmé l'arrêt *Timminco*, jugeant que l'art. 28 de la *LRC* suspend le délai de prescription applicable à tous les membres du groupe dès qu'un représentant des demandeurs invoque la cause d'action légale dans un recours collectif, et ce, même si l'autorisation n'a pas encore été accordée, pourvu que les faits à l'origine de l'action et l'intention de demander l'autorisation d'intenter l'action aient été plaidés : *Green, C.A. Ont.*, par. 6 et 78.

[168] À la suite de ces décisions, le législateur ontarien a modifié la partie XXIII.1 de la *LVM* pour faire en sorte que le délai de prescription soit suspendu au moment du dépôt d'une motion en autorisation au titre de l'art. 138.8 (par. 138.14(2), mod. L.O. 2014, c. 7, ann. 28, art. 15). Malgré cette modification, il faut trancher la question en litige dans les présents pourvois pour les parties qui comparaissent devant nous et pour les besoins des autres recours collectifs intentés avant la modification de la *LVM*.

## II. Analyse

### A. *Les questions en litige*

[169] L'article 28 de la *LRC* entre en jeu à l'« introduction du recours collectif » et a pour effet de suspendre « tout délai de prescription applicable à une cause d'action d'action invoquée » dans le recours collectif. La partie XXIII.1 de la *LVM* prévoit, en premier lieu, qu'une action visée par cette partie ne peut être intentée « qu'avec l'autorisation du tribunal, accordée sur motion avec préavis » : par. 138.8(1). En deuxième lieu, elle dispose qu'« [a]ucune action ne doit être intentée » après l'expiration du délai de prescription applicable : art. 138.14.

[170] L'application conjointe de ces dispositions dans le contexte des recours collectifs en cause soulève les questions suivantes en lien avec l'art. 28 de la *LRC* :

1. L'autorisation est-elle nécessaire pour que le demandeur « invoqu[e] » la cause d'action prévue à la partie XXIII.1?

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2. Is leave a pre-condition for the commencement of a class proceeding asserting both the Part XXIII.1 statutory cause of action and the common law tort of negligent misrepresentation?

[171] I agree with the five-member panel of the Ontario Court of Appeal and would therefore answer these questions as follows.

1. The statutory cause of action can be asserted in a class proceeding statement of claim before leave is obtained under the *OSA*.

2. Section 28 of the *CPA* applies once *the class proceeding* is commenced with respect to a *cause of action* asserted. Where the statutory cause of action is asserted in a class proceeding that has been properly commenced with respect to a common law tort, s. 28 will suspend the limitation period for all causes of action.

B. *Section 28 of the CPA*

[172] The *CPA* creates and governs the procedural vehicle of class proceedings. It is a remedial statute designed to improve judicial economy, increase the access of plaintiffs to the court system for claims that would otherwise be too costly, and promote behavioural modification of wrongdoers: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; Ontario Law Reform Commission, *Report on Class Actions* (1982) (*OLRC Report*), vol. I, at pp. 117 and 212. Section 28 is an integral part of this scheme:

**28.** (1) [Limitations] Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

2. L'autorisation est-elle une condition préalable à l'introduction d'un recours collectif dans lequel sont invoqués la cause d'action prévue à la partie XXIII.1 et le délit de déclaration inexacte faite par négligence en common law?

[171] Je suis d'accord avec la formation de cinq juges de la Cour d'appel de l'Ontario et je suis par conséquent d'avis de répondre comme suit à ces questions :

1. La cause d'action légale peut être invoquée dans la déclaration d'un recours collectif avant que l'autorisation ne soit obtenue en application de la *LVM*.

2. L'article 28 de la *LRC* s'applique dès que *le recours collectif* est introduit à l'égard d'une *cause d'action* invoquée. Lorsque la cause d'action prévue par la loi est invoquée dans un recours collectif valablement introduit à l'encontre d'un délit de common law, l'art. 28 a pour effet de suspendre le délai de prescription pour toutes les causes d'action.

B. *L'article 28 de la LRC*

[172] La *LRC* crée et régit le mécanisme procédural qu'est le recours collectif. Il s'agit d'une loi réparatrice conçue pour améliorer l'économie des ressources judiciaires, assurer aux demandeurs un meilleur accès au système judiciaire pour qu'ils puissent présenter des réclamations qui seraient par ailleurs trop coûteuses ainsi que favoriser la modification du comportement des malfaiteurs : *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 15; Commission de réforme du droit de l'Ontario, *Report on Class Actions* (1982) (*Rapport de la CRDO*), vol. I, p. 117 et 212. L'article 28 fait partie intégrante de ce régime :

**28.** (1) [Prescription] Sous réserve du paragraphe (2), tout délai de prescription applicable à une cause d'action invoquée dans un recours collectif est suspendu en faveur d'un membre du groupe à l'introduction du recours collectif et reprend au détriment du membre au moment où, selon le cas :

a) ce membre se retire du recours collectif;

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(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

b) est apportée une modification de l'ordonnance certifiant le recours collectif qui a pour effet d'exclure du groupe le membre;

c) une ordonnance annulant l'ordonnance certifiant le recours collectif est rendue en vertu de l'article 10;

d) le recours collectif est rejeté sans décision sur le fond;

e) il y a désistement du recours collectif avec l'approbation du tribunal;

f) le recours collectif fait l'objet d'une transaction avec l'approbation du tribunal, à moins que la transaction ne prévoie autre chose.

[173] The French version of s. 28(1) states that "*tout délai de prescription applicable à une cause d'action invoquée dans un recours collectif est suspendu en faveur d'un membre du groupe à l'introduction du recours collectif*".

[173] Aux termes de la version anglaise du par. 28(1), « *any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding* ».

[174] Section 28 protects potential class members from the expiration of their individual limitation periods during the representative plaintiffs' pursuit of their rights through a class proceeding by suspending the limitation period for all potential class members for any "cause of action asserted in a class proceeding". In this way, s. 28 promotes two of the purposes guiding the *CPA* — judicial economy and access to justice: *OLRC Report*, vol. III, at p. 779.

[174] L'article 28 protège les membres éventuels du groupe contre l'expiration de leurs délais de prescription respectifs pendant que le représentant des demandeurs défend leurs droits au moyen d'un recours collectif en faisant suspendre le délai de prescription pour tous les membres éventuels du groupe relativement à toute « cause d'action invoquée dans un recours collectif ». L'article 28 favorise ainsi la réalisation de deux objets de la *LRC*, l'économie des ressources judiciaires et l'accès à la justice : *Rapport de la CRDO*, vol. III, p. 779.

[175] Regardless of when the representative plaintiff commences proceedings within the limitation period, the length of the certification process is inherently uncertain: see *OLRC Report*, vol. III, at p. 779. Without s. 28, the commencement of a proceeding by a representative plaintiff would only suspend the limitation period with respect to that plaintiff; the limitation period governing other potential class members would continue to run during the certification proceedings. Thus, potential class members would have to initiate parallel individual proceedings to protect their rights from becoming statute-barred. Neither outcome — the inundation of the courts by parallel individual proceedings or the expiration of plaintiffs' individual rights due to a delayed or failed

[175] Indépendamment du moment où le représentant des demandeurs introduit le recours dans le délai prescrit, la durée du processus de certification est intrinsèquement incertaine : voir *Rapport de la CRDO*, vol. III, p. 779. Sans l'art. 28, l'introduction d'un recours par un représentant des demandeurs n'aurait pour effet de suspendre le délai de prescription que pour ce représentant seulement; le délai de prescription applicable aux autres membres éventuels du groupe continuerait de courir pendant l'instance de certification. Les membres éventuels du groupe seraient donc obligés d'introduire des instances individuelles parallèles pour empêcher la prescription de leurs droits. Ni l'un ni l'autre de ces résultats — la multiplication d'instances individuelles parallèles

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certification process — is desirable: *ibid.*, at pp. 779-80.

[176] Section 28 offers protection against both outcomes: *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), at p. 47. Section 28 shelters the rights of potential class plaintiffs under the umbrella of the representative plaintiff's action. As long as the representative plaintiff commences a class proceeding within the applicable limitation period, s. 28 will suspend the limitation periods of all potential class members during the certification process.

[177] As the text of s. 28 indicates, the suspension applies to any "cause of action asserted in a class proceeding" — "*une cause d'action invoquée dans un recours collectif*". In these appeals, this Court must determine whether s. 28 shelters the rights of potential class members with respect to a Part XXIII.1 statutory cause of action that is fully pleaded (that is, asserted), but where leave has not yet been granted.

C. *Part XXIII.1 of the OSA*

[178] Part XXIII.1 is remedial legislation intended to promote the twin purposes of facilitating and enhancing access to justice for investors and deterring corporate misconduct and negligence. It was introduced to the *OSA* following a series of "high profile and well publicized incidents of alleged misrepresentations and questionable disclosure" by Canadian public companies: Canadian Securities Administrators, "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383, at p. 7385. The Toronto Stock Exchange Committee on Corporate Disclosure (the Allen Committee) recommended the inclusion of a statutory civil liability regime in the *OSA* to remedy two gaps in the *OSA* enforcement measures: (1) the inability of regulators to effectively enforce compliance with disclosure in the secondary market; and (2) the inadequacy and inaccessibility of

devant les tribunaux ou l'expiration des droits respectifs des demandeurs pour cause de retard ou d'échec du processus de certification — n'est souhaitable : *ibid.*, p. 779-780.

[176] L'article 28 permet d'éviter ces deux résultats : *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), p. 47. L'article 28 abrite les droits d'éventuels demandeurs du groupe sous le parapluie de l'action du représentant des demandeurs. Tant que ce dernier introduit un recours collectif dans le délai de prescription applicable, l'art. 28 suspendra les délais de prescription applicables à tous les éventuels membres du groupe durant le processus de certification.

[177] Comme l'indique l'art. 28, la suspension s'applique à toute « cause d'action invoquée dans un recours collectif » (« *cause of action asserted in a class proceeding* »). Dans les présents pourvois, notre Cour doit décider si l'art. 28 abrite les droits d'éventuels membres du groupe à l'égard d'une cause d'action prévue à la partie XXIII.1 qui est plaidée à fond (c'est-à-dire invoquée), mais dans un cas où l'autorisation n'a pas encore été accordée.

C. *La partie XXIII.1 de la LVM*

[178] La partie XXIII.1 constitue un ensemble de dispositions législatives réparatrices qui vise à favoriser l'atteinte d'un double objet, à savoir faciliter et améliorer l'accès à la justice des investisseurs et dissuader les entreprises de faire preuve d'inconduite et de négligence. Elle a été ajoutée à la *LVM* après une série de [TRADUCTION] « cas très médiatisés de déclarations inexactes et de pratiques de divulgation douteuses » imputées à des sociétés ouvertes canadiennes : Autorités canadiennes en valeurs mobilières, « Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change" », avis nº 53-302 des ACVM, reproduit dans (2000), 23 OSCB 7383, p. 7385. Le Committee on Corporate Disclosure de la Bourse de Toronto (le comité Allen) a recommandé l'inclusion d'un régime légal de responsabilité civile dans la *LVM* pour corriger deux lacunes des mesures visant à faire respecter

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existing civil remedies for secondary market misrepresentations (*Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997) (the *Allen Committee Report*), at pp. vi-vii).

[179] In response to this need, Part XXIII.1 seeks to deter misleading disclosure without unduly penalizing innocent market participants or unreasonably increasing the cost of disclosure: CSA Notice 53-302, at p. 7387. To do so, it provides investors who incurred losses as a result of a misrepresentation or lack of timely disclosure on the secondary market with a statutory cause of action: *OSA*, ss. 138.3 and 138.4. This statutory cause of action exists over and above any other causes of action the plaintiff may have: s. 138.13. The scheme balances provisions to facilitate recourse for plaintiff investors, such as deemed reliance on the misrepresentation, with protections for corporate defendants. Two such protections are the restrictive limitation period and the leave requirement.

[180] First, the limitation period is restrictive in that it runs from the occurrence of the misrepresentation, or from a news release advising that leave has been granted to commence an action based on such misrepresentation, rather than from a prospective plaintiff's discovery or awareness of that event:

**138.14** [Limitation period] No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

la *LVM* : (1) l'incapacité des organismes de réglementation d'imposer efficacement le respect des obligations de divulgation sur le marché secondaire; (2) l'insuffisance et l'inaccessibilité des recours civils existants dans les cas de présentation inexacte des faits sur le marché secondaire (*Final Report — Responsible Corporate Disclosure : A Search for Balance* (1997) (le *Rapport du comité Allen*), p. vi-vii).

[179] Compte tenu de ce besoin, la partie XXIII.1 vise à prévenir la divulgation trompeuse sans pénaliser indûment les acteurs du marché qui n'ont rien à se reprocher et sans accroître déraisonnablement le coût de la divulgation : avis nº 53-302 des ACVM, p. 7387. Pour ce faire, elle confère une cause d'action aux investisseurs qui ont subi des pertes en raison d'une déclaration inexacte ou d'un manquement à l'obligation d'information occasionnelle sur le marché secondaire: *LVM*, art. 138.3 et 138.4. Cette cause d'action légale existe en sus de toutes les autres causes d'action dont peut disposer le demandeur : art. 138.13. Le régime établit un équilibre entre les dispositions qui facilitent les recours des investisseurs demandeurs, comme la règle selon laquelle l'investisseur est réputé s'appuyer sur la déclaration inexacte, et les mesures destinées à protéger les sociétés défenderesses. Le délai de prescription rigoureux et la nécessité d'obtenir l'autorisation de poursuivre sont deux mesures de protection de ce genre.

[180] Premièrement, le délai de prescription est rigoureux en ce sens qu'il commence à courir à compter de la présentation inexacte de faits ou de la délivrance d'un communiqué portant qu'a été accordée une autorisation d'intenter une action fondée sur la présentation inexacte, plutôt qu'à compter du moment où le demandeur éventuel découvre le fait ou en a connaissance :

**138.14** [Prescription] Aucune action ne doit être intentée en vertu de l'article 138.3 :

a) dans le cas de la présentation inexacte de faits dans un document, après le premier en date des jours suivants :

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(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

Similar limitation periods are prescribed for a misrepresentation in a public oral statement (s. 138.14(b)) and for the failure to make timely disclosure (s. 138.14(c)). This legislative choice protects corporate defendants from untimely claims and forces plaintiffs to act promptly.

[181] Similarly, the leave requirement acts as a screening mechanism, allowing courts to protect corporate defendants from unmeritorious claims:

**138.8** (1) [Leave to proceed] No action may be commenced under section 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.

D. *Relationship Between Section 28 of the CPA and Part XXIII.1 of the OSA*

[182] It is not a coincidence that the balancing of interests under Part XXIII.1 of the *OSA* is most evident in the context of a class action — the most effective procedural vehicle for securities liability claims. In recommending an expansion of Ontario's class action regime, the Ontario Law Reform Commission highlighted the inadequacy of the then-available procedural vehicles to address claims in the securities context:

(i) trois ans après la date à laquelle le document contenant la présentation inexacte des faits a été publié pour la première fois,

(ii) six mois après la délivrance d'un communiqué portant qu'a été accordée une autorisation d'intenter une action en vertu de l'article 138.3 ou de dispositions législatives comparables d'autres provinces ou territoires du Canada à l'égard de la même présentation inexacte des faits;

Des délais de prescription semblables sont prévus pour la présentation inexacte de faits dans une déclaration orale publique (al. 138.14b)) et le non-respect des obligations d'information occasionnelle (al. 138.14c)). Ce choix législatif protège les sociétés défenderesses des réclamations tardives et oblige les demandeurs à agir avec célérité.

[181] De même, la nécessité d'obtenir l'autorisation de poursuivre sert de mécanisme de filtrage, ce qui permet aux tribunaux de protéger les sociétés défenderesses des réclamations dénuées de fondement :

**138.8** (1) [Autorisation de poursuivre] Une action ne peut être intentée en vertu de l'article 138.3 qu'avec l'autorisation du tribunal, accordée sur motion avec préavis à chaque défendeur, et que si le tribunal est convaincu de ce qui suit :

a) l'action est intentée de bonne foi;

b) il est raisonnablement possible que l'action soit réglée au moment du procès en faveur du demandeur.

D. *Lien entre l'art. 28 de la LRC et la partie XXIII.1 de la LVM*

[182] Ce n'est pas une coïncidence si l'équilibre des intérêts que vise la partie XXIII.1 de la *LVM* ressort le plus clairement du contexte des recours collectifs, le mécanisme procédural le plus efficace pour intenter une action en responsabilité portant sur des valeurs mobilières. En recommandant l'élargissement du régime ontarien des recours collectifs, la Commission de réforme du droit de l'Ontario avait mis en évidence l'insuffisance des mécanismes procéduraux alors disponibles pour traiter les réclamations dans le contexte des valeurs mobilières :

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Although losses stemming from wrongdoing in relation to the trading of securities may be large in the aggregate, individual losses may be comparatively small; when the small size of the claim is combined with the cost of litigating complex issues in securities cases, access to the courts to redress wrongdoing may not be economically feasible for the individual investor. Moreover, . . . there is not, at present, an effective means of aggregating claims that arise in the securities context.

(*OLRC Report*, vol. I, at p. 236)

The Allen Committee, tasked more than a decade later with recommending a statutory civil liability scheme in the securities context, concluded that

the combination of class actions with statutory civil liability for a misrepresentation in continuous disclosure, properly designed, would provide the benefits of better disclosure without unduly facilitating meritless litigation.

(*Allen Committee Report*, at para. 4.6)

[183] The effectiveness and preferability of the class proceeding in pursuing Part XXIII.1 statutory claims depends on these balanced protections. By freeing plaintiffs from the obligation to prove their reliance on the misrepresentation, Part XXIII.1 ensures that class proceedings remain effective procedural vehicles for injured securities purchasers. However, by requiring plaintiffs to comply with the leave requirement and imposing a cap on recoverable damages, Part XXIII.1 also protects corporate defendants from meritless large-scale strike suits and extortionate liability in the class action context. This Part was intended to operate harmoniously with the *CPA*. The evidence to date indicates that this interrelationship is key: 26 of the 27 claims that have been the subject of decisions under Part XXIII.1 in Ontario thus far have been brought through the class proceedings vehicle.

[TRADUCTION] Bien que les pertes découlant d'actes répréhensibles en lien avec le commerce de valeurs mobilières puissent être importantes globalement, les pertes individuelles peuvent être relativement faibles; lorsque le faible montant de la réclamation vient s'ajouter au coût occasionné par l'instruction de questions complexes en matière de valeurs mobilières, il n'est peut-être pas économiquement rentable pour l'investisseur individuel de s'adresser aux tribunaux pour obtenir réparation. Qui plus est, [. . .] il n'existe pas à l'heure actuelle de moyen efficace pour regrouper les réclamations qui se présentent dans le contexte des valeurs mobilières.

(*Rapport de la CRDO*, vol. I, p. 236)

Le comité Allen, chargé plus d'une décennie plus tard de recommander un régime légal de responsabilité civile dans le contexte des valeurs mobilières, a conclu que :

[TRADUCTION] . . . un régime bien conçu qui conjuguerait les recours collectifs et la responsabilité civile légale dans les cas de déclaration inexacte de l'information continue offrirait les avantages d'une information de meilleure qualité sans favoriser indûment les actions dénuées de fondement.

(*Rapport du comité Allen*, par. 4.6)

[183] L'efficacité du recours collectif pour exercer des poursuites fondées sur la partie XXIII.1 et le fait qu'il s'agit du meilleur moyen de les engager dépendent de ces protections équilibrées. En déchargeant les demandeurs de l'obligation de prouver qu'ils se sont appuyés sur la déclaration inexacte, la partie XXIII.1 fait en sorte que les recours collectifs demeurent des mécanismes procéduraux efficaces dont peuvent se prévaloir les acheteurs de valeurs mobilières lésés. Par contre, en obligeant les demandeurs à respecter la condition d'obtenir l'autorisation de poursuivre et en imposant un plafond aux dommages-intérêts recouvrables, la partie XXIII.1 protège aussi les sociétés défenderesses des poursuites à grande échelle opportunistes et dénuées de fondement et contre une responsabilité exorbitante dans le contexte du recours collectif. Cette partie est censée coexister de manière harmonieuse avec la *LRC*. À ce jour, la preuve indique que cette corrélation est essentielle : parmi les 27 poursuites tranchées en application de la partie XXIII.1 en Ontario jusqu'à présent, 26 l'ont été par le truchement du recours collectif.

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E. *Joint Operation of Section 28 of the CPA and Sections 138.8(1) and 138.14 of the OSA*

[184] As noted above, the question is whether, in a class proceeding claiming both the Part XXIII.1 statutory cause of action and the common law tort of negligent misrepresentation, s. 28 of the *CPA* can suspend the limitation period applicable to the statutory cause of action if leave has not yet been obtained under the *OSA*.

[185] This requires determining how the two statutes operate together. The Court must determine whether the statutory cause of action can be "asserted" and whether the class proceedings can be "commenced" for the purposes of s. 28 of the *CPA* before leave has been granted under the *OSA*, such that the statutory limitation period is suspended pending certification under the *CPA*. Prior to the recent amendment, Part XXIII.1 of the *OSA* was silent regarding suspension of the limitation period. This Court must seek a harmonious interpretation that respects the ordinary meaning of the text of both statutes, and the context and the purpose of the *CPA*, recognizing its intended application in the securities context.

[186] As both the *CPA* and Part XXIII.1 of the *OSA* are remedial in nature, the provisions from those statutes must be interpreted broadly and purposively: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§ 15.18, 15.22 and 15.59. Moreover, in analysing the interaction between the laws of one legislature, we must presume that the laws "are meant to work together, both logically and teleologically, as parts of a functioning whole": Sullivan, at §11.2; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 93; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47. Here, the relevant provisions in the *OSA* were enacted after the *CPA*, although the legislator clearly intended to facilitate class actions for securities litigation. However, to the extent that we must interpret provisions in Part

E. *Effet conjugué de l'art. 28 de la LRC ainsi que du par. 138.8(1) et de l'art. 138.14 de la LVM*

[184] Comme je l'ai déjà indiqué, il s'agit de déterminer si, dans un recours collectif alléguant à la fois la cause d'action prévue à la partie XXIII.1 et le délit de déclaration inexacte faite par négligence en common law, l'art. 28 de la *LRC* peut suspendre le délai de prescription applicable à la cause d'action légale si l'autorisation n'a pas encore été obtenue en vertu de la *LVM*.

[185] Cette analyse requiert qu'on établisse la manière dont les deux lois coexistent. La Cour doit décider si la cause d'action légale peut être « invoquée » et si le recours collectif peut être « introduit » pour l'application de l'art. 28 de la *LRC* avant que l'autorisation n'ait été accordée en application de la *LVM*, de sorte que le délai de prescription prévu par la loi est suspendu jusqu'à la certification au titre de la *LRC*. Avant la modification récente, la partie XXIII.1 de la *LVM* était muette sur la suspension du délai de prescription. La Cour doit chercher une interprétation harmonieuse qui respecte le sens ordinaire du texte des deux lois ainsi que le contexte et l'objet de la *LRC*, eu égard à la manière dont cette loi est censée s'appliquer dans le contexte des valeurs mobilières.

[186] Puisque la *LRC* et la partie XXIII.1 de la *LVM* sont toutes les deux de nature réparatrice, leurs dispositions doivent être interprétées de façon large et fondée sur leur objet : R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), § 15.18, 15.22 et 15.59. De plus, en analysant la corrélation entre les lois d'un législateur, nous devons nous rappeler que ces lois [TRADUCTION] « sont présumées fonctionner ensemble, tant logiquement que téléologiquement, comme les diverses parties d'un tout » : Sullivan, § 11.2; *Thibodeau c. Air Canada*, 2014 CSC 67, [2014] 3 R.C.S. 340, par. 93; *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 47. En l'espèce, les dispositions pertinentes de la *LVM* ont été adoptées après la *LRC*, mais le législateur entendait manifestement faciliter les recours collectifs dans le

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XXIII.1 of the *OSA* to resolve this issue, it is clear that this Part was intended to operate in the context of class proceedings legislation: *Allen Committee Report*, at para. 4.6. If available, we should prefer an interpretation that does not frustrate the purposes of either law at issue.

(1) Is Leave Required to Assert the Part XXIII.1 Statutory Cause of Action for the Purposes of Section 28?

[187] Section 28 of the *CPA* is engaged upon the "commencement of the class proceeding" with respect to "a cause of action asserted" in the class proceeding. Must a plaintiff first obtain leave under the *OSA* in order to properly "assert" the statutory cause of action for the purposes of s. 28?

[188] A cause of action is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), at pp. 242-43, per Diplock L.J.; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 27; *Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd.*, 2013 ONCA 550, 117 O.R. (3d) 81, at para. 43.

[189] As the *Timminco* and *Green* panels of the Court of Appeal noted, "assert" has multiple dictionary meanings. To "assert" is defined variously as "[t]o invoke or enforce a legal right" or "make or enforce a claim to": *Black's Law Dictionary* (10th ed. 2014), at p. 139; *Canadian Oxford Dictionary* (2nd ed. 2004), at p. 78. Applying these meanings to the s. 28 context, the *Timminco* panel endorsed the narrower definition "to enforce": paras. 17-18. The *Green* panel disagreed, instead adopting the broader definition "to invoke/to make": para. 46.

domaine des valeurs mobilières. Toutefois, dans la mesure où nous devons interpréter les dispositions de la partie XXIII.1 de la *LVM* pour régler la question dont nous sommes saisis, il est clair que cette partie était censée s'appliquer dans le contexte de la législation sur les recours collectifs : *Rapport du comité Allen*, par. 4.6. Nous devons retenir si possible une interprétation qui ne contrecarre pas les objets des lois en cause.

(1) Pour l'application de l'art. 28, faut-il obtenir l'autorisation d'invoquer la cause d'action prévue à la partie XXIII.1?

[187] L'article 28 de la *LRC* entre en jeu à l'« introduction du recours collectif » pour « une cause d'action invoquée » dans le recours collectif. Un demandeur doit-il d'abord obtenir l'autorisation en vertu de la *LVM* pour pouvoir valablement « invoquer » la cause d'action légale pour l'application de l'art. 28?

[188] Une cause d'action est [TRADUCTION] « une situation de fait qui donne le droit d'obtenir réparation contre autrui devant les tribunaux » : *Letang c. Cooper*, [1965] 1 Q.B. 232 (C.A.), p. 242-243, le lord juge Diplock; *Markevich c. Canada*, 2003 CSC 9, [2003] 1 R.C.S. 94, par. 27; *Dilollo Estate (Trustee of) c. I.F. Propco Holdings (Ontario) 36 Ltd.*, 2013 ONCA 550, 117 O.R. (3d) 81, par. 43.

[189] Comme l'ont souligné les formations de la Cour d'appel dans les arrêts *Timminco* et *Green*, les dictionnaires donnent de nombreuses acceptions du mot anglais « *assert* ». Le verbe « *assert* » est défini tantôt comme [TRADUCTION] « invoquer ou faire valoir un droit », tantôt comme [TRADUCTION] « faire ou exécuter une réclamation » : *Black's Law Dictionary* (10e éd. 2014), p. 139; *Canadian Oxford Dictionary* (2e éd. 2004), p. 78. Appliquant ces définitions dans le contexte de l'art. 28, la formation saisie de l'affaire *Timminco* a adopté l'acception plus étroite [TRADUCTION] « exécuter » : par. 17-18. La formation saisie de l'affaire *Green* n'était pas de cet avis, adoptant l'acception plus large [TRADUCTION] « invoquer/faire » : par. 46.

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[190] In my view, the *Green* panel's conclusion that "asserting" a cause of action in s. 28 refers to "invoking the legal right" or "making the claim" is more consistent with the English and French text of s. 28 and with the context of s. 28. It is difficult to see how a plaintiff could ever "enforce" a claim in a pleading, practically or theoretically. A statement of claim, by its nature, is a tool of invocation, as compared to a court judgment, which by its nature is a tool of enforcement. Section 28 is engaged at a very early stage in the litigation — the commencement of a class proceeding. At this stage, the representative plaintiff must plead the constituent elements of the cause of action founding the right or claim in order to then apply for certification: *CPA*, ss. 2(2) and 5.[2] It is in this sense that the plaintiff "makes the claim" or "invokes the legal right". This is the term used in the French version of s. 28: "*invoquée*".

[191] In the context of "invoking the legal right" or "making the claim", what does it mean to "assert" the cause of action? To return to the definition of "cause of action", the claim must assert the "factual situation" that "entitles one person to obtain from the court a remedy against another person": *Letang*, at pp. 242-43; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at ¶¶ 4.409 and 4.412 to 4.414. Thus, in order to "make the claim" or "invoke the legal right", the representative plaintiff must plead the essential factual elements required to constitute the cause of action. Côté J. cites *Méthot v. Montreal Transportation Commission*, [1972] S.C.R. 387, per Hall J., in support of her conclusion that the "assertion" of the statutory cause of action requires the plaintiffs to first obtain leave: para. 51. However, the issue in *Méthot* was whether a notice requirement was a constituent element of the particular statutory cause of action. The Court decided that it was, and therefore that the right of action arose only once the notice requirement was fulfilled: p. 398. In contrast, as I shall explain,

[2] The court may only certify a class proceeding in respect of the causes of action "disclose[d]" in the pleadings: *CPA*, s. 5(1)(a).

[190] À mon avis, la conclusion de la formation saisie de l'affaire *Green* selon laquelle le mot « *asserted* », dans la version anglaise de l'art. 28, parlant d'une cause d'action, a le sens d'« invoquer le droit » ou de « faire valoir la réclamation » concorde mieux avec les textes anglais et français de l'art. 28 et le contexte de celui-ci. Il est difficile de voir comment un demandeur pourrait un jour « exécuter » une réclamation dans un acte de procédure, que ce soit en pratique ou en théorie. Une déclaration, de par sa nature, est un outil d'expression, par opposition à un jugement de la cour qui, de par sa nature, est un outil d'exécution. L'article 28 entre en jeu au tout début de l'instance, lors de l'introduction d'un recours collectif. À cette étape, le représentant des demandeurs doit plaider les éléments constitutifs de la cause d'action sur laquelle repose le droit ou la réclamation pour ensuite demander la certification : *LRC*, par. 2(2) et art. 5[2]. C'est en ce sens que le demandeur « fait valoir la réclamation » ou « invoque le droit ». C'est d'ailleurs le terme utilisé dans la version française de l'art. 28 : « invoquée ».

[191] Retenant l'acception « invoquer le droit » ou « faire valoir la réclamation », que veut-on dire, dans le texte anglais, lorsqu'on utilise le verbe « *assert* » avec le terme « *cause of action* »? Si l'on revient à la définition de « cause d'action », la réclamation doit invoquer la « situation de fait » qui « donne le droit d'obtenir réparation contre autrui devant les tribunaux » : *Letang*, p. 242-243; voir également P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (2e éd. 2014), ¶ 4.409 et 4.412 à 4.414. Par conséquent, pour « faire valoir la réclamation » ou « invoquer le droit », le représentant des demandeurs doit plaider les éléments de fait essentiels nécessaires pour constituer la cause d'action. La juge Côté cite l'arrêt *Méthot c. Commission de Transport de Montréal*, [1972] R.C.S. 387, le juge Hall, à l'appui de sa conclusion selon laquelle pour pouvoir « invoquer » (« *asserted* » dans la version anglaise de cet arrêt) la cause d'action légale, les demandeurs doivent d'abord obtenir l'autorisation : par. 51. Toutefois, il s'agissait dans *Méthot* de déterminer si l'obligation de donner un avis était

[2] Le tribunal ne peut certifier un recours collectif qu'à l'égard des causes d'action « rév[élées] » dans les actes de procédure : *LRC*, al. 5(1)a).

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the leave requirement at issue in these appeals is not a constituent element of the Part XXIII.1 statutory cause of action.

[192] Section 138.3 provides injured shareholders with four causes of action tied to misrepresentations in public documents, oral statements, or the failure to make timely disclosure of a material change: *OSA*, s. 138.3(1) to (4). Each cause of action will arise from the factual situation required to give the injured shareholder a "right of action for damages". For example, s. 138.3(1) sets out the multiple factual elements that constitute the right of action for damages for misrepresentations in a document. In order to "invoke the legal right" or "make the claim" based on this cause of action, a representative plaintiff must plead all of these elements. Notably, the obtaining of leave is not one of them. Leave is not part of the "factual situation" giving rise to this cause of action. Moreover, while not decisive, the structure of Part XXIII.1 sets out the s. 138.3 causes of action under the heading "Liability", whereas the s. 138.8 leave requirement is set out under the heading "Procedural Matters". In view of these considerations, I conclude that the presence or absence of leave does not impact the existence of the cause of action founding the statutory claim.

[193] Furthermore, treating the leave requirement as an essential component of "asserting" a claim would be inconsistent with the substance of the leave requirement itself. In order to obtain leave, the plaintiff must convince the court of two things: that "the action is being brought in good faith" and that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (*OSA*,

un élément constitutif de la cause d'action légale en question. La Cour a décidé que c'était le cas et que le droit d'action ne prenait naissance qu'au moment où l'avis exigé était donné : p. 398. Inversement, comme je l'expliquerai plus loin, la nécessité d'obtenir l'autorisation en cause dans les présents pourvois n'est pas un élément constitutif de la cause d'action prévue à la partie XXIII.1.

[192] L'article 138.3 accorde aux actionnaires lésés quatre causes d'action liées à la présentation inexacte de faits dans des documents ou des déclarations orales publics ou au non-respect des obligations d'information occasionnelle portant sur un changement important : *LVM*, par. 138.3(1) à (4). Chaque cause d'action découlera de la situation de fait qui doit prévaloir pour donner à l'actionnaire lésé le « droit d'intenter une action en dommages-intérêts ». Par exemple, le par. 138.3(1) énonce les multiples éléments de fait qui donnent ouverture au droit d'action en dommages-intérêts fondé sur la présentation inexacte de faits dans un document. Pour « invoquer le droit » ou « faire valoir la réclamation » sur le fondement de cette cause d'action, le représentant des demandeurs doit plaider tous ces éléments. Signalons que l'obtention de l'autorisation n'en fait pas partie. L'autorisation ne fait pas partie de la « situation de fait » à l'origine de cette cause d'action. En outre, bien qu'elle ne soit pas déterminante, la structure de la partie XXIII.1 énonce les causes d'actions prévues à l'art. 138.3 sous la rubrique « Responsabilité », alors que la nécessité d'obtenir l'autorisation prévue à l'art. 138.8 est énoncée sous la rubrique « Questions de procédure ». Compte tenu de ces considérations, je conclus que la présence ou l'absence d'autorisation n'influe aucunement sur l'existence de la cause d'action sur laquelle repose le recours prévu par la loi.

[193] De plus, considérer la nécessité d'obtenir l'autorisation comme un élément essentiel du fait d'« invoquer » un recours serait contraire à l'essence même de cette condition. Pour obtenir l'autorisation, le demandeur doit convaincre le tribunal de deux choses : « l'action est intentée de bonne foi » et « il est raisonnablement possible que l'action soit réglée au moment du procès en faveur du demandeur »

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s. 138.8(1); *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at paras. 31 and 38). To do so, the plaintiff must address the merits of the "factual situation" giving rise to the statutory cause of action by "setting forth the material facts" (*OSA*, s. 138.8(2)):

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

[194] In this regime, the leave requirement relates directly to the merits of the action. If obtaining leave were also a constituent element of the statutory cause of action, the court would be required to assess whether leave could be granted as an underlying pre-condition of the ultimate decision on whether to grant leave. Such an outcome would represent a sort of "catch-22" — you cannot get leave without proving you can get leave. Certainly, this would not be consistent with the scheme of the *OSA*.

[195] Effectively, obtaining leave under s. 138.8 of the *OSA* is a procedural requirement. A proceeding with respect to the statutory cause of action cannot be commenced without leave. Though the leave requirement impacts the plaintiff's ability to bring suit, it does not form part of, or affect, the factual elements comprising the statutory cause of action. Leave is necessary for the right arising from s. 138.3 to be ultimately exercised, adjudicated at trial and enforced (to obtain damages). However, "asserting" the statutory cause of action for the purposes of s. 28 of the *CPA* — that is, "invoking the legal right" or "making the claim" — does not require the representative plaintiff to first obtain leave.

(*LVM*, par. 138.8(1); *Theratechnologies inc. c. 121851 Canada inc.*, 2015 CSC 18, [2015] 2 R.C.S. 106, par. 31 et 38). Pour ce faire, le demandeur doit aborder le fond de la « situation de fait » donnant naissance à la cause d'action légale en « énonçant les faits importants » (*LVM*, par. 138.8(2)) :

(2) Sur requête présentée en vertu du présent article, le demandeur et chaque défendeur signifient et déposent un ou plusieurs affidavits énonçant les faits importants sur lesquels ils ont chacun l'intention de se fonder.

[194] Selon ce régime, la nécessité d'obtenir l'autorisation se rapporte directement au bien-fondé de l'action. Si l'obtention de l'autorisation était aussi un élément constitutif de la cause d'action légale, le tribunal serait tenu de se demander s'il est possible d'accorder l'autorisation comme condition préalable sous-jacente à la décision finale d'accorder ou non l'autorisation. Un tel résultat représenterait en quelque sorte une situation sans issue — vous ne pouvez pas obtenir l'autorisation sans prouver que vous pouvez l'obtenir. Un tel résultat serait certainement contraire à l'économie de la *LVM*.

[195] De fait, l'obtention de l'autorisation visée à l'art. 138.8 de la *LVM* est une exigence procédurale. Une instance fondée sur la cause d'action légale ne peut être introduite sans autorisation. Bien que la nécessité d'obtenir l'autorisation ait une incidence sur la faculté du demandeur d'intenter une poursuite, elle ne fait pas partie des éléments de fait qui composent la cause d'action légale et ne change rien à ces éléments. Il faut obtenir l'autorisation pour que le droit découlant de l'art. 138.3 puisse être exercé, tranché au procès et exécuté par la suite (en vue d'obtenir des dommages-intérêts). Cependant, « invoquer » (« *asserting* ») la cause d'action légale pour l'application de l'art. 28 de la *LRC* — c'est-à-dire « invoquer le droit » ou « faire valoir la réclamation » — n'oblige pas le représentant des demandeurs à obtenir d'abord l'autorisation.

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(2) Is Leave a Pre-condition for the Commencement of a Class Proceeding Asserting the Part XXIII.1 Statutory Cause of Action?

[196] As noted above, s. 28 only suspends the running of the limitation periods upon the "commencement of the class proceeding". Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, define a "proceeding" as "an action or application": r. 1.03(1). A proceeding is commenced by the issuance of an originating process, such as a statement of claim, a notice of action, or a notice of application: r. 1.03(1), "originating process". "Commencement" for the purposes of s. 28 refers to the commencement of an intended class proceeding under the *CPA* prior to certification: *Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (C.A.), at paras. 21-23. To commence a class proceeding, the representative plaintiff must file a statement of claim: r. 1.03(1), "action".

[197] With respect to an individual statutory cause of action under Part XXIII.1 of the *OSA*, s. 138.8(1) provides: "No action may be commenced under section 138.3 without leave of the court . . . ." It may well be that a plaintiff could not "commence" an individual statutory action without leave; however these appeals concern class actions, not individual actions. Further, we need not decide the issue of whether a class proceeding based solely on the statutory cause of action may be commenced without leave. The issue before us is whether *these class proceedings* have been properly commenced within the meaning of s. 28 of the *CPA*.

[198] There is no question that a class proceeding asserting the common law cause of action based on the tort of misrepresentation may be properly commenced simply by issuing a statement of claim. However, the appellants say that a class proceeding must be capable of being commenced separately for each cause of action asserted. I disagree.

(2) L'autorisation est-elle une condition préalable à l'introduction d'un recours collectif dans lequel est invoquée la cause d'action prévue à la partie XXIII.1?

[196] Comme je l'ai déjà indiqué, l'art. 28 ne suspend les délais de prescription qu'à l'« introduction du recours collectif ». Les *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, définissent l'« instance » (« *proceeding* ») comme une « [a]ction ou requête » : par. 1.03(1). Une instance est introduite par la délivrance d'un acte introductif d'instance comme une déclaration, un avis d'action ou un avis de requête : par. 1.03(1), « acte introductif d'instance ». L'« introduction », pour l'application de l'art. 28, s'entend de l'introduction d'un recours collectif projeté en vertu de la *LRC* avant la certification : *Logan c. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (C.A.), par. 21-23. Pour introduire un recours collectif, le représentant des demandeurs doit déposer une déclaration : par. 1.03(1), « action ».

[197] En ce qui concerne la cause d'action individuelle fondée sur la partie XXIII.1 de la *LVM*, le par. 138.8(1) prévoit ce qui suit : « Une action ne peut être intentée en vertu de l'article 138.3 qu'avec l'autorisation du tribunal . . . » Il se peut fort bien qu'un demandeur ne puisse pas « intenter » une action individuelle prévue par la loi sans autorisation; cependant, les présents pourvois portent sur des recours collectifs, et non sur des recours individuels. En outre, nous n'avons pas à décider si un recours collectif fondé uniquement sur la cause d'action légale peut être introduit sans autorisation. La question à trancher est de savoir si *les recours collectifs en l'espèce* ont été valablement introduits au sens de l'art. 28 de la *LRC*.

[198] Il est indubitable qu'un recours collectif dans lequel on invoque la cause d'action de common law fondée sur le délit de déclaration inexacte peut être valablement introduit par le simple dépôt d'une déclaration. Toutefois, les appelants affirment qu'un recours collectif doit pouvoir être introduit séparément pour chaque cause d'action invoquée. Je ne suis pas d'accord.

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[199] The text of s. 28 clearly recognizes the realistic prospect that multiple causes of action (with differing limitation periods and procedural requirements) could be asserted in a single statement of claim. The commencement of the "class proceeding" is sufficient to suspend "any limitation period applicable to a cause of action asserted" in the class proceeding. Section 28 does not condition the "commencement" of the class proceeding on the prior fulfilment of all procedural requirements in respect of every cause of action asserted in the proceeding. Nor does it contemplate separate class actions, or different commencement dates, for the different causes of action. Rather, on a plain reading of s. 28, the limitation periods applicable to all causes of action asserted in the proceeding are suspended upon the commencement of the class proceeding, regardless of whether some (such as the Part XXIII.1 statutory cause of action) would require leave to proceed individually.

[200] In my view, this understanding of s. 28 best accords with the words, scheme and purpose of the *CPA*, as well as the language, purpose and operation of Part XXIII.1 of the *OSA*.

[201] Unlike my colleague Côté J., I do not find it troubling that the intended class proceeding asserting the statutory cause of action (alongside the common law tort) "commences" under s. 28 prior to leave being obtained: para. 50. As stated above, the statutory cause of action arises prior to leave being obtained. It seems to me that a more troubling inconsistency flows from my colleague's interpretation of s. 28: the class proceeding could have different commencement dates for each cause of action. Her interpretation could also result in multiple class proceedings arising from the same facts. This result is neither required nor preferred by the language of s. 28.

[202] My colleague and the appellants suggest that the purpose of s. 28 is merely to shelter potential class members under a cause of action that could otherwise be commenced as an individual

[199] L'article 28 reconnaît clairement la possibilité réelle que de multiples causes d'action (dont les délais de prescription et les exigences procédurales varient) soient invoquées dans une seule déclaration. L'introduction du « recours collectif » suffit pour suspendre « tout délai de prescription applicable à une cause d'action invoquée » dans le recours collectif. L'article 28 n'a pas pour effet de rendre l'« introduction » du recours collectif conditionnelle à la réalisation de toutes les exigences procédurales à l'égard de chacune des causes d'action invoquées dans le recours. Il n'envisage pas non plus des recours collectifs distincts, ou des dates d'introduction distinctes pour les diverses causes d'action. Selon le sens ordinaire de l'art. 28, les délais de prescription applicables à toutes les causes d'action invoquées dans le recours sont plutôt suspendus à l'introduction du recours collectif, que certaines d'entre elles (telle la cause d'action prévue à la partie XXIII.1) nécessitent ou non une autorisation pour aller de l'avant individuellement.

[200] À mon avis, cette interprétation de l'art. 28 est celle qui s'accorde le mieux avec le libellé, l'économie et l'objet de la *LRC*, ainsi qu'avec le texte, l'objet et l'application de la partie XXIII.1 de la *LVM*.

[201] Contrairement à ma collègue la juge Côté, je ne vois rien de troublant à ce que le recours collectif projeté dans lequel est invoquée la cause d'action légale (avec le délit de common law) soit « introduit » au sens de l'art. 28 avant l'obtention de l'autorisation : par. 50. Comme je l'ai déjà mentionné, la cause d'action légale prend naissance avant l'obtention de l'autorisation. L'interprétation que ma collègue donne à l'art. 28 me paraît engendrer une incohérence plus troublante encore : le recours collectif comporterait différentes dates d'introduction pour chaque cause d'action. En outre, selon son interprétation, de multiples recours collectifs pourraient découler des mêmes faits. Le libellé de l'art. 28 ne dicte ni ne privilégie ce résultat.

[202] Ma collègue et les appelants affirment que l'art. 28 a simplement pour objet d'abriter les membres éventuels du groupe sous une cause d'action qui pourrait autrement être introduite sous

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action — and not to broaden the rights of the representative plaintiff by sheltering a statutory cause of action under a properly commenced class proceeding. They rely heavily on the fact that an individual plaintiff who brings an individual action (as opposed to a class action) does not benefit from a suspended limitation period simply by asserting the statutory claim in her statement of claim.

[203] With respect, such a view misses the larger point. Section 28 will never apply to an individual plaintiff; it applies only in the context of class actions. It responds to the interrelated need to protect the interests of class members and to avoid the duplication of redundant individual proceedings by class members; such needs are simply not present in individual proceedings. The provision forms part of a larger scheme that seeks to make class actions an effective and accessible procedural vehicle. Moreover, the comparison my colleague draws between the rights of individual and class plaintiffs is somewhat theoretical, since, as noted earlier, 26 of the 27 claims that have been the subject of decisions under Part XXIII.1 in Ontario have been brought through the class proceedings vehicle. Indeed, this Part of the *OSA* was specifically designed to work effectively with class proceedings.

[204] I recognize my colleague's point that the class action is a procedural vehicle, not intended to increase the parties' substantive rights. However, the class action nonetheless provides class members with tools and advantages that "mak[e] pursuing one's substantive rights feasible . . . in a way that allows mass claims to be adjudicated efficiently": W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 6. For example, where damages are certified as a common issue, ss. 23 and 24 of the *CPA* allow the court to admit otherwise inadmissible statistical information to determine issues relating to the quantum or distribution of a monetary award, and to undertake an aggregate assessment of the quantum of monetary damages owed to the class members: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at paras. 40-58; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA

forme de recours individuel — et non d'élargir les droits du représentant des demandeurs en abritant une cause d'action légale sous un recours collectif valablement introduit. Ils s'appuient en grande partie sur le fait qu'une demanderesse individuelle qui intente un recours individuel (par opposition à un recours collectif) ne bénéficie pas d'un délai de prescription suspendu simplement en invoquant le droit d'action légal dans sa déclaration.

[203] Soit dit avec égards, une telle opinion passe à côté de la vue d'ensemble. L'article 28 ne s'appliquera jamais à un demandeur individuel : il ne s'applique que dans le contexte des recours collectifs. Il répond aux besoins corrélatifs de protéger les intérêts des membres du groupe, d'une part, et d'éviter le dédoublement de recours individuels redondants par des membres du groupe, d'autre part; de tels besoins ne se présentent tout simplement pas dans les instances individuelles. La disposition fait partie d'un régime plus large qui vise à faire du recours collectif un mécanisme procédural efficace et accessible. Qui plus est, la comparaison que dresse ma collègue entre les droits des demandeurs individuels et collectifs est quelque peu théorique car, rappelons-le, sur les 27 poursuites tranchées en application de la partie XXIII.1 en Ontario, 26 l'ont été par la voie du recours collectif. De fait, cette partie de la *LVM* a été expressément conçue pour s'appliquer efficacement avec les recours collectifs.

[204] Il est vrai, comme le soutient ma collègue, que le recours collectif est un mécanisme procédural qui n'a pas pour but d'accroître les droits substantiels des parties. Toutefois, le recours collectif offre néanmoins aux membres du groupe des outils et des avantages [TRADUCTION] « qui donnent à quelqu'un la possibilité de faire valoir ses droits substantiels [. . .] d'une manière qui permet de trancher efficacement des réclamations présentées par de nombreuses parties » : W. K. Winkler et autres, *The Law of Class Actions in Canada* (2014), p. 6. Par exemple, lorsque les dommages-intérêts sont certifiés comme question commune, les art. 23 et 24 de la *LRC* permettent au tribunal d'admettre en preuve des données statistiques autrement inadmissibles pour trancher les questions en litige qui ont trait au montant ou à la répartition d'une somme adjugée et d'entreprendre une évaluation globale du montant des

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781, 87 O.R. (3d) 401, at paras. 41-53; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at paras. 119-39; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 131-35; see also *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 107-18. These mechanisms, like the protection offered by s. 28 from the running of limitation periods, are not available to individual plaintiffs. These mechanisms make the pursuit of the substantive right of action "feasible" and "efficient" in the context of a collective suit. Far from being "anomalous" (see Côté J. reasons, at para. 71), the benefits provided by these provisions are consistent with the intention to make the class proceeding an effective and feasible vehicle for the collective pursuit of substantive claims.

[205] Moreover, an interpretation that suspends the limitation period where leave has not yet been granted: (1) promotes the purposes of the *CPA*; (2) is harmonious with the language, purpose and operation of Part XXIII.1 of the *OSA*; and (3) allows the class proceeding to remain an effective vehicle for the pursuit of Part XXIII.1 statutory claims while respecting the policy underpinnings of limitation periods.

[206] First, such an interpretation of s. 28 furthers the *CPA*'s goals of judicial economy and access to justice. It guarantees the class members' access to the courts by maintaining one of the main benefits of the class action: the suspension of the limitation period for all class members. Section 28 protects potential class members, including the representative plaintiff, from the running of their individual limitation periods during the collective pursuit of their claims through the class proceeding vehicle. This protection ceases and the individual limitation periods resume running on the occurrence of any of the six events set out in s. 28(1) that end that collective pursuit. Effective protection of

dommages-intérêts auxquels ont droit les membres du groupe : *Markson c. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, par. 40-58; *Cassano c. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, par. 41-53; *Fulawka c. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, par. 119-139; *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, par. 131-135; voir aussi *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392, par. 107-118. Les demandeurs individuels ne peuvent se prévaloir de ces mécanismes pas plus que de la protection offerte par l'art. 28 contre l'écoulement des délais de prescription. Ces mécanismes font en sorte qu'il est « réaliste » et « efficace » d'exercer le droit d'action substantiel dans le contexte d'une poursuite collective. Loin d'être « anormaux » (voir les motifs de la juge Côté, par. 71), les avantages que procurent ces dispositions sont conformes à l'intention de faire du recours collectif un moyen efficace et réaliste d'exercer collectivement des recours substantiels.

[205] En outre, une interprétation qui a pour effet de suspendre le délai de prescription lorsque l'autorisation n'a pas encore été accordée : (1) favorise la réalisation des objets de la *LRC*; (2) s'harmonise avec le texte, l'objet et l'application de la partie XXIII.1 de la *LVM*; (3) fait en sorte que le recours collectif demeure un moyen efficace d'exercer les recours fondés sur la partie XXIII.1, tout en respectant les considérations d'ordre public qui sous-tendent les délais de prescription.

[206] Premièrement, une telle interprétation de l'art. 28 favorise la réalisation des objets de la *LRC*, à savoir l'économie des ressources judiciaires et l'accès à la justice. Elle garantit aux membres du groupe l'accès aux tribunaux en maintenant l'un des principaux avantages du recours collectif : la suspension du délai de prescription pour tous les membres du groupe. L'article 28 protège les membres éventuels du groupe, y compris le représentant des demandeurs, contre l'écoulement de leurs délais de prescription respectifs pendant l'exercice collectif de leurs poursuites par le truchement du recours collectif. Cette protection disparaît et les délais de prescription individuels recommencent à

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potential class members during the collective pursuit of their claims necessarily entails protecting the rights that those class members seek to pursue in a class proceeding as opposed to in individual actions. This interpretation of s. 28 protects class members' individual rights from becoming statute-barred during the pursuit of the class proceeding. This protection, in turn, obviates the need for class members to initiate duplicate individual proceedings to protect these rights, thus promoting judicial economy. My colleague's conclusion that s. 28 does not protect individual class members prior to the obtaining of leave "could go a long way toward eliminating the economic advantage of class proceedings for any class member with a small claim": *Logan v. Canada (Minister of Health)*, 2003 CanLII 20308 (Ont. S.C.J.), at para. 23, per Winkler J., aff'd *Logan* (Ont. C.A.). As Feldman J.A. noted in the present appeals, one of the effects of the decision in *Timminco* was that "[o]ne of the main benefits of the class action, the suspension of the limitation period for all members of the class, has been removed": *Green ONCA*, at para. 64.

[207] Second, such an interpretation is harmonious with the balance struck by Part XXIII.1 of the *OSA*. Even if the limitation period is suspended, the leave requirement remains. The leave requirement still serves its screening function, because in order to obtain leave, the representative plaintiff must address the merits of the statutory cause of action: *OSA*, s. 138.8. Moreover, the service of the class action claim still satisfies the recognized policy rationales for the limitation period, and for limitation periods generally: protecting the defendant from liability for ancient obligations, putting the defendant on notice of the claims against her, guaranteeing the preservation of relevant evidence, and ensuring that plaintiffs act in a timely manner (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-30; *Novak v. Bond*, [1999] 1 S.C.R. 808). If the plaintiff does not commence a class proceeding and

courir dès que survient l'un des six faits énoncés au par. 28(1) qui ont pour effet de mettre un terme à cette poursuite collective. La protection efficace des membres éventuels du groupe pendant la poursuite collective de leurs réclamations implique nécessairement la protection de droits que ces membres du groupe cherchent à faire valoir dans un recours collectif plutôt que dans des recours individuels. Cette interprétation de l'art. 28 empêche la prescription des droits individuels des membres du groupe pendant l'exercice du recours collectif. Cette protection dispense par ailleurs les membres du groupe de la nécessité d'intenter des recours individuels répétitifs pour protéger les droits en question, ce qui favorise l'économie des ressources judiciaires. La conclusion de ma collègue selon laquelle l'art. 28 ne protège pas chacun des membres du groupe avant l'obtention de l'autorisation [TRADUCTION] « pourrait contribuer largement à éliminer l'avantage économique du recours collectif pour tout membre du groupe ayant une petite créance » : *Logan c. Canada (Minister of Health)*, 2003 CanLII 20308 (C.S.J. Ont.), par. 23, le juge Winkler, conf. par *Logan* (C.A. Ont.). Comme l'a fait remarquer la juge Feldman dans les présentes affaires, l'arrêt *Timminco* a eu notamment pour conséquence que [TRADUCTION] « [l']un des principaux avantages du recours collectif, la suspension du délai de prescription pour tous les membres du groupe, a été supprimé » : *Green, C.A. Ont.*, par. 64.

[207] Deuxièmement, une telle interprétation s'harmonise avec l'équilibre établi dans la partie XXIII.1 de la *LVM*. Même si le délai de prescription est suspendu, il faut toujours obtenir l'autorisation. Cette condition remplit toujours sa fonction de filtrage car, pour obtenir l'autorisation, le représentant des demandeurs doit plaider le bien-fondé de la cause d'action légale : *LVM*, art. 138.8. Qui plus est, la signification de la déclaration du recours collectif satisfait quand même aux critères fondés sur les justifications d'ordre public reconnues relativement au délai de prescription en cause de même qu'aux délais de prescription en général : décharger la défenderesse de la responsabilité à l'égard d'anciennes obligations, aviser la défenderesse des réclamations formées contre elle, garantir la conservation d'éléments de preuve pertinents et faire en sorte que les demandeurs agissent en temps

assert the statutory claim in the proceeding before the limitation period runs out, her claim will be statute-barred. As well, the inclusion of the statutory claim and the facts underlying it gives notice to the defendants of the particulars of the claim against them and ensures that the defendants will be able to preserve evidence relevant to the claim. Indeed, as class proceedings are actively managed both pre-trial and during the trial, the managing judge is empowered to take appropriate measures to ensure that the claims proceed expeditiously and that leave is sought in a timely manner: Perell and Morden, at ¶¶ 4.234 and 4.235; *CPA*, ss. 12 and 34. Far from "displacing" the balance struck by the legislature in Part XXIII.1, this interpretation of s. 28 maintains that balance and furthers the legislative intent that Part XXIII.1 operate harmoniously with class proceedings legislation. Indeed, legislative reactions in Manitoba and Ontario to the release of the *Timminco* decision indicate that the interpretation endorsed by my colleague "interprets [Part XXIII.1 of the *OSA*] in an unintended way and limits the access to justice that the new remedy was intended to provide": *Green ONCA*, at para. 73.

opportun (*M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, p. 29-30; *Novak c. Bond*, [1999] 1 R.C.S. 808). Si la demanderesse n'introduit pas de recours collectif et n'y invoque pas le droit d'action légal dans l'instance avant l'expiration du délai de prescription, son droit d'action sera prescrit. En outre, l'inclusion de l'action prévue par la loi et des faits qui la sous-tendent informe les défendeurs des détails du recours intenté contre eux et garantit que les défendeurs seront en mesure de conserver les éléments de preuve pertinents quant à l'action. En effet, puisque les recours collectifs sont activement gérés avant le procès et pendant celui-ci, le juge chargé de la gestion de l'instance a le pouvoir de prendre les mesures qui s'imposent pour que les réclamations soient instruites avec célérité et que l'autorisation soit demandée en temps opportun : Perell et Morden, ¶ 4.234 et 4.235; *LRC*, art. 12 et 34. Loin de « briser » l'équilibre établi par le législateur à la partie XXIII.1, cette interprétation de l'art. 28 maintient cet équilibre et favorise l'atteinte de l'objectif législatif de faire en sorte que la partie XXIII.1 s'applique harmonieusement avec la loi sur les recours collectifs. De fait, les réactions du législateur au Manitoba et en Ontario au prononcé de l'arrêt *Timminco* indiquent que l'interprétation adoptée par ma collègue [TRADUCTION] « donne lieu à une interprétation de la [partie XXIII.1 de la *LVM*] que ne souhaitait pas le législateur et qui limite l'accès à la justice que ce nouveau recours visait à procurer » : *Green, C.A. Ont.*, par. 73.

[208] Finally, such an approach ensures that the class proceeding remains the most effective and available vehicle through which to pursue Part XXIII.1 statutory claims. As the facts of the *IMAX* appeal illustrate, even a plaintiff who discovers the misrepresentation quickly and initiates her claim in a timely manner may be unable to obtain leave and "commence" the statutory action within the three-year limitation period: paras. 5, 22 and 90 (CanLII). Tying the running of the limitation period to the granting of leave removes compliance with the limitation period from the plaintiff's control. It gives defendants both the incentive and, potentially, the means to delay the proceedings on the leave

[208] Enfin, une telle approche garantit que le recours collectif demeure le mécanisme le plus efficace et répandu pour exercer des recours en vertu de la partie XXIII.1. Comme le montrent les faits dans le pourvoi *IMAX*, même le demandeur qui découvre rapidement la présentation inexacte des faits et présente sa réclamation en temps opportun peut être incapable d'obtenir l'autorisation et d'« intenter » l'action prévue par la loi dans le délai de prescription de trois ans : par. 5, 22 et 90 (CanLII). Rattacher l'écoulement du délai de prescription à l'octroi de l'autorisation a pour résultat que le respect du délai de prescription échappe à la volonté du demandeur. Cela donne aux défendeurs

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motion until the expiry of the limitation period. As Feldman J.A. noted, it "undercuts the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period": *Green ONCA*, at para. 66. Such an approach also jeopardizes the adjudicative role of the court, as the cases under appeal illustrate. If unsuspended, the limitation period in the *IMAX* appeal would have expired while the leave and certification motions were under reserve, and the limitation period in the *CIBC* appeals would have expired between the filing of the notice of motion seeking leave and the hearing: *IMAX*, at para. 41; *CIBC*, at paras. 494 and 497. Such an interpretation risks the effect of forcing the court to decide whether to allow plaintiffs' rights to expire or to risk the rights of others by deferring other urgent matters to prioritize leave motions: see, for example, *CIBC*, at para. 539.

[209] In contrast, tying the suspension of the limitation period to the assertion of the statutory cause of action in a class proceeding, rather than to the granting of leave by the court, avoids these undesirable consequences. Potential plaintiffs can effectively pursue Part XXIII.1 statutory claims through the class proceeding vehicle. Courts are not put in the difficult position of deferring other cases to avoid an injustice.

III. Conclusion

[210] In my view, as long as the Part XXIII.1 statutory cause of action is asserted in a properly commenced class proceeding, s. 28 of the *CPA* will suspend the limitation periods applicable to all causes of action asserted — including the limitation period governing the statutory claim — regardless of whether leave has been obtained. This interpretation is consistent with the language of s. 28 and the purposes guiding the *CPA*, and is harmonious with the

l'incitatif et, éventuellement, les moyens de retarder l'instruction de la motion en autorisation jusqu'à l'expiration du délai de prescription. Comme l'a souligné la juge Feldman, cela [TRADUCTION] « sape la faculté des investisseurs d'intenter un recours collectif dans le délai de prescription, car la possibilité de respecter ou d'interrompre le délai échappe à leur volonté » : *Green, C.A. Ont.*, par. 66. Une telle approche met également en péril la fonction décisionnelle du tribunal, comme l'illustrent les décisions portées en appel. S'il n'avait pas été suspendu, le délai de prescription dans le pourvoi *IMAX* aurait expiré pendant que les motions en autorisation et pour certification du recours collectif étaient prises en délibéré et le délai de prescription dans les pourvois du dossier *CIBC* aurait expiré entre le dépôt de l'avis de motion en autorisation et l'audience : *IMAX*, par. 41; *CIBC*, par. 494 et 497. Pareille interprétation risque d'avoir pour effet de forcer le tribunal à décider de permettre l'expiration des droits des demandeurs ou de compromettre les droits de tiers en reportant l'examen d'autres questions urgentes pour traiter en priorité des motions en autorisation : voir, par exemple, *CIBC*, par. 539.

[209] Inversement, rattacher la suspension du délai de prescription au fait d'invoquer la cause d'action légale dans un recours collectif plutôt qu'à l'octroi de l'autorisation par le tribunal, permet d'éviter ces conséquences indésirables. Les demandeurs éventuels peuvent effectivement intenter des poursuites fondées sur la partie XXIII.1 par la voie du recours collectif. Les tribunaux ne se trouvent pas dans la situation difficile d'avoir à reporter d'autres instances pour éviter une injustice.

III. Conclusion

[210] À mon avis, tant que la cause d'action prévue à la partie XXIII.1 est invoquée dans un recours collectif valablement introduit, l'art. 28 de la *LRC* suspend les délais de prescription applicables à toutes les causes d'action invoquées — y compris le délai de prescription régissant le recours prévu par la loi — que l'autorisation ait ou non été obtenue. Cette interprétation est compatible avec le libellé de l'art. 28 et les objets encadrant la *LRC*, en

language and purposes driving Part XXIII.1 of the *OSA*. In the cases before us, the class proceedings were properly commenced with respect to the common law tort of negligent misrepresentation.

[211] In contrast, the interpretation adopted by my colleague Côté J. seriously undermines the viability of the class action vehicle in the context of Part XXIII.1 statutory claims. As the *Green* panel noted, this obliges class members to "do what s. 28 was intended to obviate: commence their own action with leave in order to try to ensure that their action is brought within the limitation period" (para. 65). By rendering the class action an ineffective vehicle to pursue Part XXIII.1 statutory claims, my colleague's interpretation effectively bars Part XXIII.1 from fulfilling either of its goals; it can neither facilitate access to justice for investors nor deter corporate misconduct.

[212] The defendants in the *CIBC* appeals additionally challenge the articulation of the standard to obtain leave under s. 138.8 of the *OSA* adopted by Strathy J. and the *Green* panel. I agree with my colleague Côté J. that the reasonable possibility of success threshold test articulated by this Court in *Theratechnologies* applies to a motion for leave under s. 138.8 of the *OSA*. In my view, the *CIBC* plaintiffs have met this threshold. I also agree with my colleague's discussion and disposition of the *CIBC* defendants' appeals concerning the certification of common issues.

## IV. Disposition

[213] In each of the three cases appealed to this Court, the respondent plaintiffs commenced class proceedings and pleaded the constituent facts of the tort of negligent misrepresentation and of the

plus de s'harmoniser avec le texte et les objets qui animent la partie XXIII.1 de la *LVM*. Dans les affaires dont nous sommes saisis, les recours collectifs ont été valablement introduits en ce qui a trait au délit de déclaration inexacte faite par négligence en common law.

[211] À l'inverse, l'interprétation qu'a adoptée ma collègue la juge Côté compromet sérieusement la viabilité du mécanisme du recours collectif dans le contexte des réclamations fondées sur la partie XXIII.1. Comme l'a souligné la formation des juges dans l'affaire *Green*, cette interprétation a pour effet d'obliger les membres du groupe à [TRADUCTION] « faire ce que l'art. 28 était censé éviter : introduire leur propre recours avec autorisation pour tenter de garantir que leur action est intentée dans le délai prescrit » (par. 65). En faisant du recours collectif un moyen inefficace d'engager des poursuites en vertu de la partie XXIII.1, l'interprétation de ma collègue empêche effectivement la partie XXIII.1 d'atteindre l'un ou l'autre de ses objectifs : elle ne peut ni faciliter l'accès des investisseurs à la justice ni décourager l'inconduite des entreprises.

[212] Les défendeurs dans les pourvois du dossier *CIBC* contestent en outre la formulation du critère d'obtention de l'autorisation visée à l'art. 138.8 de la *LVM* qu'ont retenue le juge Strathy et la formation des juges dans l'affaire *Green*. Je conviens avec ma collègue la juge Côté que le critère préliminaire formulé par notre Cour dans l'arrêt *Theratechnologies*, soit la possibilité raisonnable d'avoir gain de cause, s'applique à une motion en autorisation visée par l'art. 138.8 de la *LVM*. À mon avis, les demandeurs dans l'affaire *CIBC* ont satisfait à ce critère. Je souscris également à l'analyse et au dispositif de ma collègue visant les pourvois des défendeurs dans l'affaire *CIBC* en ce qui concerne la certification des questions communes.

## IV. Dispositif

[213] Dans chacune des trois affaires portées en appel devant notre Cour, les demandeurs intimés ont introduit des recours collectifs et plaidé dans leurs déclarations les faits constitutifs du délit de

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Part XXIII.1 statutory cause of action in their statements of claim. In my view, this pleading constitutes an assertion of the statutory cause of action for the purposes of s. 28 of the *CPA*. Thus, the limitation periods for the statutory claims at issue in these appeals are suspended as of the date of filing of their statements of claim. None of the claims are statute-barred. In light of this conclusion, it is not necessary to address the availability of *nunc pro tunc* or the special circumstances doctrine. However, I should not be taken to agree with either the analysis or conclusions of Côté J. on these issues.

déclaration inexacte faite par négligence en common law et de la cause d'action prévue à la partie XXIII.1. À mon avis, en plaidant ainsi ces faits, ils se trouvent à avoir invoqué la cause d'action légale pour l'application de l'art. 28 de la *LRC*. Par conséquent, les délais de prescription applicables aux réclamations présentées en vertu de la loi qui sont en litige dans les présents pourvois sont suspendus à compter de la date du dépôt de leurs déclarations. Aucune des réclamations n'est prescrite. Vu cette conclusion, il est inutile de se prononcer sur la possibilité d'invoquer la doctrine de *nunc pro tunc* ou celle des circonstances particulières. Il ne faut toutefois pas considérer que je souscris à l'analyse ou aux conclusions de la juge Côté sur ces points.

[214] I would dismiss the appeals with costs throughout.

[214] Je suis d'avis de rejeter les pourvois avec dépens devant toutes les cours.

*Appeals in CIBC and IMAX dismissed with costs throughout,* McLachlin C.J. *and* Rothstein *and* Côté JJ. *dissenting in part.*

*Pourvois dans CIBC et IMAX rejetés avec dépens devant toutes les cours, la juge en chef* McLachlin *et les juges* Rothstein *et* Côté *sont dissidents en partie.*

*Appeal in Celestica allowed with costs throughout,* Moldaver, Karakatsanis *and* Gascon JJ. *dissenting.*

*Pourvoi dans Celestica accueilli avec dépens devant toutes les cours, les juges* Moldaver, Karakatsanis *et* Gascon *sont dissidents.*

*Solicitors for the appellant the Canadian Imperial Bank of Commerce: Torys, Toronto.*

*Procureurs de l'appelante la Banque Canadienne Impériale de Commerce : Torys, Toronto.*

*Solicitors for the appellants Gerald McCaughey et al.: Goodmans, Toronto.*

*Procureurs des appelants Gerald McCaughey et autres : Goodmans, Toronto.*

*Solicitors for the appellants IMAX Corporation et al.: McCarthy Tétrault, Toronto.*

*Procureurs des appelants IMAX Corporation et autres : McCarthy Tétrault, Toronto.*

*Solicitors for the appellants Celestica Inc., Stephen W. Delaney and Anthony P. Puppi: Blake, Cassels & Graydon, Toronto.*

*Procureurs des appelants Celestica Inc., Stephen W. Delaney et Anthony P. Puppi : Blake, Cassels & Graydon, Toronto.*

*Solicitors for the respondents Howard Green and Anne Bell: Rochon Genova, Toronto.*

*Procureurs des intimés Howard Green et Anne Bell : Rochon Genova, Toronto.*

*Solicitors for the respondents Marvin Neil Silver and Cliff Cohen: Siskinds, London; Sutts Strosberg, Windsor.*

*Procureurs des intimés Marvin Neil Silver et Cliff Cohen : Siskinds, London; Sutts Strosberg, Windsor.*

2015 SCC 60 (CanLII)

*Solicitors for the respondents the Trustees of the Millwright Regional Council of Ontario Pension Trust Fund, Nabil Berzi and Huacheng Xing: Koskie Minsky, Toronto.*

*Solicitors for the intervener the Canadian Foundation for Advancement of Investor Rights: Paliare Roland Rosenberg Rothstein, Toronto.*

*Solicitors for the intervener the Shareholder Association for Research and Education: Groia & Company, Toronto.*

*Solicitor for the intervener the Ontario Securities Commission: Ontario Securities Commission, Toronto.*

*Solicitors for the intervener the Insurance Bureau of Canada: Stikeman Elliott, Toronto.*

*Procureurs des intimés les Fiduciaires de la caisse de retraite en fiducie du Millwright Regional Council of Ontario, Nabil Berzi et Huacheng Xing : Koskie Minsky, Toronto.*

*Procureurs de l'intervenante la Fondation canadienne pour l'avancement des droits des investisseurs : Paliare Roland Rosenberg Rothstein, Toronto.*

*Procureurs de l'intervenante Shareholder Association for Research and Education : Groia & Company, Toronto.*

*Procureur de l'intervenante la Commission des valeurs mobilières de l'Ontario : Commission des valeurs mobilières de l'Ontario, Toronto.*

*Procureurs de l'intervenant le Bureau d'assurance du Canada : Stikeman Elliott, Toronto.*

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# Tab 7

**CITATION:** Cappelli v. Nobilis Health Corp. 2019 ONSC 2266
**COURT FILE NO.:** CV-16-544173
**DATE:** 2019/04/10

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

2019 ONSC 2266 (CanLII)

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| **VINCE CAPPELLI** | ) | *Andrew Morganti, Eli Karp* and *Hadi Davarinia* for the Plaintiff |
| Plaintiff | ) | |
| **– and –** | ) | |
| | ) | |
| **NOBILIS HEALTH CORP., HARRY JOSEPH FLEMING, CHRISTOPHER H. LLOYD, ANDREW CHEN, KENNETH J. KLEIN and CALVETTI FERGUSON, P.C.** | ) | *Alan Lenczner, Nilou Nezhat* and *Brendan Morrison* for the Defendant Nobilis Health Corp. |
| Defendants | ) | |
| Proceeding pursuant to the *Class Proceedings Act, 1992* | ) | **HEARD**: March 18, 2019 |

**PERELL, J.**

## REASONS FOR DECISION

Shell game, thimblerig, a game of sleight of hand, in which three containers or nutshells are quickly moved and the contestant [the judge] must spot the one with a pea or other object underneath.

## A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*[1] and s. 138.3 of the Ontario *Securities Act*[2] and the comparable statutes across Canada,[3] Vince Cappelli sues Nobilis Health Corp., Harry Joseph Fleming, Christopher H. Lloyd, Andrew Chen, Kenneth J. Klein, and Calvetti Ferguson,

[1] S.O. 1992, c. 6.
[2] R.S.O. 1990, c. S.5.
[3] *Securities Act*, R.S.A. 2000, c. S-4; *Securities Act*, R.S.B.C. 1996, c 418; *Securities Act*, C.C.S.M. c. S50; *Securities Act*, S.N.B. 2004, c. S-5.5; *Securities Act*, R.S.N.L. 1990, c S-13; *Securities Act*, S.N.W.T. 2008, c. 10; *Securities Act*, R.S.N.S. 1989, c. 418; *Securities Act*, S.Nu. 2008, c. 12; *Securities Act*, R.S.P.E.I. 1988, c S-3.1; Securities Act, R.S.Q. c V-1.1; *Securities Act, 1988*, S.S. 1988-89, c. S-42.2; and *Securities Act*, S.Y. 2007, c. 16.

P.C. for misrepresentation in the secondary market for corporate securities.

[2] The action has been settled as against all of the defendants - with the exception of Nobilis.

[3] With leave of the court, which leave I shall grant, Mr. Cappelli has decided to abandon his common law claims against Nobilis, and he now seeks certification of a class action and leave to pursue his statutory claim for secondary market misrepresentations as against Nobilis.

[4] For the reasons that follow, I decline to grant leave and I dismiss the certification motion.

## B. Overview

[5] Pursuant to s. 138.8 (1) of the Ontario *Securities Act*, Mr. Cappelli seeks leave to bring a statutory cause of action under s. 138.3 (1) of the Act against Nobilis for misrepresentation in the secondary market.

[6] For a s. 138.3 (1) claim, the fundamental constituent elements are twofold. First, there must be material misrepresentation(s) in a core corporate document, and Mr. Cappelli submits that there are material misrepresentations in Nobilis' core documents of: (1) March 23, 2015; (2) May 14, 2015; and August 14, 2015, which are collectively identified as the "impugned documents".

[7] Second, there must be a corrective disclosure connected to the alleged misrepresentations in the impugned documents, and Mr. Cappelli pleads two corrective disclosures to define two classes and two class periods. Analytically, he has pleaded two discrete misrepresentation claims based on the impugned documents.

[8] The first corrective disclosure is an article, an internet blog posting, by SeekingAlpha.com on October 9, 2015. The Seeking Alpha article discloses four or five misrepresentations allegedly made by Nobilis that I shall label Misrepresentation Set #1. The Seeking Alpha article defines a class period for Class Period I from March 23, 2015 to October 8, 2015.

[9] For Class Period II, the second corrective disclosure is Nobilis' press release dated January 5, 2016. The January 5, 2015 press release announced that Nobilis' consolidated financial statements for 2014 and Q1 and Q2 2015 required restatement and should no longer be relied upon. The January 5, 2016 press release restated five accounting matters and also indicated that Nobilis' internal controls had not been effective. Thus, the January 5, 2016 press release discloses six misrepresentations that I shall label Misrepresentation Set #2. This second corrective disclosure, which Mr. Cappelli submits corroborates the first corrective disclosure, defines Class Period II as the period from October 9, 2015 to January 5, 2016.

[10] Mr. Cappelli connects and equates Misrepresentation Sets #1 and #2 with the restatement of Nobilis' financial statements that occurred on January 12, 2016. It is complicated and confusing, but it shall be important to note that unlike the Seeking Alpha article and the January 5, 2016 press release, the financial statements of January 12, 2016 are not expressly pleaded to be a corrective disclosure. Nevertheless, the financial statements of January 12, 2016 disclosed the six misrepresentations of Misrepresentation Set #2, and they revealed four significant and additional untrue statements in the impugned documents about accounting matters. I shall label

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these four additional alleged misrepresentations revealed by the financial statements of January 12, 2016 as Misrepresentation Set #3.

[11] Under s.138.8 (1) of the Act, for leave to be granted, the court must be satisfied that: (a) Mr. Cappelli's action is brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of Mr. Cappelli. It is conceded that Mr. Cappelli's action is brought in good faith, but Nobilis submits that there is no reasonable possibility that Mr. Cappelli will succeed at trial.

[12] Nobilis submits that Mr. Cappelli's action has no reasonable possibility of success for four reasons.

a. First, Nobilis submits that as the action has been pleaded (Misrepresentation Set #2), there are no misrepresentations that have a reasonable possibility of being successfully proven to be material (the no material misrepresentations argument).

b. Second, Nobilis submits that the two pleaded corrective disclosures do not qualify as corrective disclosures both as a matter of pleading and as a matter of evidence because the alleged corrective disclosures are not responsive to the pleaded alleged material misrepresentations (the no corrective disclosures argument).

c. Third, Nobilis relies on the expert's report defence under s. 138.4 (11) of the Ontario *Securities*. Thus, Nobilis submits that if there were material misrepresentations, these misrepresentations can be attributed to Calvetti Ferguson, P.C., which audited the financial statements. Nobilis submits that the liability of its auditor exculpates Nobilis from liability (the expert's report argument).

d. Fourth, Nobilis relies on the causation or attribution defence under s. 138.5 (3) of the Ontario *Securities Act*. It submits that the evidence establishes that the alleged material misrepresentations (Misrepresentation Set #2) did not cause any damage to the investors in Nobilis' shares (the no causation argument).

[13] Nobilis responded substantively to the case that Mr. Cappelli actually pleaded (Misrepresentation Set #2), but, Nobilis responded procedurally to the case that Mr. Cappelli presented in his factum (Misrepresentation Set #3), and Nobilis did not substantively rebut the particularized misrepresentation allegations that appeared in the factum (Misrepresentation Set #3).

[14] In turn, by and large, Mr. Cappelli did not attempt to rebut what Nobilis' experts said about the pleaded misrepresentations (Misrepresentation Set #2) not being material. It is informative to note that there were no cross-examinations of either party's witnesses. Rather, Mr. Cappelli relied on the apparent materiality of Misrepresentation Set #3 in their arguments to rebut Nobilis several defences to the leave motion.

[15] Except for its arguments about causation, by and large, I agree with Nobilis' arguments, and I, therefore, decline to grant leave under the Ontario *Securities Act*. It follows that without a permitted statutory cause of action, that Mr. Cappelli's action cannot be certified under the *Class Proceedings Act, 1992*. So, I dismiss the certification motion.

[16] By way of a broad-brush summary of why Nobilis' arguments succeed and why I am

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refusing to grant leave, there are two major reasons that Mr. Cappelli cannot connect the dots to establish a statutory misrepresentation cause of action.

[17] As for the first major reason, while Mr. Cappelli might have proven that Misrepresentation Set #3 contains material misrepresentations with associated corrective disclosures for Classes I and II, those misrepresentations, however, are not aligned with his pleadings, which are based on Misrepresentation Set #2. Given the precise and particular nature of the statutory cause of action under the Ontario *Securities Act*, I cannot grant leave to proceed with a statutory misrepresentation claim that has not been pleaded.

[18] As for the second major reason, for Misrepresentation Set #2 (the misrepresentations that have actually been pleaded by Mr. Cappelli), Nobilis has shown that these misrepresentations are not material misrepresentations.

[19] These conclusions make it unnecessary to consider whether Nobilis' expert's report argument and its causation argument provide additional reasons to dismiss the motion for leave, but since these matters were the subject of some considerable argument, my view is that the expert's report argument but not the causation argument is available for Misrepresentation Set #2 but that neither argument would likely have been available to prevent leave from being granted with respect to Misrepresentation Set #3 had Mr. Cappelli's statutory cause of action been based on those misrepresentations.

[20] One may gather from this overview that the leave motion was a version of a shell game of where's the misrepresentation. Practically speaking, Mr. Cappelli's motion for leave pursuant to the Ontario *Securities Act* was based on one set of facts that the parties argued in two parallel analytical universes where the arguments were made in one legal and factual universe, but the counterarguments were made in the other legal and factual universe.

[21] Ultimately, Mr. Cappelli's efforts to connect the constituent elements of a statutory misrepresentation claim failed, and while I am sympathetic to the plight of those who invested in Nobilis' stock, which has undoubtedly plummeted in value after the truth of its affairs and financial position was revealed, the fundamental problem here for Mr. Cappelli is that while the Ontario *Securities Act* provides a counterattack weapon against corporate misrepresentations that have harmed investors in the secondary market, the counterattack weapon is a timely Exocet missile of a statutory cause of action, not a cluster bomb of unconnected misrepresentations and unconnected corrective disclosures.

## C. Mr. Cappelli's Investment in Nobilis Shares

[22] Mr. Cappelli resides in Vaughan, Ontario. He is a Certified Public Accountant and Certified General Account.

[23] Mr. Cappelli bought 7,000 Nobilis shares between October 5 and October 9, 2015, and he sold all his shares by October 13, 2015. Thus, during Class Period I, Mr. Cappelli purchased and held 3,000 shares, which were later sold at a loss. And during Class Period II, Mr. Cappelli purchased and sold 4,000 Nobilis shares suffering a loss on these shares as well.

[24] Based on these share transactions, technically speaking, Mr. Cappelli is a member of Class I but not a member of Class II. He is not a member of Class II because he was not holding

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but had already sold his shares when the class period for Class II closed. From this circumstance, Nobilis argues that Mr. Cappelli cannot be the representative plaintiff in this proposed class proceeding.

[25] I see no reason why Mr. Cappelli cannot be the representative plaintiff for Class I, and given my conclusion that this action cannot be certified, I need not decide whether he qualifies to be the representative plaintiff for Class II. I merely mention that if he did not qualify to represent Class II, then this technical problem would have been solved by appointing a replacement representative plaintiff for Class II.

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## D. The Class Action: Procedural History

[26] As the narrative below will reveal, in a press release of January 5, 2016, there were disclosures about the unreliability of Nobilis' financial statements, and Mr. Cappelli, who had sold his shares in October 2015 at a loss, may have felt that the disclosures in the January 5, 2016 press release explained why his own former investment in Nobilis' shares had been a financial failure.

[27] In January 2016, Mr. Cappelli retained counsel to prosecute a class action. The proposed class Counsel is now a consortium of Morganti & Co. P.C. and Strosberg Sasso Sutts LLP.

[28] On January 8, 2016, Mr. Cappelli issued a Statement of Claim in a proposed class action against Nobilis Health Corp., Harry Joseph Fleming, Christopher H. Lloyd, Andrew Chen, Kenneth J. Klein, and Calvetti Ferguson, P.C. Mr. Fleming was Nobilis' President. Mr. Lloyd was Nobilis' CEO. Mr. Chen was Nobilis' CFO and then its Executive Vice President of Finance. Mr. Klein was Nobilis' CFO after July 9, 2015.

[29] On January 12, 2016, there were further disclosures about the unreliability of Nobilis' financial statements when it released its financial statements. This disclosure precipitated a further dramatic decline in the value of Nobilis' shares, which would not have affected Mr. Cappelli, since he had already crystallized his personal loss.

[30] Mr. Cappelli's Statement of Claim was amended on July 22, 2016 and again on December 6, 2016. There was a subsequent amendment, but for the purposes of the leave motion, it was withdrawn, and the leave and certification motion was argued on the basis of the Fresh as Amended Statement of Claim of December 6, 2016.

[31] On January 5, 2017, Mr. Cappelli served and filed a Notice of Motion seeking leave to assert a statutory cause of action under s. 138.3 of the Ontario *Securities Act*. The motion pertained to documents and statements that Nobilis had released between March 23, 2015 and January 5, 2016, which is the day that Nobilis issued its press release referred to above.

[32] In this recital of the procedural history and later in the description of the evidentiary and factual background to the leave motion, it is necessary to keep in mind that the press release of January 5, 2016 identifies the alleged misrepresentations that I have labelled Misrepresentation Set #2. It shall be very important to differentiate the misrepresentations identified in the press release from the four additional misrepresentations identified by Nobilis on January 12, 2016, when it released financial statements with restated figures. As noted above, I have labelled the additional four misrepresentations of the January 12, 2016 financial statements as

Misrepresentation Set #3.

[33] On June 14, 2018, I granted a consent or unopposed motion: (a) dismissing that action as against Messrs. Fleming, Lloyd, Chen, and Klein without costs; (b) certifying the action for settlement purposes as against Calvetti Ferguson, P.C.; (c) approving the settlement with Calvetti Ferguson, P.C.; and (d) approving Class Counsel's request for payment of legal fees and disbursements from the settlement funds.[4] Calvetti Ferguson, P.C. settled the claims against it for $2.0 million (USD).

[34] With the action having been resolved against the co-defendants, what was left was a proposed class action just against Nobilis for common law negligence and for a statutory misrepresentation claim pursuant to the securities law statutes across the country. As noted above, Mr. Cappelli has abandoned his common law misrepresentation claims and only pursues a statutory secondary market misrepresentation cause of action against Nobilis for which leave is required under the Ontario *Securities Act*.

[35] In his proposed class action, Mr. Cappelli proposes the following common issues:

a. Did Nobilis or any of the former defendants misrepresent the accuracy of the Nobilis financial statements and its compliance with U.S. Generally Accepted Accounting Principles ("GAAP")? If so, who made the misrepresentation, when, where and how?

b. Did Nobilis or any of the former defendants misrepresent the adequacy of Nobilis' internal controls over financial reporting and/or its disclosure controls and procedures, and if so when, where and how?

c. Did the misrepresentation in (a) and/or (b) constitute a misrepresentation within the meaning of the *OSA* and, if necessary, the analogous provisions of the equivalent *Securities Acts* of the other provinces?

d. Were the misrepresentations in (a) and (b) above publicly corrected? If so, when, how and by whom?

e. Is Nobilis vicariously liable, or otherwise responsible, for the acts of the former Individual Defendants and its other officers, directors and employees during the Class Period?

[36] After Mr. Cappelli served and filed his Notice of Motion for leave along with its supporting materials, Nobilis delivered responding material and Mr. Cappelli delivered rebuttal reply material.

[37] There were no cross-examinations.

[38] After some procedural wrangling about whether Mr. Cappelli could use a Second Fresh as Amended Statement of Claim and reopen the evidentiary record, the leave motion was argued on March 18, 2019 based on the Fresh as Amended Statement of Claim and based on the existing evidentiary record.

[4] *Cappelli v. Nobilis Health Corp*., 2018 ONSC 3698.

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## E. The Proposed Change to the Class Definition

[39] Mr. Cappelli proposes to define two classes for Class Period I and for Class Period II. These definitions, which are set out below, differ from the definitions in Mr. Cappelli's Amended Fresh as Amended Statement of Claim, also set out below. The original definitions, in effect, defined class members as purchasers (Canadians or foreigners) who purchased shares on the Toronto Stock Exchange. The revised definitions adds Class Members who are Canadians who purchased on the New York Stock Exchange ("NYSE").

[40] The revised definitions for Class I and Class II state:

> Class I
>
> Other than Excluded Persons (as defined in the Claim), all persons and entities who acquired Nobilis' common shares listed on the Toronto Stock Exchange, and all Canadians who purchased Nobilis' common shares on the NYSE on or after March 23, 2015 and who held some or all such securities until after October 8, 2015.
>
> Class II
>
> Other than Excluded Persons (as defined in the Claim), all persons and entities who acquired Nobilis' common shares listed on the TSX, and all Canadians who purchased Nobilis' common shares on the NYSE on or after October 9, 2015 and who held some or all such securities until at least January 5, 2016.

[41] The definitions in the original Statement of Claim and in the Amended Fresh as Amended Statement of Claim for Class I and Class II were:

> Class I
>
> All persons, other than Excluded Persons as defined in the Amended Fresh as Amended Statement of Claim, who acquired Nobilis' securities from and including March 23, 2015, other than on the NYSE MKT and who held some or all of those securities at the close of trading on October 8, 2015;
>
> Class II
>
> All persons, other than Excluded Persons as defined in the Amended Fresh as Amended Statement of Claim, who acquired Nobilis' securities from and including October 9, 2015, other than on the NYSE MKT and who held some or all of those securities at the close of trading on January 5, 2016.

[42] Nobilis argues that because of the intervention of limitation periods, Mr. Cappelli cannot revise the class definitions at this juncture. I disagree, and for the purposes of the leave motion and for the certification motion, I shall use the revised class definitions.

[43] Mr. Cappelli concedes that the proposed revised Class definitions would add persons to the proposed Classes I and II more than three years after the alleged misrepresentations were made. Here, it may be noted that these additions to the complement of Mr. Cappelli's proposed Ontario class action are the Canadian cohort of a proposed class action in the United States brought on behalf of those who had purchased on the NYSE and who were originally expressly excluded from Mr. Cappelli's originally proposed class definition.

[44] Mr. Cappelli submits that by filing a Notice of Motion seeking leave under 138.3 (14), he suspended the running of the limitation period for Canadian purchasers on the NYSE alleging that there were misrepresentations in the impugned documents. Nobilis, however, argues that it is

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now too late for Mr. Cappelli to be representative plaintiff for the Canadians who have already had their day in court in the United States. (The day was a disappointing one for the purchasers on the NYSE, given that the United States District Courts twice dismissed class actions based on the facts of the immediate case.)

[45] My own analysis is that the limitation period with respect to Mr. Cappelli's personal statutory cause of action with respect to Misrepresentation Set #2 stopped running when Mr. Cappelli delivered his Notice of Motion seeking leave. The issue then becomes the extent to which the limitation period stopped running against the defined and the potential class members seeking to assert a statutory misrepresentation claim based on Misrepresentation Set #2.

[46] Nobilis, in effect, concedes that the limitation period would stop running against the class members who were originally defined as class members, but it argues that the limitation period would continue to run against potential class members who had been expressly excluded in Mr. Cappelli's proposed definition.

[47] The limitation period certainly would stop running for the class of persons for whom Mr. Cappelli identified and chose to represent. Does the limitation period also stop running for potential class members?

[48] Given that Nobilis is a Canadian corporation and given that Nobilis' shares were sold on a domestic and on a foreign stock exchange, originally Mr. Cappelli had three ways that he could have defined the class suing the Canadian corporation; namely: (1) a Canadian (national) and global class of purchasers on the TSX; (2) a Canadian (national) and global class of purchasers on the TSX plus a Canadian (national class) of purchasers on the NYSE; or (3) a global Class action of purchasers on the TSX or the NYSE.

[49] At the time at which Mr. Cappelli commenced his action in January 2016 and at the time at which he delivered his Notice of Motion for leave in January 2017, he chose option #1. In 2019, he now wishes to pick option #2, an option which he could have chosen in 2017 but did not. As already mentioned, Nobilis, however, submits that it is too late for Mr. Cappelli to redefine the class definition.

[50] There is, practically speaking, no prejudice to Nobilis by Mr. Cappelli adding class members who were always potential class members. From the moment that the proposed class action was commenced, Nobilis would have known or it ought to have known that in addition to option #1, that options #2 and #3 were possibilities for defining the class members.

[51] Nobilis would have also known that that one of the issues for the certification motion would be whether the class definition was overinclusive or underinclusive. (Class definitions are frequently changed during certification motions, sometimes at the request of a defendant.) In these circumstances, I agree with Mr. Cappelli that it is not too late to add Canadians who purchased the shares of a Canadian corporation that were sold on a foreign stock exchange. The situation would be different if the cohort of Canadian purchasers on the NYSE were advancing a different claim than the originally defined class members, but they are not.

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[52] Option #3 and a genuinely global class action might raise *forum conveniens* and other conflict of law concerns, but there are no such concerns with option #2.[5] The Canadian purchasers on the NYSE have never had their day in court with respect to their rights under Canadian securities law, which is different than American law.

[53] For the above reasons, I shall use the revised class definitions for Class I and for Class II for the purposes of this leave motion and for the certification motion.

[54] And now that Nobilis knows that the added class members will be included in an action that is not going to be certified, it should appreciate that there is no prejudice whatsoever to Nobilis in having them added.

## F. Evidentiary Background

[55] Mr. Cappelli supported his motion for certification and for leave to bring the statutory claim with the following evidence:

- **Vince Cappelli**, the proposed Representative Plaintiff swore an affidavit dated January 31, 2017. He was not cross-examined.
- **Lawrence Kryzanowski** swore an affidavit dated January 31, 2017. Mr. Kryzanowki is a financial economist who is the professor of finance and senior research chair in finance at the John Molson School of Business at Concordia University. He received undergraduate degrees in economics and mathematics from the University of Calgary and a Ph.D. in business administration (finance) from the University of British Columbia. He was not cross-examined.
- **Andrew Mintzer** swore three affidavits dated May 18, 2016, October 15, 2018, and January 3, 2019. Mr. Mintzer of Santa Monica, California is a Certified Public Accountant ("CPA") in the U.S. and a Chartered Professional Accountant in Canada. His accounting firm is Hemming Morse LLP and he was an auditor with Ernst & Young LLP. Mr. Mintzer is a member of the American Institute of Certified Public Accountants, where he has held significant positions with respect to auditing standards. He is also a certified fraud examiner. He was not cross-examined.
- **Sharon Strosberg** swore an affidavit dated February 2, 2017. Ms. Strosberg is a partner at Sutts, Strosberg LLP, one of the counsel for Mr. Cappelli. She was not cross-examined.

[56] Nobilis resisted Mr. Cappelli's motion with the following evidence:

- **Kevin Chesser** swore an affidavit dated August 3, 2017. Mr. Chesser, of Cypress, Harris County, Texas is a shareholder of Briggs & Veselka, Co., an accounting and auditing firm. He has a BBA in accounting from Lamar University of Beaumont, Texas. He is a Certified Public Accountant. He was not cross-examined.
- **Bradley A. Heys** swore an affidavit dated July 27, 2017. Mr. Hays of Toronto, Ontario is an economist, a Certified Financial Analyst, and a Certified Fraud Examiner, and he is

[5] *Paniccia v. MDC Partners Inc.*, 2017 ONSC 7298.

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the director of NERA Economic Consulting. He has an MA in Economics from Queen's University, a Bachelor of Commerce from the University of Guelph, and a JD from the University of Toronto, where he also taught a graduate level economics course in Economic Analysis of Law for ten years. He was not cross-examined.

- **Anthony M. Lendez** swore an affidavit dated August 3, 2017. Mr. Lendez is a partner of BDO USA, LLP and the leader of its financial reporting disputes & monitorships practice. He is a Certified Public Accountant, a Certified Fraud Examiner, and Certified in Financial Forensics. He was not cross-examined.

## G. Facts

### 1. 2007-2014

[57] Nobilis is a Canadian corporation incorporated pursuant to British Columbia's *Business Corporations Act.*[6] Nobilis maintains its corporate headquarters in Houston, Texas. It was incorporated in 2007 under the name Northstar Healthcare Inc., and it changed its name to Nobilis in December 2014.

[58] Nobilis' business is the ownership and operation of ambulatory surgical centres and surgical hospitals across a variety of specialities including orthopaedic surgery, podiatric surgery, ENT (ear. nose, throat) surgery, pain management, gastro-intestinal, gynecology and general surgery. to 2015. By January 2016, Nobilis owned five ambulatory surgical centres, four surgical hospitals, and it partnered with 33 medical facilities.

[59] From 2011 until the summer of 2015, Calvetti Ferguson, P.C. a Houston-based accounting firm was Nobilis' auditor. It was paid in excess of $500,000 (USD) annually to audit the financial statements and to provide its audit opinion.

[60] From 2007, Nobilis' securities were listed on and traded on the Toronto Stock Exchange ("TSX") under ticker symbol "NHC," and from 2015, it shares were listed on the New York Stock Exchange for small-cap companies ("NYSE MKT") under ticker symbol "HLTH".

[61] Nobilis is a reporting issuer in all provinces and territories of Canada and a "responsible issuer" as defined in s. 138.1 of the Ontario *Securities Act* and the provisions in the comparable provincial securities statutes across Canada.

[62] It shall be significant to note that when Nobilis gained a listing on the NYSE MKT, it was required on a go-forward basis to file its audited statements under U.S. GAAP and to refile statements for 2013 and 2014 in accordance to U.S. GAAP. Up until December 2014, Nobilis prepared its annual financial statements in accordance with the Canadian standard, *i.e.*, International Financial Reporting Standards ("IFRS".

[63] Nobilis is a company that grew rapidly by acquisition, particularly in the period from 2013 to 2015. For example, in January 2014, Nobilis acquired an ownership interest in two imaging centres and one urgent care clinic in Houston. For another example, in September 29, 2014, Nobilis closed an agreement with First Surgical to establish a limited liability company for the purposes of operating a hospital and surgical centre to be managed by Nobilis. The hospital is

[6] S.B.C. 2002, c 57.

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owned 51% by Nobilis and 49% by First Surgical. For this project, Nobilis raised $7.5 million by a private placement of shares.

[64] For yet another example, on December 1, 2014, Nobilis acquired Athas Health, LLC for approximately $31.2 million to expand its marketing services. Upon closing, Nobilis paid $3 million in cash, $12 million by a promissory note, and it issued 6.7 million common shares that were subject to a lock up of up to two years and 4.7 million common shares that were to be issued over two years.

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## 2. The March 23, 2015 Core Documents

[65] On March 23, 2015, Nobilis released its: Annual Information Form ("AIF"), audited annual financial statements, Management Discussion and Analysis ("MD&A") and management certifications for year 2014. These documents represented that:

a. Total liabilities for the 2013 year were $6.94 million.

b. Total liabilities for the 2014 year were $42.28 million.

c. Shareholders' equity as at December 31, 2013 was $15.70 million.

d. Shareholders' equity as at December 31, 2014 was $65.3 million.

e. Net income for the 2013 year was $6.67 million.

f. Net income for the 2014 year was $20.25 million.

g. Net income per fully dilute common shares for the 2013 year was $0.03.

h. Net income per fully diluted common shares for the 2014 year was $0.15.

i. The company's Disclosure Controls and Procedures ("DC&P") were operating effectively.

j. The company's Internal Control over Financial Reporting ("ICFR") were operating effectively, and,

k. The Year 2014 Filings did not contain any untrue statements or omissions of material fact, and fairly presented in all material respects the financial condition and financial performance of the company.

[66] Pursuant to U.S. GAAP, the 2014 financial statements were audited by Calvetti Ferguson, P.C., which issued a clean audit report with no qualifications.

[67] Mr. Cappelli submits that the March 23, 2015 core documents contained material misrepresentations. These documents are impugned documents.

[68] In April 2015, Nobilis purchased a 54.7% equity interest in Victory Medical Centre Houston, L.P., a Texas limited partnership (Herman Drive Surgical Hospital, LP) and Plano Surgical Hospital.

[69] On May 14, 2015, Nobilis released its interim financial statements, MD&A, and management certifications for Q1 2015. These documents represented that:

a. The company's total liabilities for Q1 2015 was $34.71 million.

b. Shareholders' equity as at March 31, 2015 was $71.80 million.

c. Net income for Q1 2015 was $3.28 million.

d. Net income per fully diluted common shares for Q1 2015 was ($0.02).

e. The company's DC&P as of March 31, 2015, were effective.

f. There were no changes in the company's ICFR that occurred in the three months ended March 31, 2015 that had materially affected, or were reasonably likely to materially affect the company's ICFR, and,

g. The Q1 2015 Filings did not contain any untrue statements or omissions of material fact, and fairly presented in all material respects the financial condition and financial performance of the company.

[70] Pursuant to U.S. GAAP, the May 2015 financial statements were audited by Calvetti Ferguson, P.C., which issued a clean audit report with no qualifications.

[71] Mr. Cappelli submits that the May 14, 2015 core documents contained material misrepresentations. These documents are impugned documents.

[72] In July 2015, Nobilis purchased Victory Medical Centre Plano, L.P., a Texas limited partnership, and Scottsdale Liberty Hospital.

### 3. The August 2015 Core Documents

[73] On August 14, 2015, Nobilis released its interim financial statements, MD&A, and management certifications for Q2 2015. The documents contained the following representations:

a. The company's total liabilities for Q2 2015 was $53.20 million.

b. Shareholders' equity as at June 30, 2015 was $102.35 million.

c. Net income for Q2 2015 was $2.15 million.

d. Net income per fully diluted common shares for Q2 2015 was ($0.02).

e. The company's DC&P as of June 30, 2015, were effective.

f. There were no changes in the company's ICFR that occurred in the three months ended June 30, 2015 that had materially affected, or were reasonably likely to materially affect the company's ICFR, and

g. The Q2 2015 filings did not contain any untrue statements or omissions of material fact, and fairly presented in all material respects the financial condition and financial performance of the company.

[74] Pursuant to U.S. GAAP, the August 14, 2015 financial statements were audited by Calvetti Ferguson, P.C., which, once again, issued a clean audit report with no qualifications.

[75] Mr. Cappelli submits that the August 14, 2015 core documents contained material misrepresentations. These documents are impugned documents.

[76] After the release of its 2015, 2nd quarter audited financial statements, Nobilis terminated the engagement of Calvetti Ferguson, P.C., and it engaged Crowe Horwath, a larger and national

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accounting firm to provide auditing services.

## 4. 2015 and The Post of an Anonymous Internet Blogger

[77] On October 9, 2015, an anonymous Internet Blogger, "Seeking Alpha" published a fourteen-page stock analysis by an anonymous author, "The Emperor Has No Clothes." The blog post was highly critical of Nobilis. The analysis was entitled "Nobilis: About to Fall from Nobility, Part l, 65%+ Downside;" it stated:

> ***Summary***
>
> Surgical center roll up with a management team having experience with prior roll ups losing 90%+ of shareholder value; defunct roll up and Nobilis have the same chairman, 3 CFOs, VP IR, GC.
>
> Insiders have cashed out more than $70 million in the year-to-date period through a combination of share sales and compensation (-14% of current market cap).
>
> Accounting red flags: 4 CFO changes in a handful of years, along with recent auditor resignations; potentially overstated revenues; newly acquired acquisitions with Accounts Receivable issues. Questionable marketing, with paid studies touting inappropriate success rates for its medical procedures.
>
> The company is significantly overvalued, and appears to be guiding for unachievable targets; 65%+ downside in current stock price.
>
> ***Nobilis: A Brief Overview***
>
> Nobilis (HLTH, TSX:NHC) (formerly known as Northstar Healthcare) is a roll up of ambulatory surgical centers and medical services companies. The company owns surgery centers in Texas and Arizona, and provides marketing and management services for its own as well as third-party facilities. Nobilis has acquired various surgery centers, where it uses its marketing engine to refer procedures to doctors who perform surgeries at these facilities. The plan is for this marketing engine to drive growth at owned and acquired facilities. One of Nobilis' key acquisitions included the rights to AccuraScope, which is a spine surgery that offers patients a very short recovery time versus traditional procedures.
>
> ***"The Emperor Has No Clothes" has a solid track record, and Nobilis' stock is likely to drop in a similar style.***
>
> […]
>
> ***Fear the Roll Up: Roll Ups Rarely End Well, and Nobilis' Version is a Disaster Waiting to Happen***
>
> Roll ups have a recurring pattern of being bad stock market investments. The strategy sounds appealing to investors as an acquiring entity goes out picking up businesses and putting them together with the promise of significant synergies and cost reductions. Investment banks and their analysts love roll ups as well, as the constant stream of acquisitions provide continuing opportunities for transaction advisory and financings related to paying for them, both of which all add up to rich fees.
>
> For investors, roll ups are not nearly as attractive. Acquisitions give the impression of growth, even if the actual businesses are not growing, or even in decline. Management can continue to pay themselves handsome wages as top line expansion continues to reinforce the market excitement about the company's underlying "growth" story. Even the traditional earnings measures of the most conservative value investors can be distorted by all the opportunities in merger accounting to shift expenses and pad post-acquisition results. Synergy realizations are rare, and are more often than not unlikely to be realized.

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***A Team with Well-Catalogued Experiences of Failure***

Management teams of public companies often give comfort to investors in their stocks by listing a history of successes at prior companies and with experience in the underlying industry. As a result, stockholders can hang their hats on the likelihood of success based on management's skills and history of success. Nobilis' management does not follow this pattern, as it has no successes, as far as I can see, that resulted in any creation of shareholder value.

One would expect to see a recurring pattern in the backgrounds of a management team for a medical company to have lots of like experiences in the medical industry. But Nobilis has a different pattern. Instead, we see a common background in a company called Acro Energy Technologies.

[…]

Current Nobilis chairman of the Board, Harry Fleming, was Acro Energy's founder and chairman. […]

The tidal wave did not work out like Harry expected, as we see that in February 2013, Acro Energy filed for Chapter 7 bankruptcy. […]

***Déja, Vu All Over Again... But Only Worse***

In the case of Nobilis, the company has guided to having picked up undervalued and bankrupt assets. But with this management team and these assets, this story is likely to end very badly. However, the reality is that these assets were undervalued and bankrupt for a reason. If the underlying acquisitions are garbage, accumulating various acquisitions just yields a larger pile of garbage.

[…]

Out of the above noted acquisitions, Athas is the largest, and will be well documented throughout the rest of this report. The Victory Plano & Healthcare acquisitions come from a bankruptcy on the back of inability to collect accounts receivable, and Nobilis seems just as unlikely to change this reality. The third largest acquisition, First Nobilis, was formerly public and fell over 80% due to lawsuits against the company.

***Follow in the Same Failed Footsteps***

We have already seen the striking overlap of management between Nobilis and Acro. But the similarities go even further. Just like Acro, Nobilis is based in Houston, Texas. And just like Acro, it listed on the Canadian exchange, despite having no business operations in Canada. And just like Acro, Nobilis chose Calvettii Ferguson & Wagner, a small accounting firm with limited public company experience, to be its auditor. But the one minor difference is that unlike Acro, Nobilis jumped on the scene with a bang.

[…]

***Who is paying for this?***

[…]

One part of the excitement surrounding Nobilis' stock relates to growing the mix of in-network surgeries, but this is odd, given insurance already appears to be skeptical of the surgery. Additionally, one of its recent acquisitions, Victory, was shut down because of shift to in-network and the resulting inability to collect on accounts receivable that it was owed by insurers. On June 12, 2015, the Victory CEO said, "'Unfortunately, as out-of-network providers, we came under attack by large insurance carriers. Even though we were able to execute in-network agreements with three large insurers, the extreme slowness and lack of payment from the carriers constrained liquidity significantly. We have responded by reducing expenses and changing our facilities to provide fewer services and kept our emergency rooms open.

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[…]

A Big Valuation and a Big Supply of Shares to Sell

*Current valuation*: Even with the most bullish of expectations, Nobilis is still overvalued, despite the retreat of its stock price in the last few months. If the company achieves the very debatable guidance that it has laid out, it will still be valued at 12x 2015E EBITDA. The following table illustrates how significant Nobilis' valuation is. There is no way a glorified marketing engine deserves any of these multiples.

[…]

*Target valuation*: Based on the fundamental business issues that I have described, along with overly optimistic guidance with low likelihood of success, it is my view that the stock could trade down to $1.85/share, which would represent a generous 12x 2015E EBITDA multiple, based on Q2-2015 run-rate EBITDA levels ((12x multiple x $13.1M EBITDA less $14M debt) / 77.2M shares). My target price, thus, implies a 65%+ downside in the current stock price.

***Are Nobilis' Financials Any More Reliable Than the Company's Surgical Procedure?***

Any roll up with multiple mergers is going to lead to some complicated accounting. And Nobilis takes this even further with many subsidiaries and partial ownership of entities. Appendix A shows Nobilis' complicated organization, with 31 different entities and multiple ownership percentages. All this for a company that brought in only $49 million in revenue last quarter, for a shockingly low revenue per entity of less than $2 million. And of all the accounting firms to audit that complexity, which one did Nobilis pick? None other than tiny Calvetti Ferguson, with a total of 38 professionals. Barely more than the number of entities it audited at Nobilis. And the company's CFO situation inspires no more confidence.

***Nobilis CFO Position: a Revolving Door***

Since 2010, Nobilis has changed CFOs four times. […]

In August, Calvetti resigned as auditor. This follows closely after the last CFO change in July. A new CFO and a new auditor are now charged with figuring out all the complicated arrangement and deals built up over the years. While this does not guarantee that any problems will be found, it definitely increases the uncertainty.

Even my outsider's review of Nobilis' financial statements uncovered some potential issues. Per the organization chart or the following statements, "The Company assigned 100% of its equity interest in MSID to NHC ASC - Dallas, of which the Company owns 35% as a result of syndication... In November 2013, the Company sold 15.1% of its ownership interest in the Kirby Partnership to existing physician limited partners, effectively decreasing the Company's ownership interest to 25%" - so this means the company owns 35% of MSID and 25% of Kirby.

However, it appears to be fully consolidating both entities. The effect of this would be to inflate revenues so that the growth story appears better than it really is (Source: Nobilis' latest 10-K).

[…]

***Conclusion: A Potential House of Cards***

Nobilis has no accolades which would cause me to believe that the company can be one of the few successful and sustainable roll up strategies. Instead, it has a history of poor management with two prior roll ups that resulted in over 90% losses to shareholders (Acro Energy and Northstar Healthcare from 2007-2010). Fundamentally, Nobilis is very unlikely to make bullish guidance, yet management is extremely well paid and sells stock relentlessly. One of its primary marketed experimental procedures (AccuraScope) has questionable insurability, unsubstantiated success rates, lack of recognition from any institutions (insurance, university or medical bodies) and a poor history, with patient lives being ruined. And to top it all off, the company's accounting situation appears unstable and vulnerable. This report is part I of a potential multi-series write-up,

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as Nobilis' depth of issues runs deep.

[78] On October 9, 2015, after the publication of the Seeking Alpha article, the market price of Nobilis' common shares declined from $6.82 (the closing price on October 8, 2015) to $4.93 (the closing price on October 9, 2015), a decline of nearly twenty-eight percent. The decline continued and by the tenth trading day after the article had been published, the share price was down to $4.02, a 41.1 percent decline.

[79] On October 11, 2015, Nobilis' Board of Directors issued a response to the Seeking Alpha article. The response stated that Nobilis had serious disagreement with the article but had appointed Independent Counsel to investigate the matter. The response stated:

**Statement from the Nobilis Health Corp. Board of Directors**

> The Nobilis Board of Directors and its Audit Committee have been made aware of and have reviewed a blogger's posting on a site called "Seeking Alpha". This anonymous posting contains significant inaccuracies, inflammatory accusations and several misrepresentations concerning our company, its management and our financial condition. While we understandably have serious disagreement with these scurrilous claims, as to their validity and accuracy, the public and investors should know that the Nobilis Board of Directors and its Audit Committee take seriously any and all such claims made publicly about our company, as we understand the material effect such claims may have on our reputation and on our financial integrity.
>
> Accordingly, in an effort to address these allegations we believe that full disclosure and complete transparency is the appropriate way to show our commitment to the public, our investors and our regulators. To this end, the Chairman of our Audit Committee, Steve Ozonian is announcing that the Committee and the Board's Independent Directors have appointed and retained an outside Independent Counsel who will conduct a full review of each and every allegation raised by this blog. This Review will be presented to the public as an Independent Counsel's Report and will be based upon a pre-commitment to full transparency and disclosure.
>
> The Independent Counsel appointed to conduct this Review are Robert R. Hopper, Esq., Managing Partner, Robert R. Hopper & Associates, Attorneys at Law, Minneapolis, MN; and, Lanny J. Davis, Esq., Lanny J. Davis and Associates, Attorney at Law, Washington, DC. Both of these counsel are exceedingly experienced attorneys with the integrity to lead and guide this process.
>
> Mr. Ozonian, his Audit Committee members and the Independent Directors have the endorsement of Nobilis' full Board of Directors to engage Independent Counsel and undertake this Review. All of Nobilis' Directors are confident that the work of the Independent Counsel and their Review will show that these allegations have no merit whatsoever and that when brought to the "light of day", these allegations will be completely dismissed and the truth in Nobilis' financial integrity will prevail.

[80] On November 3, 2015, the Independent Counsel, Robert R. Hopper and Lanny J. Davis, announced that the allegations in the Seeking Alpha article were incorrect and unfounded. Their report stated:

> [The] blogger's five primary assertions [are] false, misleading, or without foundation. While we report solely on the five primary allegations made by the Blogger, we reviewed the blogger's other assertions to be equally false, misleading, or without foundation.

[81] On November 5, 2015, Nobilis announced that it had commenced a lawsuit against the (by then identified) author of the Seeking Alpha article and his employer.

[82] In November 2015, Nobilis began operations at Scottsdale Liberty Hospital following the closing of another acquisition transaction.

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## 5. The October 2015 Anonymous Internet Post as a Corrective Disclosure

[83] Mr. Cappelli submits that the Seeking Alpha article is a corrective disclosure.

[84] To foreshadow the discussion below, Nobilis, however, submits that the Seeking Alpha article cannot be a corrective disclosure because, although it is critical of Nobilis stock value, the author's criticisms do not connect any of the alleged misrepresentations in the impugned documents that are the predicate of Mr. Cappelli's pleaded misrepresentation claim (Misrepresentation Set #2).

## 6. The November 11, 2015 Press Releases

[85] On November 11, 2015, Nobilis released the following press release:

> **Nobilis Conference Call to Announce Preliminary Quarterly Results of Over $50 Million in Revenue and $9 Million in Adjusted EBITDA; Quarterly Earnings Release Delayed**
>
> MARKETWIRED November 11, 2015 -- Houston Texas. Nobilis Health Corp. (NYSE MKT: HLTH) (TSX: NHC) ("Nobilis" or the "Company") today announced management's preliminary results for the third quarter 2015 and that the Company's final earnings release will be delayed.
>
> Third quarter preliminary revenues are $50.1 million and preliminary Adjusted EBITDA is $9 million, resulting in an increase of approximately 191% and 373%, respectively, as compared to revenue of $17.2 million and Adjusted EBITDA of $1.9 million for the prior corresponding period. For the nine months ended September 30, 2015, preliminary revenues are $136.0 million and preliminary Adjusted EBITDA is $19.6 million, resulting in an increase of approximately 206% and 577%, respectively, as compared to revenue of $44.4 million and Adjusted EBITDA of $2.9 million for the prior corresponding period. Adjusted EBITDA for the trailing 12 months ended September 30, 2015 is estimated at $27 million.
>
> In August 2015, the Company engaged Crowe Horwath as its independent registered public accounting firm. "Crowe has informed us that their quarterly review procedures will not be completed within the deadline for the SEC filing of our Form 10-Q," said Kenny Klein, the Company's Chief Financial Officer. "Management and Crowe have identified certain non-cash accounting differences arising in our conversion from U.S. GAAP and IFRS rules and opening balance sheet valuations which will delay the Company's earnings release and the filing of its quarterly financial statements. Therefore, the Company will not issue its Quarterly Report on Form 10-Q for the three months ended September 30, 2015 on November 12, 2015 as previously anticipated."
>
> "The issues remaining under review should not result in material changes to the preliminary revenues and preliminary Adjusted EBITDA announced today as those are primarily non-cash items," said Chris Lloyd, the Company's Chief Executive Officer.
>
> In lieu of the previously scheduled earnings call, the Company will, however, hold a conference call on November 12th at 10:00 a.m. CST to update shareholders on third quarter revenue and discuss reasons for delay. The Company will update shareholders as soon as possible regarding the release date of final numbers and the timing of the rescheduled earnings call. […]
>
> To provide our auditors with adequate time to fully review the Company's finances, the Company will file a Form 12b-25 Notification of Late Filing with the U.S. Securities and Exchange Commission with regard to its Quarterly Report. The Company will hold its earnings conference call to discuss final third quarter results promptly following the filing of that Quarterly Report.
>
> […]

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[86] On November 12, 2015, Nobilis' common share priced dropped twenty percent on the TSX and eighteen percent on the NYSE MKT.

## 7. 2015, cont'd, and 2016 - Audit Review and January 5, 2016 Corrective Disclosure

[87] In preparing the audits for the third and fourth quarters of 2015, Crowe Horwath reviewed the prior U.S. GAAP financial statements for 2013, 2014, and first two quarters of 2015. It identified accounting standards deficiencies in the audits that had been completed by Calvetti Ferguson, P.C.

[88] Crowe Horwath's opinion was that the financial statements needed to be corrected to be compliant with accounting standards required for a listing on the NYSE.

[89] As a result or the review by Crowe Horwath, on January 5, 2016, Nobilis filed amended financial reports for 2013, 2014, and for the first two quarters of 2015. Calvetti Ferguson, P.C. agreed with the restatements.

[90] The U.S. Securities and Exchange Commission ("SEC") reviewed the restatements and the reasons for revision. The SEC found no significant misrepresentation or misconduct and closed its file, taking no action. Similarly, the Ontario Securities Commission ("OSC") took no action.

[91] On January 5, 2016, Nobilis released the following press release, which addressed the five accounting matters that required restatement to comply with U.S. GAPP. The press release stated:

> **Nobilis Health Corp. Announces Intention to Restate Consolidated Financial Statements for Fiscal Year 2014 and for 2015 Interim Periods; Updates Delay in Filing of Third Quarter Financial Statements**
>
> MARKETWIRED January 5, 2016 – Houston, Texas. Nobilis Health Corp. (NYSE MKT: HLTH) (TSX: NHC) ("Nobilis" or the "Company") today announced that the previously issued consolidated financial statements covering the Company's fiscal year ended December 31, 2014 (including financial information contained therein for prior periods) and the consolidated financial statements for the fiscal quarters ended March 31, 2015 and June 30, 2015 (collectively, the "Restatement Reports"), and the financial statements for the periods covered by the Restatement Reports included in the Company's Registration Statement on Form S-1 (File No. 333-206642) that was declared effective on October 27, 2015, require restatement and should no longer be relied upon. Accordingly, investors should no longer rely upon the Company's previously-issued financial statements for these periods (or the financial information for comparable prior periods contained in such financial statements), any earnings releases relating to these periods, the auditors' reports on those financial statements, and management's report on the effectiveness of the Company's internal control over financial reporting as of December 31, 2014. The Company intends to amend the Restatement Reports to correct the errors and file them with the Securities and Exchange Commission as soon as possible.
>
> The financial statements for the Restatement Reports contain errors related to (1) accounting for warrants and options issued in the Company's private placements in 2013, 2014 and 2015 and options granted to non-employees; (2) business combination accounting with respect to the Athas and First Nobilis transactions that occurred in December and September 2014, respectively; (3) reclassification of contingently redeemable noncontrolling interests to temporary equity; (4) share based compensation matters; and (5) calculations of fully diluted shares outstanding for application of the treasury stock method, as more fully described below. Based on management's preliminary assessment to date, the Company does not believe there will be any significant

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changes in revenue or Adjusted EBITDA for the periods covered by the Restatement Reports, except for approximately $700 thousand in additional reported revenue and an anticipated minor positive impact on Adjusted EBITDA for the three months ended March 31, 2015 and the six months ended June 30, 2015.

Based on our assessment to date, we expect the key impacts on our previously reported results for the relevant periods to be as follows:

*Accounting for warrants and options issued in private placements and options issued to non-employees as liabilities – The Company determined that FASB ASC 815-40-15-7I ("ASC 815-40"), Contracts in entities own equity*, should have been applied to the accounting for warrants and options issued in private placements and for options issued to non-employees. This accounting would have resulted in the Company classifying warrants and options issued in connection with 2013, 2014 and 2015 private placements by the Company as liabilities rather than as stockholders' equity. Similarly, this same accounting is applicable to stock options issued to non- employees once the performance conditions of such awards are completed. The Company first issued options to non-employees during the second quarter of 2014. Once recorded as liabilities, the warrants and options must be revalued each quarter with changes in their valuation reflected in earnings.

The impact of the proper application of ASC 815-40 is a reclassification from equity to liabilities of $2.4 million during 2013 for warrants and options requiring liability classification and recognition of $442 thousand of income during 2013 for the decrease in the value of such liabilities from the date of issuance through year- end. The impact for 2014 of the proper application of ASC 815-40 is estimated to be a recognition of $3.7 million of expense for increases in the value of such liabilities through December 31, 2014 (including the effect of additional issuances and exercises of such instruments).

At December 31, 2013, the warrant and stock option liabilities recognized for the proper application of ASC 815-40 in the Company's balance sheet totaled $2.4 million. During the quarter ended March 31, 2014, $374 thousand of income was recognized for decreases in the value of such liabilities through March 31, 2014. During the three months ended June 30, 2014, $372 thousand of income was recognized for decreases in the value of such liabilities (a total of $746 thousand of income for the six months ended June 30, 2014).

At December 31, 2014, the warrant and stock option liabilities recognized for the proper application of ASC 815-40 in the Company's balance sheet totaled $6.7 million. During the quarter ended March 31, 2015, $3.4 million of expense was recognized for increases in the value of such liabilities through March 31, 2015. During the three months ended June 30, 2015, $1.7 million of income was recognized for decreases in the value of such liabilities (a total of $1.7 of expense for the six months ended June 30, 2015).

*Recognition of the full fair value of noncontrolling interests in the acquisition of First Nobilis as required by U.S. GAAP instead of at a pro-rata value permitted under IFRS* – We initially adopted accounting principles generally accepted in the United States of America ("U.S. GAAP") effective January 1, 2013 in connection with our filings made with the U.S. Securities & Exchange Commission for registration of our common stock under the Securities Exchange Act of 1934 in early 2015. Previously we prepared our financial statements under International Financial Reporting Standards ("IFRS"). The Company determined that FASB ASC 805, *Business Combinations* ("ASC 805") was not properly applied in the initial adoption of U.S. GAAP by the Company and its application to the First Nobilis acquisition completed in September 2014. Under U.S. GAAP, noncontrolling interests should be measured at fair value on the acquisition date [ASC 805-20-30-1] whereas under IFRS these may be measured at their proportionate share of the recognized amount of the acquiree's identifiable net assets [IFRS 3.19].

The impact of the proper application of ASC 805 as of the date of acquisition (September 2014) is a reduction in noncontrolling interests of $2.0 million, a decrease in acquired intangible assets of $1.4 million and a decrease in recognized goodwill of $0.6 million, in each case beginning with the period ended September 30, 2014. Amortization expense recognized since the acquisition date

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will decrease by $15 thousand quarterly because of this change.

*Adjustments to the acquisition accounting for the Athas transaction* – The Company determined that it did not properly apply ASC 805 in its initial accounting for the Athas acquisition completed in December 2014. The Company incorrectly used an earlier version of the report of the independent valuation firm that was later modified and, secondly, incorrectly gave recognition of Athas' deferred rent as a liability in the acquisition accounting.

Also, we expect to correct our accounting policies related to accounts receivable factoring activities which commenced with the Athas acquisition. Under ASC 310-10-25-3, factoring revenue is recognized over the period from purchase of the account receivable until its collection. Correction for these accounting policies affects the initial acquisition accounting for the Athas transaction because it included accounts receivable for transactions recognized before the factoring purchase date.

The impact of the proper application of ASC 805 as of the date of acquisition is an increase in acquired intangible assets of $1.4 million, a reduction of liabilities of $260 thousand and a decrease in recognized goodwill of $1.7 million, in each case beginning with the period ended December 31, 2014. Amortization expense recognized since the acquisition date will increase by $15 thousand quarterly because of this change.

The impact of the proper application of ASC 310-10-25-3 as of the date of acquisition is a decrease in acquired accounts receivable of $1.7 million, a reduction in accrued liabilities of $0.3 million and a corresponding net increase in goodwill of $1.4 million, in each case beginning with the period ended December 31, 2014. This correction of the Company's accounting policies will impact the timing of revenue recognition in the future. However, this change had no impact on 2014 revenues given the proximity of the acquisition date for Athas to the Company's 2014 fiscal year end. Revenues and accounts receivable for and as of the three months ended March 31, 2015 and the six months ended June 30, 2015 increased by $735 thousand.

*Reclassification of Contingently Redeemable Noncontrolling Interests to Temporary Equity* – The Company determined that it did not properly apply SEC Accounting Series Release No. 268, Presentation of Financial Statements of Redeemable Preferred Stock ("ASR 268") in classifying contingently redeemable noncontrolling interests associated with NHC ASC- Dallas, LLC, Northstar Healthcare Dallas Management, LLC and First Nobilis. Agreements with the third-party equity owners in these entities give these owners limited rights to require the Company to repurchase their equity interests upon the occurrence of certain events. The contingently redeemable noncontrolling interests associated with these entities should be classified in the Company's balance sheet as "temporary" or mezzanine equity in accordance with ASR 268.

The impact of the proper application of ASR 268 is a reclassification of $12.9 million of contingently redeemable noncontrolling interests from "permanent" equity to "temporary" or mezzanine equity at December 31, 2014 and $1.3 million at December 31, 2013; a reclassification of $15.5 million of contingently redeemable noncontrolling interests from "permanent" equity to "temporary" or mezzanine equity at March 31, 2015; and a reclassification of $15.9 million of contingently redeemable noncontrolling interests from "permanent" equity to "temporary" or mezzanine equity at June 30, 2015.

*Other Adjustments* – We have also identified and made correction for certain other accounting matters affecting our previous financial statements. These include (i) corrections for stock-based compensation expense for expected term, forfeitures and related assumptions in determining the grant date valuations of option awards, (ii) corrections to the accounting for options issued to non-employees to measure such awards as of the date that performance was completed, and (iii) corrections to the calculations of fully diluted shares outstanding for application of the treasury stock method. The combined impact of these other corrections was an increase in compensation expense of $74 thousand for the year 2013 and an increase of $367 thousand for the year 2014; an increase in compensation expense of $4 thousand for the quarter ended March 31, 2014 and an increase of $621 thousand for the quarter ended March 31, 2015; and a decrease in compensation

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expense of $9 thousand for the quarter ended June 30, 2014 (decrease of $5 thousand for the six months ended June 30, 2014) and an increase of $470 thousand for the quarter ended June 30, 2015 (increase of $1.1 million for the six months ended June 30, 2015).

Mr. Steve Ozonian, Chairman of the Company's Audit Committee, issued the following statement: "Our executive management team, together with our Board of Directors, is committed to achieving and maintaining a strong control environment, high ethical standards, and financial reporting integrity. The Audit Committee takes the Company's internal controls over financial reporting and the integrity of its financial statements very seriously, and we are committed to implementing corrective measures and becoming current in our periodic reporting obligations as soon as possible."

**UPDATE ON DELAY IN FILING OF UNAUDITED INTERIM FINANCIAL STATEMENTS**

The Company previously announced that due to its new auditor having not completed their quarterly review procedures, it would not be in a position, by the filing deadline, to file its unaudited interim financial statements for the three and nine months ended September 30, 2015 (the "Financial Statements") and the related management's discussion and analysis ("MD&A") and related CEO and CFO certificates. It remains uncertain as to when the Company will be able to finalize its Financial Statements and related disclosures.

As previously announced, the Company continues to work with its auditor to resolve certain accounting issues that are delaying the finalization and release of the Financial Statements and the MD&A. As noted above, the Company intends to amend the Restatement Reports to correct the errors and file them as soon as possible. The Financial Statements, MD&A and related CEO and CFO certificates are expected to be filed shortly after the amendments to the Restatement Reports are filed.

The Company has made and the Ontario Securities Commission, as principal regulator for the Company, has approved an application under National Policy 12-203 – Cease Trade Orders for Continuous Disclosure Defaults ("NP 12-203") requesting that a management cease trade order be imposed in respect of this late filing rather than an issuer cease trade order. The issuance of a management cease trade order generally does not affect the ability of persons who have not been directors, officers or insiders of the Company to trade in their securities. The Ontario Securities Commission issued the management cease trade order on Friday, December 4, 2015.

The Company confirms that it will satisfy the provisions of the alternative information guidelines under NP 12-203 by issuing biweekly default status reports in the form of news releases for so long as it remains in default of the filing requirements to file its Financial Statements and MD&A within the prescribed period of time. The Company confirms that there have been no failures with respect to the Company fulfilling its stated intention of satisfying the requirements of the alternative information guidelines and further confirms that there is no other material information relating to the status of the default and its affairs that has not been generally disclosed.

[…]

[92] The five accounting issues that were the subject of the press release were also identified and described in Nobilis' Form 8-K dated January 5, 2016 submitted to the SEC. The five accounting issues (which are a part of Misrepresentation Set #2) were:

a. accounting for warrants and options issued in private placements to non-employees;

b. recognition of the full fair value of noncontrolling interests in the acquisition of First Nobilis as required by U.S. GAAP instead of at a pro-rata value permitted under IFRS;

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c. adjustments to the acquisition accounting for the Athas transaction;

d. reclassification of contingently redeemable noncontrolling interests to temporary equity;

e. other adjustments including: (i) corrections for stock-based compensation expense, (ii) corrections to the accounting for options issued to non-employees, and (iii) corrections to the calculations of fully diluted shares outstanding for application of the treasury stock method.

[93] The statements made in the January 5, 2016 press release were made because the new auditors required that five discrete items had to comply with U.S. GAAP rather than IFRS and certain items had to reclassified as temporary rather than permanent equity. Nobilis submits that these five accounting issues arose as a result of the Nobilis' large and complex transactions in 2014 and 2015, which had increased Nobilis' net income of $1.6 million in 2013 to $50.8 million in 2015 and as a result of the conversation from Canadian IFRS to U.S. GAAP.

[94] To foreshadow the discussion below, Nobilis submits that the restatements set out in the press release were not material because the adjustments: (a) had no impact on total revenue or gross profit; (b) had no impact on operational, financing, or investing activities; and (c) there was no diminution of EBITDA (Earnings Before Interest, Tax, Depreciation and Amortization).

[95] All the stock market analysts who were following Nobilis commented favourably on the press release of January 5, 2016 or regarded it as a non-event, and on the following day, January 6, 2016, Nobilis' stock price rose on the TSX. The price of the shares rose by thirteen percent from $3.85 to $4.36. The view of the analysts was that the information did not relate to operating performance and had no significant effect on the value of Nobilis' securities.

[96] On January 12, 2016, Nobilis released its the 2nd quarter 2015 financial statement and MDA. Included within Nobilis' Form 10-K/A was the following statement:

> On December 29, 2015, our Audit Committee of the Board of Directors, after consultation with management and the Company's predecessor auditors concluded that the Company's financial statements as of and for the three months ended March 31, 2015 and 2014, should be restated because the financial statements did not properly account for the following items:
>
> - Accounting for warrants and options issued in private placements and options issued to non-employees as liabilities …
> - Recognition of the full fair value of noncontrolling interests in the acquisition of First Nobilis as required by U.S. GAAP instead of at a pro-rata value permitted under IFRS …
> - Adjustments to the acquisition accounting for the Athas transaction …
> - Reclassification of Contingency Redeemable Noncontrolling Interests to Temporary Equity …
> - Other adjustments.

[97] The January 12, 2016 financial statements also revealed that:

a. Liabilities for the restatement period were understated:

i. Total liabilities for the 2013 year were $9.34 million [not $6.94 million].

ii. Total liabilities for the 2014 year were $48.38 million [not $42.28

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million.]

iii. Total liabilities for Q1 2015 were $41.25 million [not $34.71 million], and

iv. Total liabilities for Q2 2015 were $65.24 million [not $53.20 million].

b. Shareholders' equity for the restatement period was overstated:

i. Shareholders' equity as at December 31, 2013 was $12.04 million [not $15.70 million].

ii. Shareholders' equity as at December 31, 2014 was $43.80 million [not $65.30 million].

iii. Shareholders' equity as at March 31, 2015 was $47.72 million [not $71.80 million], and,

iv. Shareholders' equity as at June 30, 2015 was $72.38 million [not $102.35 million].

c. Net income for the restatement period was misstated:

i. Net income for the 2013 year was $7.04 million [not $6.67 million].

ii. Net income for the 2014 year was $16.19 million [not $20.25 million].

iii. Net income for Q1 2015 was $2,000 [not $3.28 million].

iv. Net income for Q2 2015 was $3.34 million [not $2.15 million].

v. Total net income for the period January 1, 2013 to June 30, 2015 was $26.56 million [not $32.35 million].

d. Net income per fully diluted share for the restatement period was misstated:

i. Net income per fully diluted share for the 2013 year was $0.04 [not $0.03].

ii. Net income per fully diluted share for the 2014 year was $0.07 [not $0.15].

iii. Net income per fully diluted share for Q1 2015 was $0.07 [not $0.02]

iv. Net income per fully diluted share for Q2 2015 was $0.01 [not $0.02].

[98] Thus, the January 12, 2016 financial statements disclose Misrepresentation Set # 2; *i.e.*, the five accounting misrepresentations plus the misrepresentation that Nobilis had effective Disclosure Controls and Procedures ("DC&P") and Internal Control over Financial Reporting ("ICFR") as of December 31, 2014, March 31, 2015 and June 30, 2015, and that its ICFR was free of material weakness, as defined by SEC regulations. The January 12, 2016 financial statements also disclose the four additional misrepresentations that I have labelled Misrepresentation Set #3.

[99] The statements of Misrepresentation Set #3 revealed the four additional misrepresentations that: (1) total liabilities were understated between 14% and 35%; (2) shareholders' equity was overstated between 23% and 34%; (3) net income was overstated by 18% for total net income earned between January 1, 2013 and June 30, 2015; and (4) net income

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per fully diluted share was overstated by 250% for one quarter during the restated period, and misstated between 33% to 250% for the entire restated Period.

[100] With the release of the January 12, 2016 financial statements, the market reacted by selling off Nobilis' common shares on the TSX and NYSE. By January 26, 2016, ten-trading days after the release of the January 12, 2016 financial statements, the stock market price of Nobilis' shares dropped fifteen percent on the TSX and nineteen percent on the NYSE.

[101] From November 11, 2015 to January 26, 2016, Nobilis' stock price on the TSX had declined from $4.78 to $2.88, a forty percent decline.

[102] Nobilis' share price and investor support never returned. Its shares eventually were delisted from the TSX. The shares currently trade at $0.39. Nobilis's market capitalization is now down to $31 million from over $500 million.

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## H. The Experts' Evidence

### (a) Andrew M. Mintzer

[103] Mr. Mintzer opined that: (a) Nobilis' financial statements from December 31, 2013 to June 30, 2015 were not prepared in accordance with U.S. GAAP and violated SEC reporting requirements; (b) Nobilis' statement that its disclosure controls and procedures were effective from December 31, 2013 to June 30, 2015 were misleading because there were material weaknesses in its internal controls over financial reporting as of December 31, 2014; (c) Nobilis' restatement of its financial statements validated [confirmed?] the Seeking Alpha article criticisms of Nobilis' disclosure failures; and (d) Calvetti Ferguson, P.C. did not comply with professional auditing requirements when it issued an unqualified clean opinion on Nobilis' financial statements as the statements were not prepared in accordance with U.S. GAPP.

[104] Mr. Mintzer stated that definition of materiality under GAAP is similar to the definition of materiality under the Ontario *Securities Act* and that the omissions or misstatement of an item in a financial report would be material if, in the light of surrounding circumstances, the magnitude of the item was such that it is probable the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.

[105] Mr. Mintzer said that errors resulting in a restatement of previously issued financial statements were inherently material under GAAP; *i.e.*, a restatement was *per se* an admission by the corporation that its former financial statements contained material errors.

[106] Mr. Mintzer said that Nobilis' January 12, 2016 re-statement of its financial statement was reasonably correlated with the allegations set out in the Seeking Alpha article. Mr. Mintzer stated that the accounting issued raised by the Seeking Alpha article were errors with: (a) accounting practices with regards to entities that the Company had less than 50% ownership; (b) the valuation and accounting for acquisitions made by the Company; (c) the compensation of current and former directors and officers; and (d) issues with regards to its accounts receivable from prior acquisitions.

[107] In his cross-examination, Mr. Mintzer stated that he was not asked to do an analysis of

whether the January 5, 2016 press release had any impact on the price of Nobilis's shares and that he did not do this analysis.

**(b) Lawrence Kryzanowski**

[108] Mr. Kryzanowski opined that a reasonable investor: (a) would consider it important that the financial statements of a publicly-traded company fairly present in all material aspects the financial condition, results of operations, cash flows, expenses, assets and earnings, including adherence to GAAP or IFRS; (b) would consider the statement that Nobilis' financial statements fairly present in all material aspects the financial condition, results of operations, cash flows, expenses, assets and earnings, including adherence to GAAP or IFRS an important factor in making the decision to purchase Nobilis securities; and (c) would consider the statement that Nobilis' internal control over financial reporting was effective, as being an important factor in making the decision to purchase Nobilis securities.

[109] Pertaining to ICFR, Mr. Kryzanowski explained that internal control weakness disclosures were important to investors and were associated with a negative stock price reaction and that lenders charged greater rates to lend to such companies. He said that knowledge that a company has ICFR weaknesses had empirically been found to have a materially-negative impact on the valuation placed on the company by both investors and lenders.

[110] Mr. Kryzanowski stated that reasonable investors will consider any misrepresentation in financial filings to be material (important) if such information relates to firm performance and/or stewardship that would have significantly altered the information made publicly available and had significance in their decisions to invest. In this case, a reasonable investor would have made an investment decision with the incorrect belief that Nobilis' filings contained no material misrepresentations.

[111] Further, he stated that investors rely upon financial statements to assess the honesty and reliability of a corporation's management, even errors in financial statements that are not technically material from an accounting perspective are still material to the investing decisions of reasonable investors because they have a bearing on the credibility of management.

[112] Mr. Kryzanowski did not specifically consider whether the accounting items restated in the January 5, 2016 press release impacted on investor expectations or the market price of Nobilis shares. He does not analysis of the content of the restated financial statements and he does not comment about the published analysts' reports.

**(c) C. Kevin Chesser**

[113] Mr. Chesser stated that the five accounting matters discussed in the January 5, 2015 press release were not material representations. He said that these five matters did not result in any metrics that shareholders focus and rely on. They five matters did not reveal any diminution to cash flow or EBITDA and the information did not impact on operational, financing or investing activities.

[114] Of the five accounting issues described in Nobilis' January 5, 2016 press release and in the Nobilis' Form 8-K dated January 5, 2016, Mr. Chesser explained that:

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a. (accounting for warrants and options issued in private placements to non-employees) - When Nobilis completed private placement financings in 2013, 2014 and 2015 it issued warrants and options to certain non-employees for services, and under U.S. GAAP, these warrants and options should have been classified as liabilities rather than as stockholders' equity. Because Nobilis' financial statements were reported in U.S. dollars the warrants and options had to be reported as liabilities and revalued each quarter with changes in their valuation reflected in earnings. These liabilities are valued by the use of Black-Scholes valuation models and their size is impacted mostly by the Nobilis ' stock price and its volatility. Ultimately, the instruments would expire if not exercised or settled by issuance of the underlying shares which are then recorded as equity.

b. (recognition of the full fair value of noncontrolling interests in the acquisition of First Nobilis as required by U.S. GAAP instead of at a pro-rata value permitted under IFRS) - When Nobilis acquired a 51% interest in First Nobilis, it should have applied U.S. GAAP and measured the 49% non-controlling interests at fair value rather than at their proportionate share of the acquired assets, permitted under IFRS. Using U.S. GAPP would change the values recorded for goodwill and intangible assets. The result was a reduction in non-controlling interests of $2 million, a decrease in acquired intangible assets of $1.4 million and a decrease in recognized goodwill of $0.6 million.

c. (adjustments to the acquisition accounting for the Athas transaction) - Nobilis determined that in accounting for the Athas acquisition completed in December 2014, it incorrectly used an earlier, later amended, independent valuation report and incorrectly booked Athas' deferred rent as a liability. The correct accounting yielded an increase in acquired intangible of $1.4 million, a reduction of liabilities of $260,000 and a decrease in recognized goodwill of $1.7 million. Nobilis also corrected its accounting policies with respect to factoring accounts receivable which had commenced with the Athas acquisition. The practice had been to pay doctors for cases approximately 45 days after the surgery date and then file and collect the insurance proceeds, which typically occurred at about 60 days. Under U.S. GAAP ASC 310-20, this is considered a factoring arrangement under which revenue should be recognized over the period from purchase of the account receivable until its collection. Correction for these accounting policies affected the initial acquisition accounting for the Athas transaction because the transaction included accounts receivable for cases recognized before the factoring purchase date. The ultimate amounts to be recognized as revenue were not impacted by this change.

d. (reclassification of contingently redeemable noncontrolling interests to temporary equity) - The acquisition of NHC ASC-Dallas LLC, Northstar Healthcare Dallas Management, and First Nobilis involved agreements with third party equity owners who were given limited rights to require Nobilis to repurchase their equity interests upon the occurrence of certain events. These non-controlling interests should have been classified on the company's balance sheet as "temporary" or mezzanine equity rather than full equity. In aggregate the numerical numbers of

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these numbers did not change.

e. (other adjustments) - The combined impact of these corrections was an increase in compensation expense of $74 thousand for the year 2013 and an increase of $367 thousand for the year 2014. The adjustments did not impact Nobilis' previously reported cash, cash equivalents or cash flows from operating, financing or investing activities. Mr. Chester opined that that the impact of these adjustments on EPS (earnings per share) was negligible.

[115] Mr. Chesser stated that the accounting issues discussed in the January 5, 2016 press release with matters that should have been identifiable by an independent auditor in its routine procedures. He said the accounting issues discussed in the press release arose from Nobilis' acquisitions and private placements, and these matters are usually given special attention by an auditor because of their size and complexity.

[116] Mr. Chesser opined that there is no relationship between the allegations in the Seeking Alpha article and the accounting issues noted in the January 5, 2016 press release. Mr. Chesser stated:

> After careful review of this Article and comparison to the identified accounting issues corrected in the restatement, I have concluded that the identified accounting issues corrected were not identified in the Article.
>
> Of the particular accounting criticisms raised in the Article, I am not aware of any assertion including by the predecessor or successor auditors that Nobilis' accounting for these items was materially misstated. The Article questions Nobilis' ability to collect its accounts receivable. The restatement adjustments do not include correction for any uncollectible accounts receivable or asset impairments.
>
> The correction and restatement of the identified accounting issues does not relate to any of the article's claims or criticisms.

**(d) Bradley A. Heys**

[117] Mr. Heys opined that the restatements of the accounting matters discussed in the January 5, 2016 press release were not material from an economic and finance perspective. Mr. Heys opined that: (a) the alleged misrepresentations were not material from an economic and finance perspective; *i.e.*, at the dates of each of Nobilis' public disclosures of its originally stated financial statements, it would not have been reasonable to expect any significant effect on the market price or value of Nobilis' shares had those financial statements been prepared in accordance with the relevant accounting standards; and (b) any economic losses incurred by members of the Class are attributable to factors other than the correction of the alleged misrepresentations, implying that aggregate damages to members of the Class are $nil.

[118] Mr. Heys opined that there is no relationship between the allegations in the Seeking Alpha article and the accounting issues noted in the January 5, 2016 press release. Mr. Hays stated:

> More specifically, none of the allegations made in the Seeking Alpha Article are related to, or are corrective of, the Alleged Misrepresentations:
>
> a. The Seeking Alpha Article makes several serious allegations regarding the legitimacy of Nobilis' business operations, growth strategy, marketing tactics, and management

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> team, and raises questions about the quality of its financial reporting, as set out in Section 4.3.1 above. The article effectively implies that Nobilis is a fraudulent and unsustainable business, and that the market price of the Company's shares dramatically exceeded their actual value.
>
> b. None of these allegations are related to, or supported by, the subsequent restatement of Nobilis' financial statements that are the subject of the Alleged Misrepresentations. Rather, the restatements of the Company's financial statements are largely the result of technical accounting adjustments, as described in Section 4.3.2 above.
>
> c. The technical accounting changes that led to the restatement of the Company's financial statements are unrelated to, and do not confirm, the allegations made in the Seeking Alpha Article. For example:
>
> > i. The Seeking Alpha Article questions the merits of a roll-up strategy and suggests that Nobilis' revenue growth was only due to its acquisitions. In contrast, the restatement of the Company's financial statements did not have any significant affect the reported sales revenue and did not reveal any flaw in the Company's business strategy;
> >
> > ii. The Seeking Alpha Article's allegations or insinuations about the "AccuraScope procedure" are not confirmed by, or even related to, the restatement of the Company's financial statements (and are otherwise said to be baseless by both the Company and independent analysts);
> >
> > iii. The technical accounting adjustments relating to the accounting for warrants and stock options are not connected to and do not confirm the assertions in the Seeking Alpha Article that management was extracting undue compensation from the Company; and
> >
> > iv. The restatements do not provide any indication that the Company's previously issued guidance was "overly optimistic."

[119] Mr. Heys did an event study and it was his opinion that the study demonstrated that the January 5, 2016 press release had no adverse impact on Nobilis' share price.

[120] The methodology of an event study uses a market model to measure the statistical relationship between the changes in the market price for the stock and the effects of other market and/or industry factors. The difference between the actual return and the return that would have been expected—*i.e.,* the "predicted return"—given the returns for the market and industry is referred to as the "excess" or "company-specific" return. Estimation of the market model based on actual historical data provides an estimate of the expected volatility (or variance) of daily excess returns which provides the statistical benchmark for assessing the significance of any change in the market price of the security.

[121] Mr. Heys' stated that the event study analysis revealed that following Nobilis' January 5, 2016 press release in which it disclosed that it would restate its previously issued financial statements and provided details regarding the nature of those restatements, the stock price increased by more than thirteen percent, which was a statistically significant excess return after controlling for industry effects.

[122] Mr. Heys deposed that Mr. Kryzanowski's report did not address the same questions as the press release and rather discussed the general importance to investors of properly prepared financial statements and opined that Nobilis' representations that its financial statements were prepared in accordance with the relevant accounting standards would have been important

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information to a reasonable investor.

[123] Mr. Heys deposed that Mr. Kryzanowski's report did not consider how or whether the differing accounting treatment of the items that were the subject of the restatements [in the January 5, 2016 press release] might have impacted investor expectations or the market price or value of Nobilis' common shares during the Class Periods. Further, Mr. Heys stated that Mr. Kryzanowski's report did not provide any of the analyses that would be required to assess whether the correction of the alleged misrepresentations was the cause of any economic losses to members of the class.

**(e) Anthony M. Lendez**

[124] With respect to the accounting matters noted in the January 5, 2016 press release, Mr. Lendez stated that income from operations for the year ended December 31, 2014 and the quarter ended June 30, 2015 decreased by 1.6% and 29.9%, respectively, but increased by 2.6% for the quarter ended March 31, 2015. There was a two percent increase in total revenue and gross profit for the quarter ended March 31, 2015. Mr. Lendez said that in light of in light of the Company's total revenues for the quarter of $48.9 million, total shareholders' equity of $72.4 million, and total assets of $153.5 million as of June 30, 2015, the impact of the accounting issues in the press release did not have a material impact on income from operations and had no impact on Nobilis' total revenue and gross profit for the year ended December 31, 2014 and the quarter ended June 30, 2015.

[125] Mr. Lendez said that the accounting matters had a positive impact on Nobilis' adjusted EBITDA, which is a metric disclosed in an earnings release due to its importance to shareholders.

[126] Mr. Lendez opined that there is no relationship between the allegations in the Seeking Alpha article and the accounting issues noted in the January 5, 2016 press release. Mr. Lendez stated:

> I have read the Seeking Alpha article (the "Article") dated October 9, 2015 titled, Nobilis: About To Fall From Nobility, Part I, 65%+ Downside. There are five topics discussed in the Article, namely (1) the Company's strategy of acquiring entities and putting them together with the promise of significant synergies and cost reductions (referred to as "roll ups" in the article); (2) that insiders have sold more than $50 million of their stock in the year-to-date period; (3) accounting red flags (characterized in the article as four CFO changes in a handful of years, recent auditor resignations, potentially overstated revenues, newly acquired acquisitions with accounts receivable issues); (4) questionable marketing with paid studies touting inappropriate success rates for its medical procedures; and (5) that the company is significantly overvalued and appears to be guiding for unachievable targets. All of these issues are different from, and wholly unrelated to, the accounting issues that were addressed by the Restatement.

[127] Mr. Lendez stated that if an auditor of a public company determines that the company has not complied with GAAP, then the auditor must notify the company's management so that appropriate corrective measures can be taken to become compliant. He said that if management failed to undertake remedial action to correct its non-compliance with GAAP, then the auditor would have to express a qualified or an adverse audit opinion on the company's financial statements. Mr. Lendez took from the fact that Calvetti Ferguson, P.C. had not qualified its opinion that it did not take exception to Nobilis accounting.

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[128] Mr. Lendez did not identify any information withheld by Nobilis from the auditors that would have precluded Calvetti Ferguson, P.C. from evaluating all the facts and circumstances surrounding the accounting issues that were the discussed in the January 5, 2016 press release.

## I. The Pleaded Statutory Misrepresentation Action

[129] In his Statement of Claim, after the pleading of the impugned documents, the allegations that are relevant to the statutory cause of action for misrepresentation against Nobilis are set out in paragraphs 3-12, 24-33, 42, 56-67 of the Amended Fresh as Amended Statement of Claim dated December 6, 2016 as follows:

> NATURE OF THE ACTION
>
> 3. This is a proposed securities class action for misrepresentations about the financial state of Nobilis and the adequacy of its controls and procedures, with respect to disclosure and financial reporting, made by the Defendants in core documents and in other written and oral statements during Class Period I and by the Nobilis Defendants during Class Period II.
>
> 4. During Class Period I, the closing price of Nobilis' securities increased over sixty-five (65%), from $6.06 per share to as high as $10.05 per share.
>
> 5. The Plaintiff alleges that during the Class Periods, the price of Nobilis' securities was artificially inflated as a result of the acts and omissions of the Defendants.
>
> 6. During the Class Periods, Nobilis' accounting for its acquisitions of Athas and First Nobilis, as found in its FYE 2014 and Q1 and Q2 2015 financial statements were incorrect, resulted in the overstatement of goodwill and provided the investing public with a misleading view of Nobilis' revenues, expenses, and general business operations.
>
> 7. On October 9, 2015, SeekingAlpha.com, an investment research website, published an article asserting that Nobilis may have made misrepresentations in its core documents and other publications, about its: (a) accounting practices with regards to entities in which it had less than 50% ownership; (b) the valuation and accounting for acquisitions made by it; (c) the compensation of current and former directors and officers; and (d) issues with regards to its accounts receivable from prior acquisitions ("Corrective Disclosure I").
>
> 8. The publication of Corrective Disclosure I caused the price of Nobilis' securities to drop 27.7% on the TSX from a closing price of $6.82 on October 8th to $4.93 on October 9, 2016. Ten (10) trading days after Corrective Disclosure I, the price of Nobilis' securities closed at $4.02.
>
> 9. Nobilis vehemently denied the allegations in press releases, telephone briefs, public statements and in the Hopper-Davis Report repeatedly characterizing them as "baseless allegations ... [that] are completely false", "scurrilous claims...[that] have no merit whatsoever", "inflammatory and slanderous", "spurious and misleading", and "false, misleading, or without foundation". The Company attempted to paint itself as the "victim of a scheme to 'short and distort' and manipulate Nobilis' stock".
>
> 10. Despite its steadfast denials of the allegations, on January 5, 2016, Nobilis announced its intention to restate its consolidated financial statements for FYE 2014 and Q1 and Q2 of 2015. Nobilis also announced that its Registration Statement filed October 27, 2015 required restatement and should no longer be relied upon by investors, and again delayed the release of its Q3 2015 financial results ("Corrective Disclosure II").
>
> 11. Thereafter, the price of Nobilis' securities on the TSX and NYSE MKT plunged once again. Ten (10) trading days after Corrective Disclosure II, the price of Nobilis' securities on the TSX closed at $3.13, 19% below the closing price on January 5, 2016 and more than 54% below the closing price on October 8, 2015.

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12. On January 12, 2016, Nobilis filed the restated financial statements.

[…]

24. Calvetti Ferguson was Nobilis' independent registered public accountant. On March 31, 2015, it certified that Nobilis' 2014 and 2013 consolidated audited financial statements presented fairly, in all material respects, the final position of the company as at December 31, 2013 and 2014 and its financial performance and cash flows in accordance with IFRS. On April 2, 2015 it certified that very similar 2014 and 2013 consolidated audited financial statements presented fairly, in all material respects, the final position of the company as at December 31, 2013 and 2014 and its financial, performance and cash flows in accordance with U.S. GAAP. During 2014 and 2013, it earned $512,000 and $230,000, respectively, from Nobilis. On September 2, 2015, it resigned from serving as Nobilis' independent registered public accountant effective August 14, 2015.

THE MATERIAL EVENTS

25. Nobilis initially adopted U.S. GAAP in early 2015.

26. The financial statements for FYE 2013, 2014 issued on March 23, 2015 were the last Nobilis publicly issued financial statements purportedly prepared in accordance with IFRS. All financial statements prepared or released thereafter were purportedly prepared in accordance with U.S. GAAP.

27. On March 23, 2015, Nobilis released its audited, annual, consolidated financial statements, AT and MD&A for fiscal 2014.

28. Chen and Lloyd certified, in Form 52-109F1, that these documents did not contain any misrepresentations and acknowledged their responsibility for establishing and maintaining ICFR and DC&P as those terms are defined in NI 52-109.

29. Nobilis stated in the MD&A that management had conducted an evaluation of the effectiveness of the design and operation of the DC&P as of December 31, 2014 and concluded that they operated effectively. They further stated that management, under the direction of Chen and Lloyd, assessed the effectiveness of the ICFR as of December 31, 2014 and concluded that they were operating effectively.

30. Calvetti Ferguson stated in its audit report that the consolidated financial statements were prepared in accordance with Canadian generally accepted auditing standards and that Nobilis' financial performance and cash flows for those years were fairly presented in accordance with IFRS.

31. On April 2, 2015, Nobilis filed the FYE 2013, 2014 consolidated financial statements on EDGAR.

32. Calvetti Ferguson stated, in its unqualified audit report, that the consolidated financial statements were prepared in accordance with the standards of the PCAOB and that the consolidated financial statements fairly presented, in all material respects, the financial position of Nobilis and the results of its operations and its cash flows for the years audited in conformity with accounting principles generally accepted in the United States.

33. These certifications and statements were incorrect because these core documents did not fairly present, in all material respects, the financial condition and results of operation of Nobilis or the true effectiveness of its ICFR or DC&P as demonstrated by Nobilis' January 2016 restatement of these core documents.

[…]

42. On October 9, 2015, SeekingAlpha.com published an article that was critical of Nobilis. The article questioned among other things: (a) the turn-over in chief financial officers within short periods of time; (b) over-priced acquisitions of companies related to insiders; (c) accounting irregularities; (d) the validity of Nobilis' sales of AccuraScope; (e) insiders selling tens of millions

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of dollars worth of stock within the past several months; and (f) materially unrealistic pro forma revenues and expenses that the insiders knew were overly optimistic.

[…]

52. On January 5, 2016, Nobilis announced that it was restating its previously published consolidated financial statements and MD&A for FYE. 2014, Q1 2015, and Q2 2015. Nobilis also announced that its Registration Statement of October 27, 2015 should no longer be relied upon by investors. Nobilis again delayed filing its Q3 2015 financial results.

53. On January 7, 2016, Nobilis announced the resignation of Lloyd as CEO, effective January 6, 2016 and the appointment of Fleming as the new CEO.

54. On January 12, 2016, Nobilis released its Q3 2015 results and filed the previously announced financial restatements. In Form 10-K/A Nobilis admitted that its financial statements for the three months ended March 31, 2015 and June 30, 2015 and for FYE 2014 should be restated because the financial statements did not properly account for the following:

> (a) accounting for warrants and options issued in private placements and options issued to non-employees as liabilities rather than as shareholders' equities;
>
> (b) recognition of the full fair value of noncontrolling interests in the acquisition of First Nobilis as required by U.S. GAAP instead of at a pro rata value permitted under 1FRS thereby overstating its assets;
>
> (c) adjustments to the acquisition accounting for the Athas transaction by overstating receivables and failing to apply the correct valuation report;
>
> (d) reclassifying contingently redeemable noncontrolling interests to temporary equity; and
>
> (e) other adjustments.

55. Furthermore, Nobilis admitted in its restated financial statements released on January 12, 2016, for FYE 2014, and Q1 and Q2 2015, and in its Q3 2015 financial statements (which were also released on January 12, 2016) that its management had determined that Nobilis' internal controls were deficient in a manner that constituted a material weakness (as defined by SEC regulations,) in its ICFR as at December 31, 2014, March 31, 2015, June 30, 2015, and as of September 30, 2015.

56. Nobilis admitted in its restated MD&As that there were material weaknesses in its DC&P and ICFR because:

> (a) it did not maintain a sufficient compliment of personnel with the appropriate level of accounting knowledge, experience and training in the application of U.S. GAAP necessary to support its operations; and
>
> (b) it did not apply the appropriate level of review and oversight to the accounting and disclosure for significant, infrequently occurring transactions such as business combinations and private placements.

57. To remedy these material deficiencies Nobilis:

> (a) replaced the CFO on July 9, 2015;
>
> (b) strengthened it accounting and financial reporting group with the addition of five new professionals with knowledge, experience and training in the application of U.S. GAAP;
>
> (c) engaged third-party accounting specialists to assist with significant, infrequently occurring transactions; and
>
> (d) revised and implemented remediation steps for a more detailed supervisory review process.

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58. Subsequent to its resignation, Calvetti Ferguson performed additional audit procedures and concluded that its previously issued report was no longer valid as the financial statements of Nobilis as originally reported on contained material departures from U.S. GAAP. Calvetti Ferguson issued a revised audit report with a dual date, the original date for the unchanged items and the January 12, 2016 date for the restated items.

59. Errors that require the restatement of previously filed financial statements are material under U.S. GAAP.

THE MISREPRESENTATIONS

60. On March 23, 2015, Nobilis and Calvetti Ferguson represented in Nobilis' FYE 2013 and 2014 consolidated financial statements that those financial statements were prepared in accordance with IFRS.

61. On April 2, 2015, Nobilis and Calvetti Ferguson represented that the FYF, 2013 and 2014 consolidated financial statements were prepared in accordance with U.S. GAAP.

62. Thereafter, the Defendants represented that all financial statements and the restatements were prepared in accordance with U.S. GAAP. But those statements were untrue and misleading because the financial statements were not prepared in accordance with U.S. GAAP. These statements contained misrepresentations and omissions of material facts.

63. In each MD&A during Class Period I, Nobilis represented that its disclosure controls and procedures were effective. This was a misrepresentation as Nobilis admitted on January 12, 2016 that there was a deficiency in its internal control over financial reporting that constituted a material weakness, as defined by SEC regulations, as at December 31, 2014, March 31, 2015, June 30, 2015, and as of September 30, 2015.

64. In its Annual 2013, and 2014 MD&A, Nobilis represented that its ICFR and DC&P were effective which was untrue and misleading.

65. During Class Period I, and Class Period II, Nobilis represented that Nobilis' system or DC&P and ICFR were effective, when in fact they were deficient and suffered from material weaknesses.

66. ICFR is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements in accordance with a company's generally accepted accounting principles. DC&P are designed to provide reasonable assurance that information required to be publicly disclosed is accurately recorded, processed, summarized and reported within time periods specified in securities legislation.

67. In Nobilis' FYE 2014 consolidated financial statements filed on April 2, 2015, Calvetti Ferguson represented that: (a) Nobilis' financial reporting was U.S. GAAP compliant; and (b) it had conducted its audits of Nobilis in compliance with PCAOB Standards. These representations were untrue and misleading.

68. During Class Period II, the Nobilis Defendants did not correct, but rather reaffirmed the misrepresentations made in Class Period I.

69. These further representations were misrepresentations because:

(a) the claims in the SeekingAlpha.com article were correct, in that the Nobilis financial statements released in Class Period I were not reliable and did not comply with applicable laws and regulations; and

(b) the changes to the Nobilis financial statements in the restatements were material.

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## J. Legal Background

[130] Part XXIII.1 of Ontario's *Securities Act* provides several statutory causes of action for secondary market misrepresentation. The objectives of Part XXIII.1 of the Ontario *Securities Act* are to deter misrepresentative disclosure and to provide a remedy for injured investors, while at the same time preventing strike suits against issuers.[7]

[131] Under s.138.8 (1) of the Ontario *Securities Act*, leave of the court is required to proceed with 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.

[132] 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.[8]

[133] In the immediate case, it was not disputed that Mr. Cappelli satisfies the good faith branch of the test for leave.

[134] The various statutory causes of action for which leave is required are connected to an issuer's disclosure obligations under the Ontario *Securities Act.* Section 138.3 (1) establishes a statutory cause of action with respect to a misrepresentation made by on or behalf of a responsible issuer in its core documents.

[135] In the immediate case, there is no dispute that Nobilis is a responsible issuer and that the alleged misrepresentations were made in its core documents, which in this case were comprised of AIFs, audited annual financial statements, quarterly financial statements, MD&As and management certifications.

[136] The statutory cause of action provided by s. 138.3 (1) of the Act for secondary market misrepresentation is available to any person who acquires or disposes of an issuer's securities between the time that documents containing misrepresentations were publicly released and the time when the misrepresentations were publicly corrected.

[137] There are a variety of statutory defences to claims against a responsible issuer, including two that are relevant to the immediate case; namely: (1) s.138.4 (11) (expert's report defence); and (2) s.138.5(3) (damages attributable to other causes not recoverable), which state:

> *Expert report, statement or opinion*
>
> 138.4 (11) A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or

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[7] *CIBC v. Green*, 2015 SCC 60 at para. 178; *Yip v. HSBC Holdings plc*, 2018 ONCA 626 at para. 13; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2015 ONCA 718 at para. 49.

[8] *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.).

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> quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,
>
> > (a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and
> >
> > (b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert.
>
> […]
>
> *Assessment of Damages*
>
> 138.5 (3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

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[138] To plead the statutory cause of action for misrepresentation in the secondary market, the plaintiff should identify and articulate the falsity of the representation and link the misrepresentation to a corrective disclosure so with sufficient clarity and precision so as to give the other party fair notice of the case they are required to meet and to enable the court.[9]

[139] The specification of the date of the public correction is a factor in the calculation of damages under Part XXIII.1 of the Ontario *Securities Act*.[10] The specification of the public correction is important for class actions about Part XXIII.1 claims because it determines the class period for the purposes of determining class membership and, for the Class Members seeking damages, the public correction is a factor in the calculation of damages under Part XXIII.1 of the Ontario *Securities Act*.[11]

[140] Once the plaintiff shows a misrepresentation and a public correction, causation is presumed and damages are implied. In other words, causation, or more precisely the lack of it, is transformed into a defence under s.138.5(3) (the "attribution defence"), if the issuer can show that the decline in share price was not caused by the misrepresentation.[12]

[141] To plead the statutory causes of action, the plaintiff should: (1) identify the misrepresentation and when and where it was made; (2) specify the falseness of the statement; and (3) identify the public correction and when it was made.[13]

[142] In *Mask v. Silvercorp Metals Inc.*,[14] Justice Belobaba stated:

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[9] *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470; *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 at para. 61; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2015 ONSC 256 at paras. 28 and 44.

[10] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2016 ONSC 5784.

[11] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc., 2016 ONSC 5784.*

[12] *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 at paras. 57-58.

[13] *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470 at para 64; *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 at para. 61; *Mask v. Silvercorp Metals Inc*., 2015 ONSC 5348 at paras. 22-23, aff'd 2016 ONCA 641; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2015 ONSC 256 at paras. 27- 28, 44.

[14] 2015 ONSC 5348 at paras. 22-23.

> 22. As I have already noted, s. 138.3 provides a statutory cause of action for damages sustained between two time-posts: the time that documents containing the alleged misrepresentations were publicly released by the defendant and the time that the misrepresentations were publicly corrected. It is obviously a matter of fairness to the defendant that both the start point (the misrepresentation) and the end point (the public correction) be identified with some precision.
>
> 23. Indeed, Ontario law is clear that a plaintiff is required to specifically "identify and articulate" the "falsity" in the initial representation, which the court can then use as a "benchmark to determine when and whether there was a corrective disclosure". The plaintiff must "link" that misrepresentation to a "pleaded public correction", providing "full particulars" of "the necessary material facts with sufficient clarity and precision so as to give the other party fair notice of the case they are required to meet."

[143] In *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*,[15] Justice Belobaba stated:

> 65. In my view, the public correction requirement in s. 138.3 of the OSA can be satisfied as follows:
>
> (i) The public correction must be pleaded with sufficient precision to provide fair notice to the defendant. The plaintiff must point to specific words or figures that allegedly constitute the public correction of the alleged misrepresentation. Because the function of the public correction requirement under s. 138.3(1) is to establish the second "time-post" for fixing liability, the plaintiff must also identify the timing of the public correction.
>
> (ii) The pleaded public correction need not be a "mirror-image" of the alleged misrepresentation or a direct admission that a previous statement is untrue. But there must be some linkage or connection between the pleaded public correction and the alleged misrepresentation -- at the very least, the pleaded public correction must share the same subject matter as, and in some way relate back to, the misrepresentation. The fact that an alleged public correction is over or under-inclusive relative to the misrepresentation is not a bar to establishing that the words or figures constitute a public correction. Of course, the more tenuous the connection between the public correction and the misrepresentation, the more likely that the defendant will be able to show under s.138.5(3) that shareholder losses were unrelated to the misrepresentation.
>
> (iii) The public correction must be reasonably capable of revealing to the market the existence of the alleged misrepresentation. However, the public correction need not prove, or help prove, that the earlier statement or omission was in fact a misrepresentation as defined by s. 1(1) of the OSA. Moreover, the public correction need not be understood by the ordinary investor as revelatory of the existence of a misrepresentation. It may be the case that only market participants with specialized knowledge and expertise (*e.g.*, analysts or traders) are able to understand that particular words or figures constituted the public correction of a misrepresentation. But that will be sufficient.
>
> (iv) The public correction may take "any of a number of forms" and need not emanate from the defendant corporation. The source of the public correction can be third parties, including media reports or internet postings. [footnotes omitted]

[144] For the statutory causes of action, "misrepresentation," "material change," and "material fact," are defined in s.1(1) of the Act as follows:

> "misrepresentation" means,
>
> (a) an untrue statement of material fact, or
>
> (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made;

[15] 2015 ONSC 6434 at para. 65.

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[….]

"material change",

(a) when used in relation to an issuer other than an investment fund, means,

(i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or

(ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, and

(b) when used in relation to an issuer that is an investment fund, means,

(i) a change in the business, operations or affairs of the issuer that would be considered important by a reasonable investor in determining whether to purchase or continue to hold securities of the issuer, or

(ii) a decision to implement a change referred to in subclause (i) made,

(A) by the board of directors of the issuer or the board of directors of the investment fund manager of the issuer or other persons acting in a similar capacity,

(B) by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, or

(C) by senior management of the investment fund manager of the issuer who believe that confirmation of the decision by the board of directors of the investment fund manager of the issuer or such other persons acting in a similar capacity is probable;

[….]

"material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;

[145] Thus, under the Act, a misrepresentation is an untrue statement of a fact that would objectively be expected to have a significant effect on the market price or value of the security (*i.e.* a material fact).[16] Leave will not be granted where there is no misrepresentation or where the materiality of the misrepresentation is not established.[17]

[146] Each alleged misrepresentation is a discrete misrepresentation claim for the purpose of the leave requirement and for the purpose of determining whether the claim is not statute-barred.[18] When a plaintiff seeks leave to amend a statement of claim, the court must consider

[16] *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at para. 32, varied 2010 ONSC 4068 (Div. Ct.); *Allen v. Aspen Group Resources Corp*., [2009] O.J. No. 5213 at para. 9 (S.C.J.); *Skye Properties Ltd. v. Wu*, [2008] O.J. No. 4349 (S.C.J.).

[17] *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470; *Coffin v. Atlantic Power Corp*., 2015 ONSC 3686; *Abdula v. Canadian Solar Inc.*, 2014 ONSC 5167.

[18] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of)* v. *SNC-Lavalin Group Inc*., 2015 ONCA 718, var'g 2015 ONSC 256; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc*., 2014 ONSC 1057.

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whether the proposed amendment provides particulars or details of an existing claim for which leave has been granted or a new statutory cause of action requiring leave.[19]

[147] Materiality is determined objectively from the perspective of what a reasonable investor would consider important in deciding to invest and at what price.[20] A fact may be considered material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price.[21] Materiality is a contextual and fact-specific inquiry, determined on a case-by-case basis from the perspective of the reasonable investor and involves the application of a legal standard to specific facts in light of all of the relevant circumstances and the total mix of information.[22]

[148] The court must therefore inquire into what the reasonable investor would consider as significantly altering the total mix of information made available to him or her in the particular circumstances; this is a fact-specific inquiry, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.[23]

[149] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*,[24] Justice Rothstein summarized the test for materiality and the methodology for applying the test as follows:

> 61. In sum, the important aspects of the test for materiality are:
>
> (i) Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;
>
> (ii) An omitted fact is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely might have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;
>
> (iii) The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;
>
> (iv) Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and
>
> (v) The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well,

[19] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2015 ONCA 718, var'g 2015 ONSC 256.
[20] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23; *Wong v. Pretium Resources Inc*., 2017 ONSC 3361 at paras. 29-31.
[21] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23; *Wong v. Pretium Resources Inc*., 2017 ONSC 3361.
[22] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*., 2011 SCC 23 at paras. 52-58.
[23] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*., 2011 SCC 23 at para. 58.
[24] 2011 SCC 23 at para. 61.

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> evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

[150] In several cases, including one of my own, it has been held that a company's restatement of its financial statements **is** an acknowledgment by the company that it has made material misrepresentations in relation to its audited financial statements that justifies granting leave to bring a statutory cause of action.[25] In *Middlemiss v Penn West Petroleum*,[26] Justice Belobaba, citing his own decision in *Rahimi v. South Gobi Resources,*[27] said: "it is hard to imagine a scenario where a publicly-traded company restates its financials and in doing so allegedly causes shareholder loss and leave under s. 138.8 is not granted." As I shall explain below, while those holdings were correct for those cases, the legal proposition is overstated and the "is" should be more accurately be replaced by a "may be."

[151] The phrase "publicly corrected" is not defined in the Ontario *Securities Act,* and it is taken from economic theory about how to measure damages for misrepresentations that affect the value of securities trading in the primary or secondary market. A key identifier of a public correction is that it can be shown to have a statistically significant impact on market prices.[28]

[152] The public correction need not be made by the issuer of the security and can take any form of message including statements by the issuer, credit rating agencies, market analysts, and short-sellers in newspaper articles and internet postings even anonymous ones.[29] The public correction need not be a mirror-image of the alleged misrepresentation or a direct admission that a previous statement is untrue but the correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact.[30] The correction is a one-time event; *i.e.,* partial or cumulative corrections do not amount to a correction but rather are a continuation of the misrepresentation.[31]

[153] 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.[32] While relatively low, the test for leave is a different and more robust standard than the general threshold for the certification or authorization of a class action.[33] The

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[25] *Silver v. Imax Corp*. (2009), 66 BLR (4th) 222 at paras. 7, 208, and 351 (S.C.J.), leave to appeal ref'd 2011 ONSC 1035 (Div. Ct.).
[26] 2016 ONSC 3537 at para 9.
[27] *Rahimi v. SouthGobi Resources Ltd*., 2015 ONSC 5948 at para. 25, var'd 2017 ONCA 719.
[28] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2016 ONSC 5784.
[29] *Mask v. Silvercorp Metals Inc*., 2015 ONSC 5348 at paras. 29-30, aff'd 2016 ONCA 641.
[30] *Ironworkers Ontario Pension Fund (Trustees of) v. Manulife Financial*, 2013 ONSC 4083, at para. 64-71, leave to appeal ref'd 2014 ONSC 1347 (Div. Ct); *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 at paras. 62 -65.
[31] *Dugal v. Manulife Financial Corp*., 2011 ONSC 387 at paras. 31-33.
[32] *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.); *Bradley v. Eastern Platinum Ltd.*, 2016 ONSC 1903 at para. 51.
[33] *Theratechnologies inc. v. 121851 Canada inc*., 2015 SCC 18 at para. 35; *CIBC v. Green,* 2015 SCC 60 at paras. 120-123, 147, 212; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22 at paras. 27-33, aff'g 2015 ONSC 2746.

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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 merit are prevented from proceeding.[34]

[154] For the purposes of the leave motion, the evidentiary burden placed on the plaintiff is considerably less than the burden of a trial or a mini-trial. In *Theratechnologies inc. v. 121851 Canada inc*.,[35] the Supreme Court of Canada described the plaintiff's burden. The Court said that the plaintiff should provide a plausible analysis of the legislation and some credible evidence in support for the claim. The Court said that the leave motion should not be treated as a mini-trial or be so onerous as to essentially replicate the demands of a trial. All that was required was sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the plaintiff's favour.

[155] Using the record of affidavit evidence and cross-examinations, the court hearing the leave motion is entitled to weigh the evidence, but the court must take into account that the leave motion involves merely a paper record and that the statutory leave test sets a low evidentiary threshold.[36] The motions judge should be cognizant of the fact that full production has not been made and that the defendant may have relevant documentation and evidence that is not before the court.[37]

[156] As already noted above, on a leave motion, a full analysis of the evidence is unnecessary, and the plaintiff need only provide a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim sufficient to persuade the court that there is a reasonable possibility that the action will be resolved in the plaintiff's favour.[38] The test is that leave should not be granted if having considered all the evidence and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that the plaintiff's case has no reasonable possibility of success.[39]

[157] If a defence is raised by a defendant at a plaintiff's leave motion, then the test for the plaintiff is whether there is a reasonable possibility that the defendants will not be able to establish the defence; if there is a reasonable possibility that the defendants will not be able to establish the defence at trial, the motion for leave should be granted.[40]

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

[35] 2015 SCC 18 at para. 39.

[36] *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.

[37] *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719 at paras. 45-49.

[38] *Theratechnologies inc. v. 121851 Canada inc*., 2015 SCC 18 at paras. 38-39; *Green v. CIBC*, 2015 SCC 60 at paras. 122, 147, and 212, aff'g 2014 ONCA 90, var'g 2012 ONSC 3637; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22 at para. 34, aff'g 2015 ONSC 2746.

[39] *Rahimi v. SouthGobi Resources Ltd*., 2015 ONSC 5948, var'd 2017 ONCA 719; *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434; *Mask v. Silvercorp Metals Inc*., 2015 ONSC 5348, aff'd 2016 ONCA 641; *Coffin v. Atlantic Power Corp*., 2015 ONSC 3686; *Goldsmith v. National Bank of Canada*, 2015 ONSC 2746, aff'd 2016 ONCA 22.

[40] *Wong v. Pretium Resources Inc.*, 2017 ONSC 3361 at paras. 42-48; *Silver v. Imax*, [2009] O.J. No. 5573 at para. 256, leave to appeal refused [2011] O.J. 656 (Div. Ct.).

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## K. Should Mr. Cappelli be Granted Leave to Assert a Statutory Cause of Action?

[158] I shall begin the analysis of whether Mr. Cappelli should be granted leave to assert a statutory cause of action by identifying the misrepresentations and the corrective disclosures that are the basis of Mr. Cappelli's statutory cause of action for both Class I and Class II.

[159] In this regard, the first point to note is that there are three sets of misrepresentations, which I have labelled Misrepresentation Sets #1, #2, and #3.

[160] In paragraph 7 of his Fresh as Amended Statement of Claim, set out above, Mr. Cappelli pleads that on October 9, 2015, SeekingAlpha.com published an article asserting that Nobilis made four misrepresentations in its impugned documents. (Some of the witnesses identified more than four alleged misrepresentations as having been revealed by the Seeking Alpha article, which is pleaded as the corrective disclosure for Class I claimants.) The four alleged misrepresentations in the Seeking Alpha article from the Fresh as Amended Statement of Claim, which I have labelled Misrepresentation Set #1 are about: (1) accounting practices with regards to entities in which Nobilis had less than 50% ownership; (2) the valuation and accounting for acquisitions made by Nobilis; (3) the compensation of current and former directors and officers; and (4) issues with regards to Nobilis' accounts receivable from prior acquisitions. The Seeking Alpha article is the corrective disclosure for Class I.

[161] In his argument, Mr. Cappelli submitted that Misrepresentation Set #1 were reiterated, validated, confirmed, explained, or corroborated by the misrepresentations disclosed by Nobilis' January 5, 2016 press release, which press release is the corrective disclosure for Class II. This is a shell game argument because the January 5, 2016 press release identifies a different set of six misrepresentations, (five accounting misrepresentations and a misrepresentation about effective internal controls), which I have labelled as Misrepresentation Set #2.

[162] More specifically, the accounting misrepresentations in Misrepresentation Set #2 are about alleged misrepresentations concerning: (1) accounting for warrants and options issued in private placements to non-employees; (2) recognition of the full fair value of non-controlling interests in the acquisition of First Nobilis as required by U.S. GAAP instead of at a pro-rata value permitted under IFRS; (3) adjustments to the acquisition accounting for the Athas transaction; (4) reclassification of contingently redeemable non-controlling interests to temporary equity; and (5) other adjustments including: (i) corrections for stock-based compensation expense, (ii) corrections to the accounting for options issued to non-employees, and (iii) corrections to the calculations of fully diluted shares outstanding for application of the treasury stock method.

[163] Mr. Cappelli's statutory cause of actions are actually built upon the misrepresentations disclosed by the January 5, 2016 press release, which is the corrective disclosure for Class II, which Mr. Cappelli links to the Seeking Alpha article, which is the corrective disclosure for Class I. The point to emphasize is although they have different corrective disclosures, the statutory causes of action for both Class I and Class II are actually built upon the set of misrepresentations that I have labelled Misrepresentation Set #2.

[164] On the leave motion and in the run up to it, Nobilis advanced evidence and argument and asserted that the misrepresentations of Misrepresentation Set #2 were not material misrepresentations. Mr. Cappelli did not cross-examine Nobilis' experts, and instead, in his

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factum for the leave motion, Mr. Cappelli relied on the revelation of misrepresentations on January 12, 2016, when Nobilis released restated financial statements as establishing the materiality of all the misrepresentations. I have labelled the additional misrepresentations disclosed by the January 12, 2016 financial statements as Misrepresentation Set #3.

[165] The January 12, 2016 restatement of Nobilis's financial statements revealed in addition to the accounting misrepresentations identified in the January 5, 2016 press release (part of Misrepresentation Set #2), four more materially untrue statements about accounting information had been made in the impugned documents (Misrepresentation Set #3). As noted above in the description of the factual background, the four additional misrepresentations disclosed on January 12, 2016 were that: (1) total liabilities were understated between 14% and 35%; (2) shareholders' equity was overstated between 23% and 34%; (3) net income was overstated by 18% for total net income earned between January 1, 2013 and June 30, 2015; (4) net income per fully diluted share was overstated by 250% for one quarter during the restated period, and misstated between 33% to 250% for the entire restated Period.

[166] Mr. Cappelli submitted that the alleged misrepresentations, which I have labelled Misrepresentation Set #3, demonstrated that he had satisfied the onus of showing that there is a reasonable possibility that his action will be resolved at trial in his favour. This is a shell game argument because now Mr. Cappelli is equating all three sets of misrepresentations and relying on the apparently materiality of the misrepresentations of Misrepresentation Set #3 as proof of the materiality of the misrepresentations of Misrepresentation Set #2.

[167] Although most of the misrepresentations are about accounting matters, the misrepresentation sets, however, are not equivalents. Notwithstanding Mr. Cappelli's efforts to hammer the square-peg of the January 5, 2016 press release and the octagon-peg of the January 12, 2016 financial statements into the round-peg-hole of the Seeing Alpha article, and notwithstanding his efforts to hammer the square-peg of the January 5, 2016 press release into the octagon-peg-hole of the January 12, 2016 financial statements, there is no reasonable possibility that this hammering will succeed. Misrepresentation Set #1 does not equal Misrepresentation Set #2 which does not equal Misrepresentation Set #3. The misrepresentation set upon which the statutory causes of action of Class I and Class II are built is Misrepresentation Set #2.

[168] Having identified the set of misrepresentation that are the predicate for the statutory causes of action for both Class I and Class II, the next point to note is that there is no dispute that the statements of Misrepresentation Set # 2 are false statements. The issue or question for the leave motion is whether there is a reasonable possibility that the action will be resolved in favour of Mr. Cappelli because the false statements of Misrepresentation Set #2 are material misrepresentations. The critical issue for the leave motion is the materiality of the misrepresentations of Misrepresentation Set #2.

[169] Nobilis responded to Mr. Cappelli's statutory causes of action for Class I and Class II by treating Misrepresentation Set #2 as the operative set of misrepresentations for which Mr. Cappelli was seeking leave for both Class I and Class II. Nobilis submitted that leave should not be granted because the misrepresentations in Misrepresentation Set #2 were not material.

[170] However, Mr. Cappelli did not actually join issue on Nobilis' arguments about Misrepresentation Set #2 and rather responded to those arguments by general arguments about

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what counts for materiality as a matter of accounting standards and by relying on the materiality of the misrepresentations in Misrepresentation Set #3, which as I have already mentioned, he equated with the other misrepresentation sets.

[171] The next point to note for determining the leave motion is to recognize that Mr. Cappelli and his experts did not succeed in rebutting Nobilis and its experts about the want of materiality of Misrepresentation Set #2. This finding is the major reason for refusing to grant leave to assert the statutory causes of action.

[172] As I have noted, Mr. Cappelli did not cross-examine any of Nobilis' expert witnesses, and he responded to Nobilis' non-materiality argument with generalizations of what counts for materiality in the accounting world and with the maneuver of substituting the materiality of the misrepresentations of Misrepresentation Set #3, which does have the appearance of passing the threshold of both accounting and legal materiality.

[173] In my opinion, weighing the evidence and taking into account that the leave motion involves a low evidentiary threshold and a low merits test, Mr. Cappelli has not provided some credible evidence in support of the claim based on Misrepresentation Set #2 (which is his pleaded set of misrepresentations) that is sufficient to persuade the court that there is a reasonable possibility that the statutory causes of action will be resolved in his favour.

[174] Yes, Nobilis admits in its January 5, 2016 press release that its financial statements contained mistakes, which is to say misrepresentations, and that the statements should no longer be relied upon, but it did not admit that these misrepresentations were material, and it appears that investors and the analysts that had an eye on the trading of Nobilis' shares, agreed with this assessment of non-materiality, but, more to the point, based on the evidence presented on the leave motion, I conclude that Mr. Cappelli's case based on Misrepresentation Set #2 is weak and has been successfully rebutted by Nobilis; the pleaded case has no reasonable possibility of success.

[175] As I noted above in the Legal Background part of these Reasons for Decision, in several cases, including one of my own, it has been held that a company's restatement of its financial statements **is** an acknowledgment by the company that it has made material misrepresentations in relation to its audited financial statements that justifies granting leave to bring a statutory cause of action.[41] While those holdings were correct for those cases, where the facts of those cases and common sense would indicate that a material misrepresentation had indeed been disclosed by the restatement of the financial statements, the legal proposition in those cases is overstated, and the "is" should be more accurately be replaced by a "may be," so that the legal proposition becomes a company's restatement of its financial statements may be an acknowledgment by the company that it has made material misrepresentations in relation to its audited financial statements that justifies granting leave to bring a statutory cause of action.

[176] In the case at bar, the restatement of the financial statements associated with Misrepresentation Set #3 might be an admission of materiality; however, the restatement of the financial statements associated with Misrepresentation Set #2 is not an admission of materiality because Nobilis' experts have shown that those particular misrepresentations were not material

[41] *Silver v. Imax Corp*. (2009), 66 BLR (4th) 222 at paras. 7, 208, and 351 (S.C.J.), leave to appeal ref'd 2011 ONSC 1035 (Div. Ct.).

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to reasonable investors.

[177] It must be kept in mind that a determination of the materiality of a misrepresentation requires a case specific analysis of the factual circumstances of the particular case and a determination whether the particular misrepresentations would objectively be expected to have a significant effect on the market price or value of the security. Materiality is a contextual and fact-specific inquiry, determined on a case-by-case basis from the perspective of the reasonable investor and involves the application of a legal standard to specific facts in light of all of the relevant circumstances and the total mix of information.[42] In the case at bar, no common-sense inference of materiality is available for the misrepresentations of Misrepresentation Set #2 and the evidence establishes that Mr. Cappelli has no reasonable possibility of success of showing that the misrepresentations of Misrepresentation Set #2 would have been material to investors in the secondary market.

[178] As I have already mentioned, common sense conclusions of materiality might be available with respect to Misrepresentation Set #3, which was based on Nobilis restating its financial statements on January 12, 2016. The January 12, 2016 release of financial statements does repeat the corrective disclosures of Misrepresentation Set #2 found in the January 5, 2016 press release, but the January 12, 2016 release of financial statements adds the additional set of four misrepresentations that constitute Misrepresentation Set #3, and it is in those additional set of misrepresentations where materiality might be found. Subject to Nobilis having an opportunity to address this set of misrepresentations, I might have concluded that Mr. Cappelli had a reasonable possibility of success with respect to this discrete set of misrepresentations. But, Mr. Cappelli's statutory cause of action was not actually built on the misrepresentations of Misrepresentation Set #3.

[179] I emphasize that Mr. Cappelli's statutory cause of action for Class I and his statutory cause of action for Class II are not based on Misrepresentation Set #3, and although it would appear that for a leave motion under Ontario's *Securities Act*, Nobilis would have had a very uphill and possibly unsuccessful battle in resisting leave being granted for Misrepresentation Set #3, the point to emphasize is that Nobilis was not sued based on Misrepresentation Set #3, which is a different set of misrepresentations than Misrepresentation Set #2. It is trite that a party cannot succeed on a cause of action that it has not pleaded.

[180] The reality is that Nobilis has not had the opportunity to show that the misrepresentations of Misrepresentation Set #3 are not material, and it is not beyond peradventure that Nobilis might have been able to show that this set of misrepresentations was not material.

[181] There is one item of Misrepresentation Set #2 that requires specific attention because it is not a matter of financial restatement. It is the matter of Disclosure Controls and Procedures ("DC&P") and Internal Control over Financial Reporting ("ICFR"). The January 5, 2016 press release does not actually mention DC&P and ICFR, directly, but the press release does indicate that Nobilis takes its internal controls over financial reporting and the integrity of its financial statements very seriously. The press release states that Nobilis is committed to implementing corrective measures with respect to its internal controls. In my opinion, these statements by

[42] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 52-58.

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Nobilis may be taken to be a corrective disclosure that it misrepresented the effectiveness of its DC&P and ICFC in the impugned documents.

[182] It does not necessary follow, however, that this corrective disclosure by itself establishes that this misrepresentation about internal controls identified in the January 5, 2016 press release is a material one. An admission by a corporation that it needs to improve its internal controls does not *ipso facto* mean that it has made an admission that its statements about effective internal controls were a material misrepresentation. The representation of effective internal controls has to be tethered to some factual nexus. The factual nexus of the January 5, 2016 press release was misstatements about five accounting matters that were not material and that arose largely because of the transition from Canadian IFRS to U.S. GAPP.

[183] A statement about the effectiveness of internal controls has to be weighed against the significance of the subject matter being controlled. There is a risk management and proportionality analysis that is connected to the notion of effectiveness, and the materiality of a statement about effectiveness has to be viewed as to whether a reasonable investor would regard the particular statement as having significantly altered the total mix of information made available about the effectiveness of internal controls and whether there was a substantial likelihood that information of change would have assumed actual significance in a reasonable investor's deliberations. The evidence of Nobilis' experts is that there was no material matters disclosed in what I have described as Misrepresentation Set #2.

[184] This is not to say that revelations about weaknesses in internal controls cannot be serious and material matters. Mr. Kryzanowski's evidence showed that, generally speaking, the effectiveness of internal controls is a matter of concern to investors in and to lenders to corporations. It is, however, to say that in the immediate case, Nobilis has shown that the misrepresentations disclosed by the January 5, 2016 press release about internal controls were not material misrepresentations. The actual response of investors and analysts suggests that all of the revelations contained in the January 5, 2016 press release were corrective of misrepresentations but not material ones.

[185] I, therefore, conclude that based on the no material misrepresentation argument for Class I and for Class II Nobilis has succeeded in demonstrating that Mr. Cappelli's action has no reasonable possibility of success. This is dispositive, but I shall, nevertheless, continue the analysis and address; (a) the no corrective disclosure argument, which only affects Class I; (b) the expert's report argument; *i.e.,* the argument that Calvetti Ferguson, P.C., but not Nobilis, is liable for the misrepresentations in Misrepresentation Set #2; and (c) the no-causation argument; *i.e.,* the argument that the misrepresentations did not cause any damage.

[186] The no corrective disclosure argument concerns only Class I. Mr. Cappelli joined issue with Nobilis' no corrective disclosure argument, and he relied on the Seeking Alpha article as disclosing that there were material misrepresentations in the impugned documents. The Seeking Alpha article is said to be the corrective disclosure for Class I.

[187] The first analytical string to pull to unravel this dispute and the gamesmanship of the parties is the string that recognizes Mr. Cappelli's motives and the legal problem with which he was confronted. Mr. Cappelli undoubtedly suffered a loss from his investment misadventure with Nobilis' shares, but he needed to have the Seeking Alpha article a corrective disclosure connected to material misrepresentations in order to have a claim under Ontario's *Securities Act*.

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In other words, because Mr. Cappelli had sold his Nobilis shares before the January 5, 2016 press release and before the January 12, 2016 release of restated financial statements, he needed to persuade the court that the Seeking Alpha article, which was connected to Misrepresentation Set #1, was also a corrective disclosure of Misrepresentation Set #2, which were the basis of his pleaded statutory cause of action. In still other words, Mr. Cappelli had no personal claim actually based on the January 5, 2016 press release or the January 12, 2016 financial statements (because he had already sold his shares), and thus, he had the problem of designing his claim based on the Seeking Alpha article and linking it to Misrepresentation Set #2.

[188] The identification of a corrective disclosure was a serious problem for Mr. Cappelli because he had pleaded the Saving Alpha article was the corrective disclosure document for Class I. Unfortunately for Mr. Cappelli, the Saving Alpha article is a corrective disclosure for Misrepresentation Set #1, but it is not a corrective disclosure for Misrepresentation Set #2.

[189] Nowhere in the Saving Alpha article is there a challenge or correction to the accounting treatment or accounting principles in the three impugned financial statements of 2014, or of Q1 and 2 of 2015. The impugned documents are not mentioned. A reading of the article reveals no challenge to the earlier financial statements as would eventually emerge from Misrepresentation Sets #2 or Misrepresentation Set #3, for that matter. It follows from this finding that there is no corrective disclosure for Class I. This is another reason not to grant leave for the statutory causes of action of Class I.

[190] Turning now to Nobilis' expert report argument, which is based on s. 138.4 (11) of the Ontario *Securities Act*. This argument was advanced in support of Nobilis' argument that Mr. Cappelli's case was weak and had no reasonable possibility of success. Neither party was able to find any case law about s. 138.4 (11) of the Ontario *Securities Act*.

[191] The expert report argument was that Nobilis was not liable for that part of the impugned documents that summarized the audit opinion of Calvetti Ferguson, P.C. with respect to the misrepresentations of Misrepresentation Set #2. More precisely, the argument is that pursuant to s. 138.4 (11) of the Ontario *Securities Act*, Nobilis had proven that the representations in the impugned documents about Misrepresentation Set #2 represented the opinion made by Calvetti Ferguson, P.C. and Nobilis did not know and had no reasonable grounds to believe that there had been a misrepresentation made by Calvetti Ferguson, P.C.

[192] In my opinion, it will be a very rare situation that the intervention of an unqualified audit opinion will make available a defence under s. 138.4 (11) to the corporation with incorrect financial statements. It appears to me that this defence that the Legislature made available was designed for such things as an expert's report or opinion about a mining company's mineral reserves. It was not designed for misrepresentations made by auditors. However, that said, with respect to the misrepresentations of Misrepresentation Set #2 (but not with respect to the misrepresentations of Misrepresentation Set #3), in my opinion, the case at bar is one such very rare case where the corporation can offload liability to the auditor.

[193] The critical factor in the immediate case that makes Calvetti Ferguson, P.C. liable but not Nobilis liable for Misrepresentation Set #2 is that Nobilis had no role to play in Calvetti Ferguson, P.C.'s decisions about how to restate the financial and shareholding data provided from the bookkeeping of Nobilis to accord with U.S. GAAP in the transition from Canadian IFRS.

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[194] No financial information was withheld from Calvetti Ferguson P.C. and there was no effort to persuade or dissuade Calvetti Ferguson as to how the information should be represented in Nobilis' financial statements. The restatement reclassifications for Misrepresentation Set #2 came about from the usually circumstance that the financial statements had to be restated - not because of discovered errors - but because Nobilis' shares began to trade on the NYSE and the SEC required that U.S. GAPP be followed. The result was the application of different accounting principles and this led to a different presentation of the financial statements based on the same data.

[195] In the immediate case, the data provided by Nobilis was accurate and not misstated by Nobilis, but Nobilis's new auditors concluded that Calvetti Ferguson had not properly treated that data pursuant to U.S. GAPP. But for the change in auditing standards from IFRS to U.S. GAPP, there would have been no problem with respect to the restatements associated with Misrepresentation Set #2. There is no evidence that there was a mistake in the financial statements pursuant to IFRS. This rare circumstance makes the expert's report defence available in the immediate case.

[196] In the case at bar, Calvetti Ferguson has accepted its liability. It accepted that it was in error in the presentation and categorization of the financial information presented to it by Nobilis. There is no suggestion in any of the material that Nobilis was not forthcoming or withheld any information. The errors of the auditor consisted of failing to appreciate the principles applicable to accounting for acquisitions and the differences in the treatment of those principles between Canadian IFRS and U.S. GAAP. These errors are uniquely within the competence of the auditor. Nobilis reasonably relied on that competence.

[197] Thus, in my opinion, the expert's report defence is available with respect to Misrepresentation Set #2. For what its worth, its my opinion, the defence would not have been available had Mr. Cappelli's case been built on Misrepresentation Set #3. The accounting problems and the restatements problems associated Misrepresentation Set #3 went beyond the transition from IFRS to U.S. GAPP.

[198] The critical factor for the expert's report defence of a misrepresentation that exists exclusively because of the expert's treatment of the data will rarely occur when the expert is an auditor who depends upon the bookkeeping of the corporation. Thus, in my opinion, the critical factor of a misrepresentation associated only with the expert's report would not be present with respect to Misrepresentation Set #3, where the misrepresentations were not a matter of how data from Nobilis was treated by Calvetti Ferguson, P.C. but rather was a matter of data that was not true or that was incorrectly treated in whole or in part by Nobilis. Nobilis had a role in the errors revealed by the January 12, 2017 restatement of its financial statements.

[199] Thus, in my opinion, Nobilis expert report argument supports its main argument that Mr. Cappelli's case is weak and that his action based on Misrepresentation Set #2 has no reasonable possibility of success. I should add, however, had I concluded that the argument was not available, as it typically will not be available when the expert is an auditor, I still would have concluded that Mr. Cappelli's case based on Misrepresentation Set #2 was weak and had no reasonable possibility of success.

[200] Finally, turning to the no causation argument, I can be brief. As for Nobilis' reliance on the causation or attribution defence under s. 138.5 (3) of the Ontario *Securities Act*, in my

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opinion, the design of the Act is that this is a post-leave-having-been-granted defence. The leave motion is not the time for an event study to disprove the causation that the Act presumes. Thus, I disagree with Nobilis' no causation argument.

## L. The Certification Motion

[201] For the above reasons, I decline to grant leave to Mr. Cappelli to assert a statutory cause of action for the members of Class I or Class II. It follows that there is no reasonable cause of action and Mr. Cappelli cannot satisfy the first criterion for certification of his proposed misrepresentation class action.

## M. Conclusion

[202] For the above reasons, the leave motion and the certification motion is dismissed.

[203] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Nobilis' submissions within twenty days from the release of these Reasons for Decision followed by Mr. Cappelli's submissions within a further twenty days.

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Perell, J.

Released: April 10, 2019

2019 ONSC 2266 (CanLII)

**CITATION:** Cappelli v. Nobilis Health Corp. 2019 ONSC 2266
**COURT FILE NO.:** CV-16-544173
**DATE:** 2019/04/10

2019 ONSC 2266 (CanLII)

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**VINCE CAPPELLI**

Plaintiff

**– and –**

**NOBILIS HEALTH CORP., HARRY JOSEPH FLEMING, CHRISTOPHER H. LLOYD, ANDREW CHEN, KENNETH J. KLEIN and CALVETTI FERGUSON, P.C.**

Defendants

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**REASONS FOR DECISION**

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PERELL J.

Released: April 10, 2019

# Tab 8

3218520 Canada Inc. v. Bre-X Minerals Ltd. et al.*

[Indexed as: Carom v. Bre-X Minerals Ltd.]

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51 O.R. (3d) 236
[2000] O.J. No. 4014
Docket No. C33905

Court of Appeal for Ontario
Finlayson, Feldman and MacPherson JJ.A.
October 31, 2000

* Application for leave to appeal to the Supreme Court of Canada dismissed October 18, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28309. S.C.C. Bulletin, 2001, p. 1837.

Civil procedure -- Class proceedings -- Certification -- Common issues -- Preferable procedure -- Representative plaintiffs being shareholders of Alberta company developing gold mine in Indonesia -- Allegations that defendants conspired to increase share price for their own benefit by fraudulent and negligent representations of gold resources -- Investors suffering loss when share values plummeting after disclosure that reports of gold resources fraudulent -- Representative plaintiffs seeking certification and advancing claims of conspiracy, fraudulent misrepresentation, negligent misrepresentation and breach of Competition Act -- Class Proceedings Act, 1992, S.O. 1992, c. 6.

The three representative plaintiffs in a class proceeding lost a great deal of money investing in a corporation that was developing a gold mine in Indonesia. They alleged that the defendants, who were two gold mine corporations and its insiders, lied to the public about the presence of gold in the mine in a series of 160 press releases and other statements. Winkler J. certified a class action with respect to the

plaintiffs' claims of fraudulent misrepresentation, conspiracy and breach of the Competition Act, R.S.C. 1985, c. C-34. He also held that a class proceeding was the preferable procedure for the resolution of 15 common issues. Winkler J. refused, however, to certify the plaintiffs' claim for negligent misrepresentation, which he held did not relate to the plaintiffs' certified claims. Winkler J. further held that a class proceeding was not the preferable procedure for the determination of the negligent misrepresentation claim. Winkler J.'s decision was affirmed by the Divisional Court. Leave having been granted, the plaintiffs appealed to the Court of Appeal. The issues for the appeal were whether the Divisional Court: (1) erred in failing to order that the class proceedings that will determine the 15 certified common issues should apply to the claim in negligent misrepresentation; and (2) erred in determining that a class action was not the preferable procedure for dealing with the negligent misrepresentation claim.

Held, the appeal should be allowed.

Winkler J. and the Divisional Court erred on a matter of general principle. There was no sufficient difference between the plaintiffs' claims in fraudulent and in negligent misrepresentation to justify the certification of one and not the other. The creation of a dichotomy in the litigation was an error in principle, policy and logic. The standard for certification is not to be set too high because this would compromise the procedural objectives of the Class Proceedings Act, 1992 of judicial economy and promotion of access to justice, and it is not necessary that the plaintiffs in a class action present absolutely identical issues of fact or law. Resolution of the entire action through the class proceeding or even resolution of particular legal claims is not required. For certification, there need only be common issues of fact or law that move the litigation forward. Given the accepted definitions of the torts of fraudulent and negligent misrepresentation, there was no principled basis for treating them differently on the question of certification. Further, there was a substantial overlap of factual issues common to both torts.

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On the issue of preferable procedure for the determination of the negligent misrepresentation claim, a crucial factor was that there was to be a class proceeding for the plaintiffs' three other claims. There was no precedent in other cases of certifying some but not all of the potential claims, and the cases seemed to favour either complete certification or no certification. There was substantial merit in trying to utilize the Class Proceedings Act, 1992 to deal with as many issues as possible. Conversely, it was not necessary that the entire litigation be resolved by the determination of the common issues. Certification can be the preferable procedure in situations far short of the final resolution of the lawsuit. It was sensible and desirable that the negligent misrepresentation claim be placed with the other three claims. Accordingly, the appeal should be allowed.

Cases referred to

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 121 D.L.R. (4th) 496, 31 C.P.C. (3d) 197 (Div. Ct.); Anderson v. Wilson (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409, 36 C.P.C. (4th) 17 (C.A.); Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, 106 D.L.R. (4th) 339, 16 C.P.C. (3d) 156 (Gen. Div.); Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), supp. reasons (1999), 30 C.P.C. (4th) 131 (Ont. Gen. Div.); Campbell v. Flexwatt Corp. (1997), 44 B.C.L.R. (3d) 343, [1998] 6 W.W.R. 275, 15 C.P.C. (4th) 1 (C.A.) [Leave to appeal to S.C.C. refused (1998), 228 N.R. 197n]; Chadha v. Bayer Inc. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (S.C.J.); Controltech Engineering Inc. v. Ontario Hydro, [1998] O.J. No. 5350 (Gen. Div.), affd [2000] O.J. No. 379 (Div. Ct.); Dabbs v. Sun Life Assurance Co. of Canada (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482, [1999] I.L.R. 1-3629, 27 C.P.C. (4th) 243 (C.A.), quashing (1998), 40 O.R. (3d) 429, [1998] I.L.R. 1-3575, 22 C.P.C. (4th) 381 (Gen. Div.) [Leave to appeal to S.C.C. refused (1998), 235 N.R. 390n]; Hollick v. Metropolitan Toronto (Municipality) (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426, 7 M.P.L.R. (3d) 244 (C.A.) [Leave to appeal granted [2000] S.C.C.A. No. 41]; Maxwell v. MLG Ventures Ltd., [1995]

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O.J. No. 1136 (Gen. Div.); Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63, 22 C.P.C. (4th) 198 (Gen. Div.); Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245 (Gen. Div.); Peppiatt v. Nicol (1993), 16 O.R. (3d) 133, 20 C.P.C. (3d) 272 (Gen. Div.); Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 30 C.P.C. (4th) 182 (Gen. Div.), supp. reasons (1999), 43 O.R. (3d) 389 (Gen. Div.); Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776, 86 C.P.R. (3d) 1, 31 C.P.C. (4th) 340 (Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 1 "common issues", 5(1), 8(1)
Competition Act, R.S.C. 1985, c. C-34

Authorities referred to

Ontario, Report on Class Actions (Ontario Law Reform Commission, 1982)
Report of the Attorney General's Advisory Committee on Class Action Reform (1990)

APPEAL from a judgment of the Divisional Court (O'Driscoll, Campbell and MacFarland JJ.) (1999), 46 O.R. (3d) 315, 6 B.L.R. (3d) 82.

Paul J. Pape, for appellants.
H. Douglas Stewart, Q.C., for Bresea Resources Ltd.
Joseph Groia and Kevin Richard, for John Felderhof.
Alan Lenczner, Q.C., and Lawrence Thacker, for Jeannette Walsh, personally and as estate trustee for David Walsh, and for T. Stephen McAnulty.
Robert Potts and Robert Muir, for John Thorpe.
Brian Bellmore and K. Mitchell, for Rolando Francisco.
Paul Le Vay and Johanna Braden, for Paul Kavanagh.

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The judgment of the court was delivered by

MACPHERSON J.A.: --

Introduction

[1] Disasters spawn litigation. Trains collide or derail, planes crash, ships sink, lakes and rivers become polluted, chemical factories explode, ordinary people eat, drink, wear or use unhealthy or defective products. People -- sometimes hundreds, even thousands -- are injured or killed by these events. When the crisis subsides, some of the victims turn to the courts for redress and compensation.

[2] One of the modern mechanisms for dealing with the litigation fallout from major disasters is the class action. In Ontario, this type of action is regulated in a detailed fashion by a relatively recent statute, the Class Proceedings Act, 1992, S.O. 1992, c. 6.

[3] In the Report of the Attorney General's Advisory Committee on Class Action Reform (1990), a class action was defined in simple, straightforward terms, at p. 15:

> A class action is an action brought on behalf of, or for the benefit of numerous persons having a common interest. It is a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many.

[4] In this passage, one of the principal procedural goals of class actions is stated explicitly, namely litigation efficiency. This goal is sometimes framed with different terminology -- judicial economy. The underlying objective of either formulation is the same, namely to find a mechanism to enable the court system to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered injuries from the same event or product.

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[5] There is, however, a second fundamental procedural goal of class actions. It is to encourage access by victims to the court system. In its landmark study, Report on Class Actions (1982), the Ontario Law Reform Commission discussed the linkage between class actions and access to the courts in considerable detail. The Commission stated its conclusion on this point, at p. 139:

> The Commission is of the view that many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

[6] The Class Proceedings Act, 1992 ("CPA") is anchored in the principles of access to justice and judicial economy. Lawyers and judges in Ontario are in the early stages of grappling with this law. Class proceedings have been certified in several cases. Some of the cases have dealt with defective products such as silicone gel breast implants and pacemakers: see, respectively, Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Gen. Div.), and Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552 (Gen. Div.). In other cases, courts have certified mass tort claims in relation to a single accident, for example, a fire in a subway: see Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.).

[7] Certifications of class actions under the CPA have not been limited to situations in which redress is sought for physical injuries. Economic injury or financial loss has also served as a basis for some class actions. For example, a class action was certified for a copyright infringement claim by writers who alleged that a publisher had wrongfully reproduced their work in electronic form: see Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (Gen. Div.).

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Another class action was certified for a claim by building owners that certain companies had engaged in illegal price fixing in relation to construction materials: see Chadha v. Bayer Inc. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (S.C.J.).

[8] However, certifications of class actions have not been automatic. Probably the most notable domain in which certification has been refused relates to claims grounded in allegations of misrepresentation. For example, a claim against a petroleum company for misrepresenting the nature of a franchise to potential franchisees was not certified: see Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776, 31 C.P.C. (4th) 340 (Gen. Div.). A claim against Ontario Hydro for misrepresentation in the context of a bidding process was also not certified: see Controltech Engineering Inc. v. Ontario Hydro, [1998] O.J. No. 5350 (Gen. Div.), affd [2000] O.J. No. 379 (Div. Ct.).

[9] The present appeal involves some of the causes of action that have been considered by Ontario courts in previous cases -- misrepresentation, anti-competitive practices and conspiracy. It arises in the context of economic, not physical, injuries suffered by thousands of people who invested in a sham gold mining company. The plaintiffs in the action lost a great deal of money. They allege that the defendants, the "insiders" of the company, made great fortunes by lying to the public about the presence of gold in a mine in Indonesia. The investors seek redress from the "insiders" of the company. The procedural mechanism the investors want to employ in their litigation is certification as a class action.

[10] The motions judge, Winkler J., certified a class action with respect to three of the claims advanced by the plaintiffs -- fraudulent misrepresentation, the tort of conspiracy and breach of the Competition Act, R.S.C. 1985, c. C-34 [reported at 44 O.R. (3d) 173]. However, he refused to certify a class action for a fourth claim put forward by the plaintiffs, namely negligent misrepresentation. Winkler J.'s decision was upheld by the Divisional Court [reported at 46 O.R. (3d) 315].

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[11] The appeal from the Divisional Court's decision raises at least two interesting and important questions. First, is it appropriate to certify part of an action as a class proceeding? Is it logical and desirable to permit a two-track lawsuit, with some claims proceeding under the CPA while others advance through the normal route of lawsuits initiated by individual plaintiffs? Second, is there a sufficient distinction between the torts of fraudulent misrepresentation and negligent misrepresentation to justify routing them onto separate tracks in the litigation process? Why is it appropriate to certify a class action for a claim of fraudulent misrepresentation, but refuse certification for a claim of negligent misrepresentation?

A. Factual Background

(1) The events

[12] I begin this section of my reasons with two preliminary points, the first to provide context, and the second in the nature of a warning.

[13] The contextual point is this. The plaintiffs initiated eight lawsuits relating to the Bre-X gold mine and stock market debacle which I will shortly describe. The main action is against Bre-X Minerals Ltd., Bresea Resources Ltd. and various individuals who held senior positions in these companies. In the main action, the plaintiffs also sued two stock brokerage firms, Nesbitt Burns Inc. and First Marathon Securities Ltd., and two research analysts, Egizio Bianchini and Kerry Smith, employed by these firms. The second action was brought against two engineering companies which conducted analyses of gold resources on behalf of Bre-X. Five other actions were brought against various stock brokerage firms and some of their individual analysts who are alleged to have promoted Bre-X stock. An eighth action was brought against Ingrid Felderhof and Spartacus Corp.; it was stayed at an early juncture.

[14] The motions judge heard motions seeking certification of the first seven actions as class proceedings. His decision was that class proceedings were inappropriate for all seven

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actions. His decisions with respect to all of the brokerage firms, the two engineering firms, and all of the named individual analysts in those firms, have not been appealed by the plaintiffs. In other words, the only defendants who remain in the proposed class action are the companies and individuals directly involved in the gold mine venture. I make this point at the outset to indicate that what might appear on the record as a highly complicated matter (eight lawsuits, three categories of defendants, and almost three dozen named defendants) is in fact, at this juncture, a much smaller matter -- a single action, a single category of defendants and 10 named defendants. In short, the lawsuit that will go forward is against two gold mine companies and their senior officers; it no longer relates to stock brokerage firms or engineering companies which provided professional services to the gold mine companies and to investors.

[15] I move now to my second preliminary point. Although the title and sub-title of this section of my reasons are "factual background" and "the events", an important warning is required at the outset. There has been no trial in this matter. Indeed, at this juncture none of the defendants has been required to file a Statement of Defence. The "facts" in the action thus far are not facts at all; rather, they are allegations by the plaintiffs. However, as required by the CPA, the courts below accepted the factual background set out in the plaintiffs' statement of claim for purposes of determining whether the plaintiffs' claims should be certified as a class action. I will do the same, but underline that at this point no one should accept those allegations as proven.

[16] Bre-X Minerals Ltd. ("Bre-X") was a junior mining company. In 1989, its shares were listed on the Alberta Stock Exchange. Bresea Resources Ltd. ("Bresea") and Bre-X held shares in each other. Bresea was controlled by the directing minds of Bre-X.

[17] In 1987, an Australian-based joint venture obtained a contract of work to drill for gold in a remote area of Indonesia known as the Busang. For several years, the results of the project were generally poor. In the spring of 1993, Bre-

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X acquired an option to purchase an 80 per cent interest in the Busang project.

[18] On May 6, 1993, Bre-X and Bresea issued a press release announcing the deal and stating that the property showed sufficient gold to yield an annual after-tax cash flow of US $10 million to Bre-X. Thereafter, Bre-X and Bresea issued a series of 160 press releases and other statements building on the favourable results in the first release. From January 1994, Bre-X reported core drilling results that gave investors reason to believe that the Busang properties contained one of the largest gold deposits ever discovered. The price of Bre-X shares rose from 50 cents in 1993 to more than $200 in late 1996. Many Canadians made fortunes during these years by trading in Bre-X shares.

[19] In fact, there were no economic gold deposits in the Busang properties. The core samples drilled by Bre-X had been, in the language of the mining industry, "salted" with gold which could not have come from the Busang. In short, someone committed a massive fraud. As expressed bluntly in a May 3, 1997 report by Strathcona Mineral Services Ltd., a company retained by Bre-X to perform a technical audit of Bre-X's exploration work:

> [T]he magnitude of the tampering with core samples that we believe has occurred and resulting falsification of assay values at Busang, is of a scale and over a period of time and with a precision that, to our knowledge, is without precedent in the history of mining anywhere in the world.

[20] In 1997, Bre-X collapsed. Its shares became worthless, and many Canadians lost fortunes. Some of them want to sue those they hold responsible for the fraud.

(2) The parties

[21] At present, there are three representative plaintiffs in the class action. 3218520 Canada Inc. was the corporate investment vehicle for Greg Windsor. He purchased 500 Bre-X shares in September 1996 for $13,975. Osamu Shimizu purchased

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300 Bre-X shares in September 1996 for $7,887. Both of these sets of shares are now worthless. 662492 Ontario Limited was the corporate investment vehicle for Ivo Battistella. Between May 1996 and April 1997, he traded in Bre-X shares and lost about $762,000.

[22] The plaintiffs have sued Bre-X and Bresea. They have also sued several Bre-X "insiders", including David Walsh, Chairman and President, [See Note 1 at end of document] Jeannette Walsh, Corporate Secretary, John Felderhof, Vice-Chairman, Senior Vice-President and supervising geologist, T. Stephen McAnulty, Vice-President, John Thorpe, Treasurer, Rolando Francisco, Executive Vice-President and Chief Financial Officer, Hugh Lyons, outside director, and Paul Kavanagh, outside director. The plaintiffs allege that these insiders were responsible for their losses and, in addition, made huge financial gains by selling their own Bre-X shares before the fraud became known. The scale of the alleged fraud, and some sense of the magnitude of the losses suffered by investors, is apparent from the financial gains the insiders are alleged to have garnered: David Walsh -- $25,018,512; Jeannette Walsh -- $30,605,010; John Felderhof -- $71,211,417; Stephen McAnulty -- $8,234,460; John Thorpe -- $4,109,973; Rolando Francisco -- $1,254,500; Hugh Lyons -- $3,250,000; and Paul Kavanagh -- $511,500.

(3) The litigation

[23] On April 3, 1997, the plaintiffs issued their notice of action. On November 3, 1997, they delivered their Statement of Claim. Their claim is grounded in four causes of action: the torts of conspiracy, fraudulent misrepresentation and negligent misrepresentation, and breach of the Competition Act. On December 3, 1997, the plaintiffs brought their motion for certification of the action as a class proceeding.

[24] The requirements for certification are set out in s. 5 of the CPA:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

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(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 interest 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.

[25] On April 8, 1998, the motions judge, Winkler J., determined that the pleadings disclosed a cause of action pursuant to s. 5(1)(a). On February 11, 1999, the motions judge adopted a national class as the identifiable class under s. 5(1)(b). This class included persons not resident in Ontario, although these non-residents were permitted to opt out of the class and the action.

[26] On May 13, 1999, the motions judge disposed of the remaining aspects of the certification motion, including certification of common issues (s. 5(1)(c)), preferable procedure (s. 5(1)(d)), representative plaintiffs (s. 5(1)(e)) and the remaining issues of class description.

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[27] On the question of common issues, the motions judge certified 15 common issues for determination in a class proceeding. The formal Order provides:

8. THIS COURT DECLARES that the common issues for the Class against the Certified Defendants are:

(a) Did Busang contain gold in commercial quantities or in quantities sufficient to make the mining of it commercially viable ("gold in mineable quantities")?

(b) Was Bre-X operating a legitimate business?

(c) Were the core samples from Bre-X salted with gold and, if so, how, when, where and by whom?

(d) Did Bre-X follow generally accepted mining exploration practices and techniques and, if not, how did it deviate? Was any deviation reasonable under the circumstances?

(e) Did Bre-X, Bresea and the Insiders or any of them conspire to inflate the price of Bre-X and Bresea shares on the Markets? If they did, what are the particulars of the conspiracy?

(f) Did Bresea and the named individual defendants, or any of them, know or ought to have known the answers to the questions (a), (b), (c), (d) and (e) or any of them and, if so, who knew or ought to have known what, when and why and what should have they done, if anything?

(g) Did Bre-X and/or the named individual defendants represent that:

(i) There is gold in mineable quantities in the Busang?

(ii) Any company associated with SNC-Lavalin Inc. audited Bre-X's work or otherwise verified the accuracy of Bre-X's resource database?

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(iii) Bre-X was operating a legitimate business?

(h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?

(i) Are the named individual defendants, or any of them, personally liable for any damages resulting from or caused by the representations identified by issue (g)?

(j) What is the meaning of the words "as a result of" in section 36 of the Competition Act?

(k) Does the Negligence Act or the concept of contributory negligence apply in assessing loss or damage under section 36?

(l) Must the plaintiffs prove an anti-competitive component to the Competition Act cause of action? If so, have they? Does Part VI apply to behaviour which is not anti-competitive?

(m) Should the full costs of investigation in connection with this matter and the cost of the proceedings or part thereof be assessed globally as provided for in section 36 of the Competition Act, and, if so, who should pay and in what amount(s)?

(n) Was there a breach of section 52 of the Competition Act by Bre-X and the named individual defendants giving rise to liability pursuant to section 36 if the Class member can prove damages as a result of the representation(s)?

(o) Was the conduct of the defendants, or any of them, such that they ought to pay globally to the Class members exemplary or punitive damages?

[28] The motions judge held that these common issues relate to the torts of conspiracy and fraudulent misrepresentation and

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to breach of the Competition Act. He also held that a class proceeding is the preferable procedure for the resolution of these common issues.

[29] There is no dispute about any of the above. The motions judge's decisions relating to whether the pleadings disclose a cause of action and his definition of the plaintiff class have not been appealed. Moreover, his identification of 15 common issues and his determination that these issues are relevant to the conspiracy, fraudulent misrepresentation and Competition Act causes of action have been accepted by all parties.

[30] The point of contention in this appeal relates to the motions judge's determination, confirmed by the Divisional Court, that the 15 common issues he identified did not relate to the claim of negligent misrepresentation. Additionally, the motions judge held, and the Divisional Court confirmed, that if some of the common issues were applicable to negligent misrepresentation, nevertheless the preferable procedure was that they be determined in separate actions brought by individual plaintiffs. In short, the courts below have held that the plaintiffs' claims in conspiracy, fraudulent misrepresentation and breach of the Competition Act meet all of the components of the test in s. 5(1) of the CPA, but that the plaintiffs' claim in negligent misrepresentation fails both s. 5(1)(c) ("common issues") and s. 5(1)(d) ("preferable procedure"). Hence, the courts below refused to certify the claim in negligent misrepresentation as part of the class action.

[31] The plaintiffs sought leave to appeal from the decision of the Divisional Court upholding the motions judge's refusal to permit the claim in negligent misrepresentation to proceed as part of the class action. By Order dated March 14, 2000, a panel of this court (Osborne A.C.J.O. and Abella and Moldaver JJ.A.) granted the plaintiffs' motion for leave to appeal.

B. Issues

[32] There are two issues on this appeal:

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(1) Did the Divisional Court err in failing to order that the class proceeding which will determine the 15 certified common issues should apply to the claim in negligent misrepresentation?

(2) Did the Divisional Court err by determining that a class action was not the preferable procedure for dealing with the negligent misrepresentation claim?

C. Analysis

(1) The "common issues" issue

[33] The motions judge certified 15 common issues for the class action. He explicitly held that these common issues are relevant to three of the legal claims advanced by the plaintiffs -- conspiracy, fraudulent misrepresentation and breach of the Competition Act.

[34] However, the motions judge further held that the 15 common issues did not relate to the plaintiffs' claim of negligent misrepresentation. He explained the different results for the torts of fraudulent misrepresentation and negligent misrepresentation in this fashion [at pp. 196-98 O.R.]:

> The essence of each tort is the representation made by the defendant to the plaintiff. The plaintiffs contend that the series of statements contained in the press releases and other documentation emanating from Bre-X, notwithstanding their number and diversity of content, contain a common misrepresentation, namely that "gold was present in mineable quantities in the Busang". Thus they contend that a number of common issues arise from what they state is a singular misrepresentation.
>
> The plaintiffs identify some 160 statements made by the defendants over a four-year period to a class indeterminate in number and national in scope. The statements were distributed to the public through various forms of media and subject to whatever editorial control that may have been exercised by the respective proprietors. The statements were

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received by investors with varying degrees of sophistication and knowledge, and more importantly, differing investment strategies.

. . . . .

A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs' contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. As such, there is no prospect of a resolution in a trial on common issues which would advance this litigation in any manner as it relates to the claim in negligent misrepresentation.

However, I am of the view that the claim in fraudulent misrepresentation raises common issues. The plaintiffs' allegation is that the Bre-X operation was fraudulent. Therefore, it is contended, every representation, whenever made, is tainted by the fraud. The allegation that the fraud permeates every statement raises common issues regardless of whether individual issues may arise from the actual communications made to the class members.

(Emphasis added)

[35] In a relatively short endorsement, the Divisional Court

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agreed with the motions judge's reasoning and with the dichotomy he created. A. Campbell J. said [at p. 316 O.R.]:

> There is a complex, overlapping, differing and sometimes inconsistent tissue of representations made by different people at different times. As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.
>
> The common issue cannot be dependent upon findings which have to be made, as here, at individual trials.

[36] There is no doubt that class actions are a new, different and, in many cases, complex development in the Ontario legal system. Because of this, a practice has developed of assigning a small number of judges to hear certification motions. Those judges develop an expertise which should be recognized and respected by appellate courts. As expressed by Carthy J.A. in Anderson v. Wilson (1999), 44 O.R. (3d) 673 at p. 677, 175 D.L.R. (4th) 409 (C.A.):

> . . . I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle.

[37] Bearing in mind this admonishment, I have reached the reluctant conclusion that the Divisional Court and the motions judge have erred on a matter of general principle. I do not agree that there is a sufficient difference between the plaintiffs' claims in fraudulent misrepresentation and negligent misrepresentation to justify certification of the former and non-certification of the latter. In my view, the creation of such a dichotomy in this litigation is an error in logic, in principle and in policy. I reach this conclusion for several reasons.

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[38] My first two reasons are contextual ones.

[39] First, s. 8(1) of the CPA provides that a certification order should set out the common issues of the class. Section 1 of the CPA defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[40] The observation I would make about this definition is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high. The important procedural objectives of the CPA, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.

[41] Second, the courts have also been wary of setting the bar too high on the common issues factor. In many cases, the Ontario courts have stated explicitly that certification should be ordered if the resolution of the common issues would advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of particular legal claims in the action, is not required. In Campbell v. Flexwatt Corp. (1997), 15 C.P.C. (4th) 1, 44 B.C.L.R. (3d) 343 (C.A.), Cumming J.A. said, at p. 18 C.P.C.:

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

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In Anderson v. Wilson, supra, Carthy J.A., speaking for a unanimous court, expressly adopted this reasoning.

> [42] Against the backdrop of the low bar set by the legislature and judiciary for common issues, I turn to my third, and most important, reason for thinking that the courts below erred. Given the accepted definitions of the torts of fraudulent misrepresentation and negligent misrepresentation, I can see no logical or principled basis for treating them differently on the question of certification. I could understand an order certifying, or refusing to certify, both claims. I do not, however, understand why opposite orders were considered appropriate for the two claims.

[43] The best way to commence my discussion of my doubts on this issue is by setting out the motions judge's careful and accurate description of the elements of the two torts. He said [at pp. 195-96 O.R.]:

> The constituent elements of a claim for fraudulent misrepresentation were enunciated by the Supreme Court of Canada in Parna v. G. & S. Properties Ltd., [1971] S.C.R. 306 at p. 316, 15 D.L.R. (3d) 336 at p. 344:
>
> ". . . Anson on Contract [12th ed., p. 187], where "fraud" has been defined, reads:
>
> [Fraud is] a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."
>
> See also Derry v. Peek (1889), 14 App. Cas. 337 at p. 374, [1886-90] All E.R. Rep. 1 (H.L.).
>
> The tort of negligent misrepresentation has five constituent elements. There must be a duty of care arising from a special relationship between a representator and a representee. There must be a representation made that was untrue, inaccurate or misleading. The representor must have made the statement

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negligently. The representee must have reasonably relied upon the statement and further, suffered damage as a result of the reliance. See Queen v. Cognos Inc., [1993] 1 S.C.R. 87 at p. 110, 99 D.L.R. (4th) 626.

[44] There are substantial similarities in these definitions of the two torts. A fraudulent misrepresentation is "a false representation of fact"; a negligent misrepresentation is one that is "untrue, inaccurate or misleading". A fraudulent misrepresentation can be one that is made "recklessly, without belief in its truth"; a negligent misrepresentation is one that is made "negligently" or, to employ the standard non-conclusory word, "carelessly". At least two of the 15 common issues that have been certified relate directly to the tort of fraudulent misrepresentation:

> (g) Did Bre-X and or the named defendants represent that:
>
> (i) There is gold in mineable quantities in the Busang?
>
> . . .
>
> (h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?

These common issues relate to two of the four components of the tort of fraudulent misrepresentation -- a false statement and two potential reasons (knowledge or recklessness) for the statement. In my view, they relate equally to two of the five components of the tort of negligent misrepresentation -- a false statement and one potential reason (carelessness) for the statement. My conclusion, therefore, is that there is a sufficient overlap in the legal claims of the plaintiffs, grounded in fraudulent misrepresentation and negligent misrepresentation, to justify certification for both claims.

[45] Fourth, in my view there is a substantial overlap of factual issues common to both torts. There are two core issues in this litigation: first, was there gold in mineable quantities in the Busang; and second, if there was not, what

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was the various defendants' knowledge of the true state of affairs?

[46] The defendants' conduct with respect to the first question was manifested in the 160 statements and press releases which informed the public about exploration developments in the Busang. These 160 statements will have to be analyzed in the context of the fraudulent misrepresentation claim. The analysis might become somewhat complicated. For example, it cannot be said categorically that the fraud crystallized with the first press release on May 6, 1993 and that all of the other statements from Bre-X during the next four years were mere elaborations on the crystallized fraud. This would not be true for several of the named defendants who were not associated with Bre-X in 1993 -- for example, Francisco, Lyons and Kavanagh. It follows that an individualized assessment of each defendant's conduct will be required in the certified class action relating to fraudulent misrepresentation.

[47] Given this reality, I see no principled basis for treating the claim in negligent misrepresentation differently. Under both torts, the focus will be on the defendants, their knowledge and their conduct. Did they know (fraud) that there was no gold in the Busang? Were they careless about (negligence) their knowledge of the state of affairs in the Busang? The answers to these questions under the tort of fraudulent misrepresentation might be different for each defendant. Some might have participated in the fraud from its inception. Some might have joined the fraud later. Others might never have known that there was a fraud or participated in it in a fashion that might give rise to liability. Precisely the same thing can be said about the tort of negligent misrepresentation. Some of the defendants might have been careless about the state of affairs in the Busang from the outset. Some might have become careless later. Others might never have been careless or participated in Bre-X's affairs in a fashion that would give rise to liability. In short, the complexity that exists with respect to determining the defendants' states of mind and conduct is inherent in both torts. It follows that certification should either be granted

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or withheld for both claims.

[48] I make one other observation with respect to the overlap of factual issues common to both torts. Both the motions judge and the Divisional Court attached great significance to the fact that the contested representations by Bre-X were not made on a single occasion; rather, they took the form of 160 statements and press releases. In the eyes of the motions judge and the Divisional Court, this posed particularly difficult problems on the reliance component of the tort of negligent misrepresentation. As expressed by the Divisional Court [at pp. 316-17 O.R.]:

> The alleged negligent misrepresentations include 160 or more Bre-X press releases over a four-year period beginning May 10, 1993. The representations were different in content and made at different times by different people for different reasons. . . . As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.

[49] With respect, I think it is a mistake, at this early juncture of the litigation, to overemphasize the number and diversity of Bre-X's representations. One of the potential benefits of a class action with certified common issues relating to the knowledge and conduct of the defendants is that the resolution of those issues might narrow substantially the subsequent inquiries on the plaintiffs' side of the coin. As I understand the theory of the plaintiffs, the named defendants participated in a scheme to promote Bre-X shares by embarking on a program of issuing press releases they knew to be false, that portrayed the assay results from the Busang site as demonstrating the existence of a gold mine of staggering dimensions. If these facts can be established by the plaintiffs, the questions raised in para. 8(f) of the order declaring the common issues must be addressed. What did the individual defendants know about the promotional fraud? Here, if knowledge of the fraud cannot be attributed to a given defendant, the lesser degree of complicity respecting carelessness can be

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addressed. At this stage of the proceedings, the court does not know what this will entail by way of evidence. It is possible -- I put it no higher -- that fixing the knowledge and conduct of each Bre-X insider will present a much clearer picture. For example, if the moment when a Bre-X insider became careless about a representation or representations in which he participated could be isolated, the subsequent consideration, admittedly in individual trials, of such issues as duty of care and reliance might be rendered more focussed and manageable. This would "move the litigation forward". In short, the existence of 160 representations should not be used as a reason to refuse certification as a class action; rather, certification is, potentially, a way of reducing those 160 representations to a much smaller number of relevant ones.

[50] Fifth, in this action and in five companion actions, the plaintiffs made claims against five stock brokerage firms which provided investment advice and services to them. The motions judge concluded that the claims of fraudulent misrepresentation and negligent misrepresentation against the brokerage firms raised common issues appropriate for certification. He said [at pp. 236-38 O.R.]:

> . . . I accept the plaintiffs' contention that common issues are raised on the basis that it is arguable that a finding can be made at a common issue trial that there is a point in time at which the analysts were, or ought to have been, aware of the alleged fraud.
>
> . . . . .
>
> The essence of misrepresentation is the negligent statement. If a point in time is fixed at which the analysts knew or ought to have known of the alleged fraud, then any statement to the contrary after that point is an inaccurate, negligently made statement. Such a finding would advance the litigation.

I agree with this analysis. In my view, if the words "Bre-X insiders" were substituted for "analysts", this reasoning would be equally applicable.

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[51] In summary, the motions judge and the Divisional Court certified 15 common issues as appropriate for resolution in a class proceeding. The focus of these common issues is the knowledge and conduct of the defendants, the Bre-X insiders. The conduct, especially the reliance, of the plaintiffs stays on the sidelines at this juncture in the litigation. The plaintiffs advance four claims against the defendants. The courts below certified three of them, including the claim for fraudulent misrepresentation. I agree with these components of the courts' decisions. However, the courts below refused to certify the claim in negligent misrepresentation. For the above reasons, I am of the view that they erred in this refusal. After setting out the definitions of fraudulent and negligent misrepresentation, the motions judge said [at p. 196 O.R.]: "The essence of each tort is the representation made by the defendant to the plaintiff." I agree with that statement. However, in my view it serves to bind together, not divide, the treatment of both claims under the CPA.

(2) The "preferable procedure" issue

[52] Section 5(1)(d) of the CPA provides that a court shall certify a class proceeding if it would be the preferable procedure for the resolution of the common issues. The motions judge concluded that a class proceeding was not the preferable procedure for the claim of negligent misrepresentation. He said [at p. 202 O.R.]:

> I have concluded that there are no common issues concerning the claim in negligent misrepresentation but even if I had not so concluded, I would nevertheless find that a class proceeding is not the preferable procedure for the resolution of any such issues for the reasons particularized in the SNC-Carom II and Brokers actions.

The Divisional Court agreed with the motions judge's reasoning and conclusion on this point.

[53] The SNC-Carom II and Brokers actions were companion actions brought by the plaintiffs against, respectively,

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companies which analyzed Bre-X's Busang project and stock brokerage firms which advised, and sold shares to, the plaintiffs. The crucial fact of these companion actions was that the claims of negligence and negligent misrepresentation were the only claims against the defendants. After a careful review of the relevant factors, the motions judge determined that a class proceeding was not a preferable procedure.

[54] The crucial difference in the present appeal is that a class action has already been certified for three of the four claims advanced by the plaintiffs. The question then becomes: if most of the plaintiffs' claims will proceed in a class proceedings context, is there a strong reason to exclude the claim in negligent misrepresentation from the proceedings? In my view, for several reasons, the answer to this question is "No".

[55] First, and at a general level, I am not aware of any Ontario case, before this one, in which some of the potential claims were certified while others were not certified. Anderson v. Wilson, supra, Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Gen. Div.), Maxwell v. MLG Ventures Ltd., [1995] O.J. No. 1136 (Gen. Div.), and Peppiatt v. Nicol (1993), 16 O.R. (3d) 133, 20 C.P.C. (3d) 272 (Gen. Div.) are all cases in which certifications were ordered. In several of these cases there were multiple claims advanced by the plaintiffs. On the other hand, Hollick v. Metropolitan Toronto (Municipality) (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (C.A.), [See Note 2 at end of document] Controltech Engineering Inc. v. Ontario Hydro, supra, Rosedale Motors Inc. v. Petro-Canada Inc., supra, Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63, 22 C.P.C. (4th) 198 (Div. Ct.), and Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 121 D.L.R. (4th) 496 (Div. Ct.) are all cases in which certification was refused. Again, in several of these cases there were multiple claims against the defendants. The implicit message from these results is that the courts seem to employ a starting point or presumption -- I put it no higher -- in favour of either complete certification or no certification. The decisions of the motions judge and Divisional Court in the present matter are not in tune with these results.

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[56] Second, in my view there is substantial merit in trying to utilize the CPA to deal with as many issues as possible. On this point, the motions judge's analysis of the relationship among the three claims he certified is instructive [at p. 202 O.R.]:

> Since I have found a class proceeding to be the preferable procedure for resolving the common issues in respect of the claim in conspiracy, I have concluded as well that it is in keeping with the goals of the CPA to determine the common issues arising out of the claims in fraudulent misrepresentation and breach of the Competition Act as part and parcel of the inquiry. The determination of the common issues proposed for the claims in fraudulent misrepresentation and under the Competition Act will not unduly complicate the common issue trial. In my view, it advances the goals of judicial economy to take advantage of the opportunity for efficiency presented by the common issue trial necessary for the claim in conspiracy. The fact that there will be a common issue trial between the same parties, on a claim which arises from the same background circumstances, favours including the common issues arising from claims in fraudulent misrepresentation and breach of the Competition Act, even though the plaintiffs may still have to engage in lengthy individual trials to determine the actual liability of the defendants on the claims. In these unique circumstances, the efficiencies achieved on the one hand, offset the inefficiencies on the other.

I agree with this analysis. I would simply extend it to the plaintiffs' fourth claim, the one in negligent misrepresentation.

[57] Third, I observe that the plaintiffs and defendants accept that detrimental reliance is an element of both the torts of fraudulent and negligent misrepresentation. Moreover, they agree that the reliance component will have to be dealt with at individual trials on the issue of fraudulent misrepresentation. Yet the defendants do not use this two-track scenario as a basis for challenging, by way of appeal or cross-

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appeal, the certification of the claim in fraudulent misrepresentation. In my view, this silence tells in favour of moving the negligent misrepresentation claim onto the same unchallenged track on which the fraudulent misrepresentation claim is already situated.

[58] Fourth, the fact that determination of some of the common issues relevant to the claim in negligent misrepresentation (or indeed the other three claims) will not resolve the entire litigation is not determinative. Certification can be the preferable procedure in situations far short of final resolution of the lawsuit.

[59] On this point, the decision of this court in Anderson v. Wilson, supra, is instructive. In that case, the court certified claims in negligence and breach of contract by patients exposed to Hepatitis B through electroencephalogram tests administered by the defendant clinics. The court found that the class proceeding could not resolve the ultimate issues of liability and damages because it could not provide an answer to the pivotal question of causation. In those circumstances, Carthy J.A. framed the question in these terms, at p. 683 O.R.:

> The question then becomes whether there are sufficient common issues left to justify certification. In my view, it seems sensible with this number of potential plaintiffs and the similarities that are evident in their claims, that any potential efficiency in advancement of their claims through the flexibility provided by the CPA should, where reasonable, be utilized.

[60] In my view, this passage evinces a proper understanding of, and respect for, the objectives of the CPA. The CPA does provide a flexible procedure for dealing with multiple plaintiffs with similar claims, usually arising out of a single accident, catastrophe or other major event.

[61] Carthy J.A. then proceeded to answer his own question in Anderson v. Wilson. He said, at pp. 683-84 O.R.:

> In this case, the common issue as to the standard of

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conduct expected from the clinics from time to time, and whether they fell below the standard, can fairly be tried as a common issue. Resolving this issue would move the litigation forward. The participation of the class members is not needed for that inquiry, although their later evidence may bear upon whether standards, such as the use of gloves, were actually met in individual cases. Isolating this one major issue, the class action proceeding clearly appears to be the preferable method of resolution to the benefit of all parties.

[62] A similar analysis can be made in the present appeal. The major common issue in this action is the knowledge and conduct of the Bre-X insiders. What did they know about gold in the Busang and when did they know about it? And, given their knowledge, what did they tell the public and what legal rubrics (innocent, false, careless, anti-competitive, conspiratorial) should be attached to their statements? The answers to some of these questions may become complicated. Moreover, different answers may be required for different defendants. However, the complications are offset by two overarching considerations. First, the presence and the stories of the plaintiffs are not required for the first stage of the lawsuit. The focus is on the defendants, their knowledge and their conduct. The determination of these matters, although perhaps difficult, will move the litigation forward. Second, it is uncontroverted that there will be a class proceeding with respect to three of the plaintiffs' claims. In that context, it seems sensible and desirable to place the claim of negligent misrepresentation on the same litigation track.

Disposition

[63] I think it important, and fair, to place the disposition of this appeal in a proper context. The Bre-X debacle has given rise to seven separate lawsuits involving three different groups of defendants -- the Bre-X insiders, external analyst corporations and stock brokerage firms. The plaintiffs have sought certification of all of their legal claims in all seven actions. A single judge, Winkler J., has been charged with dealing with all class proceedings aspects of these actions. In

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a series of comprehensive, careful and, I might say, timely decisions, the motions judge has resolved many important and difficult issues, including whether there are causes of action, the definition of the plaintiff class, mechanisms for non-residents of Ontario to participate (or not) in the class proceedings, and, ultimately, the appropriateness of certification of class actions in terms of the statutory criteria of "common issues" and "preferable procedure". In all of this, the vast majority of the motions judge's decisions have been accepted by the parties.

[64] The sole exception -- and it is a minor one in the grand scheme of the lawsuits relating to Bre-X -- is this appeal, which challenges the decisions of the Divisional Court and the motions judge refusing to certify the plaintiffs' claim in negligent misrepresentation against the Bre-X insiders.

[65] For the reasons I have outlined above, I would allow the appeal. Paragraph 9 of the Order of the Superior Court of Justice should be amended by deleting reference to the claim in negligent misrepresentation.

[66] In my view, the appellants are entitled to their costs of the appeal, including the motion for leave to appeal. The appellants are also entitled to their costs in the Divisional Court. The costs order of the motions judge should stand.

Order accordingly.

Notes

Note 1: Mr. Walsh is deceased. The action continues against his estate with his wife, Jeannette Walsh, as estate trustee.

Note 2: Leave to appeal granted on September 21, [2000] S.C.C.A. No. 41.

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# Tab 9

**CITATION:** Cornish v. Ontario Securities Commission, 2013 ONSC 1310
**DIVISIONAL COURT FILE NOS.:** 33/12 and 35/12
**DATE:** 20130319

2013 ONSC 1310 (CanLII)

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**ASTON, SWINTON AND T. DUCHARME JJ.**

**IN THE MATTER OF THE *SECURITIES ACT***
**R.S.O. 1990, c. S.5, as amended**

| | | |
|---|---|---|
| **COURT FILE: 33/12** | ) | |
| | ) | |
| **B E T W E E N:** | ) | |
| GEOFFREY CORNISH | ) | *B. Zarnett, J.T. Curry, S. Roy* and *P. Kolla*, for the Appellant, Geoffrey Cornish |
| Appellant | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| ONTARIO SECURITIES COMMISSION | ) | *J. Waechter, M. Vaillancourt* and *C. Johnson*, for the Respondent |
| Respondent | ) | |
| | ) | |
| **COURT FILE: 35/12** | ) | |
| **AND BETWEEN:** | ) | |
| | ) | |
| DEAN TAI | ) | *P. Le Vay and P. Sagull*, for the Appellant, Dean Tai |
| | ) | |
| Appellant | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | |
| ONTARIO SECURITIES COMMISSION | ) | *J. Waechter, M. Vaillancourt and C. Johnson*, for the Respondent |
| | ) | |
| | ) | **HEARD at Toronto:** October 23 and 24, |

) 2012

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**T. DUCHARME J.**

## REASONS FOR JUDGMENT

## I. OVERVIEW

[1] Coventree Inc. ("Coventree") is an Ontario company that was incorporated in 1998. It became a reporting issuer following an initial public offering on November 15, 2006. At the relevant time, Coventree described itself as a niche investment bank specializing in structured finance. The appellant, Geoffrey Cornish, is a founder, President and a former CEO of Coventree Inc. The appellant, Dean Tai, was also a founder, director and officer of Coventree.

[2] On September 28, 2011, following a 45 day hearing that ran from May 12, 2010 to December 9, 2010, the Ontario Securities Commission ("OSC" or the "Commission") found that the appellants authorized, permitted or acquiesced in Coventree's non-compliance with Ontario securities law, and thereby failed to comply with Ontario securities law pursuant to s. 129.2 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"). The conduct of each of the appellants in contravening Ontario securities law was also found to be contrary to the public interest.

[3] Following a separate hearing on October 26 and 27, 2011 to consider the appropriate sanctions, the Commission issued its sanctions order on November 8, 2011. It publicly reprimanded Mr. Cornish and Mr. Tai and:

(a) required them to resign as a director or officer of any reporting issuer, other than Coventree;

(b) prohibited them from becoming or acting as a director or officer of a reporting issuer for one year; and

(c) levied a $500,000 administrative monetary penalty against each.

[4] The appellants seek to have the September 28, 2011 order and the November 28, 2011 sanctions order set aside, and, in their place, request an order be made dismissing the Statement of Allegations of the Commission dated December 7, 2009 against the appellants.

[5] The appellants challenge the Commission's interpretation and application of its enabling statute. In particular, they challenge the Commission's interpretation and

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application of the definition of "material change" under the Act, and the Commission's discretionary application of its public interest jurisdiction under s. 127 of the Act. The appellants also argue that the Commission in its reasons for decision made inappropriate credibility findings as well as other irrelevant and prejudicial findings against them. The appellants characterize these issues as a denial of procedural fairness and a breach of natural justice.

[6] For the reasons that follow, I would dismiss the appeals. The Commission made no error in law and reached a reasonable decision based on the evidence before it.

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## II. FACTUAL BACKGROUND

### (A) Facts

[7] Coventree and its subsidiary, Nereus Inc. ("Nereus"), managed and administered ten separate trusts commonly known as "conduits". The conduits issued asset-backed commercial paper ("ABCP"), debt instruments that typically have a short maturity term (30-90 days). A purchaser of ABCP receives a financial instrument that contains a promise that the conduit will pay interest on the ABCP's principal amount at a rate above the Canadian Deposit Offering Rate.[1] The ABCP is backed by investments in long-term assets held by the conduits. Given the short-term maturity of ABCP, to fund maturing ABCP the conduits sold new ABCP to investors daily, a process known as "rolling".

[8] Coventree was the conduits' securitization agent or sponsor and in that capacity managed and administered the transactions that were carried out by the conduits, which included selecting and arranging the purchase of assets. As sponsor, Coventree negotiated and implemented traditional securitization transactions[2] and credit arbitrage transactions. Credit arbitrage transactions are a type of ABCP asset securitization

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[1] This is the daily average of the interest rates for Canadian bankers' acceptances.

[2] Traditional securitization transactions involve the purchase of traditional revenue generating assets.

transaction.[3] Although Coventree engaged in other lines of business, its revenues from its securitization activities comprised approximately 90% of its total revenues. Moreover, most of Coventree's revenue came from credit arbitrage transactions – 80% of Coventree's total revenue was derived from those transactions for each of the three-month periods that ended on December 31, 2006, March 31, 2007 and June 30, 2007, respectively.

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[9] Coventree was the only non-bank ABCP sponsor in Canada that was a reporting issuer. The ABCP market was an opaque market about which public shareholders and investors had limited information. The Commission explained this as follows:

> The over-the-counter market for ABCP was a very opaque securities market. There was no public reporting of the prices at which transactions in ABCP were effected, there were no securities law filings required in connection with the sale or trading of ABCP and there was no disclosure legally required with respect to the attributes of, or assets backing, ABCP. As a result, investors relied heavily on the credit rating of the ABCP and had very limited ability to carry out their own due diligence with respect to the ABCP and the assets backing it.[4]

[10] The credit rating of ABCP was done by the Dominion Bond Rating Service ("DBRS"). DBRS played a very significant role in establishing standards in the ABCP market through the conditions it imposed as a requirement for issuing its ratings of ABCP.

**(1) The DBRS January Release**

[11] On January 19, 2007, DBRS issued a press release announcing changes to its credit rating criteria for certain credit arbitrage transactions ("DBRS January Release"). These changes did not affect the ratings of existing Canadian ABCP backed by credit arbitrage transactions. However, it effectively required Coventree to secure an

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[3] Credit arbitrage transactions include collateralized debt obligations and leveraged super senior transactions ("LSS transactions"). Revenue to the sponsor is based on the spread between the return on the underlying assets and the conduit's cost of funds. The term is generally used interchangeably with structured financial asset transactions or "SFA transactions".

[4] Reasons for Decision dated September 28, 2011 reported at 34 O.S.C.B. 10209 at para. 66.

unattainable type of liquidity to back certain types of its credit arbitrage transactions going forward. Liquidity backing was designed to provide for payment to ABCP investors if the ABCP failed to roll. Prior to this change, the now DBRS-prohibited type of credit arbitrage transactions had represented 40% of the conduits' assets and their use had been the largest contributor to Coventree's growth. In an affidavit sworn on March 1, 2007, Tai recognized the significance of this development, saying that he was not aware of any liquidity providers that were prepared to offer liquidity for credit arbitrage transactions in accordance with the DBRS's new terms.

**(2) Coventree's Mention of DBRS Change in Criteria**

[12] Coventree mentioned the DBRS January Release in a letter to its shareholders on February 14, 2007. In its second quarter Management's Discussion & Analysis ("MD&A"), publicly filed on May 14, 2007, Coventree disclosed that the DBRS January Release would "have the effect of reducing the profitability of the Company by substantially curtailing its ability to grow, if not halt in the short term, its credit arbitrage business." The market price of Coventree's shares did not change significantly as a result of these two disclosures.

**(3) The August 1, 2007 Liquidity Events**

[13] By July 2007, as a result of downgrades of certain US residential mortgage-backed securities and the collapse of two foreign hedge funds, a global credit crisis emerged that affected all markets, including the Canadian market for ABCP. By late July, the dealers who sold ABCP on behalf of Coventree-sponsored conduits were reporting difficulties in selling. From late July to early August, Coventree took a series of steps to attempt to address the lack of demand for new ABCP, including:

(a) Selling some of its assets to raise cash;

(b) Deferring the planned purchase of $66 million of mortgages from Xeed Mortgage Corporation;

(c) Monitoring "spread widening" which occurred when a conduit was required to offer its ABCP for sale at higher interest rates. Cornish testified that modest spread widening began to occur on July 30, 2007; and

(d) Generally following the market closely and meeting regularly to discuss what would bring about a "material change."

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### (4) August 1 Board Meeting and Continued Meetings About Disclosure

[14] On August 1, 2007, Coventree's Board of Directors met to discuss market conditions and consider whether material changes had occurred to Coventree's business or operations. Cornish drafted a press release that was never released. The Board met on a daily basis to discuss market conditions and assess whether a material change had occurred.

### (5) August 13, 2007 Market Disruption and Disclosure

[15] On August 13, 2007, the $16-billion market for Coventree-sponsored ABCP collapsed, leaving Coventree's ABCP investors holding illiquid investments that they could neither sell nor redeem. Cornish prepared and issued a press release disclosing the market disruption as a material change. On August 14, 2007, Coventree's share price dropped to $2.37 from its initial public offering price of $10.75 per share.

## (B) The Decision Below

[16] The Commission dealt with the following primary allegations that were set out in the Statement of Allegations issued by Commission Staff on December 7, 2009:

(a) The First Particular alleged that Coventree had violated s. 56 of the Act by failing to make full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed. Specifically, there was no mention in the prospectus of the fact that, in November 2006, Coventree had received a letter from DBRS which indicated, among other things, that DBRS had adopted more restrictive credit rating criteria for ABCP;

(b) The Second Particular alleged that Coventree had violated s. 75 of the Act by failing to comply with its continuous disclosure obligations with respect to material changes under ss. 75(1) and 75(2) of the Act. Specifically, Coventree failed to issue and file a news release, and file a material change report, disclosing that DBRS's decision to change its credit rating methodology in January 2007 resulted in a material change in Coventree's business or operations;

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(c) The Third Particular alleged that Coventree had violated s. 126.2(1) of the Act by making a statement that is misleading "in a material respect" and would reasonably be expected to have a significant effect on the market price or value of a security. This related to Coventree presentations to investors which suggested that the total U.S. subprime mortgage exposure ("subprime exposure") of its sponsored conduits was 7.4% (the "subprime statement"), and did not provide investors with a breakdown of that exposure by conduit and ABCP note series; and

(d) The Fourth Particular alleged that Coventree had violated s. 75 of the Act by failing to comply with its continuous disclosure obligations with respect to material changes under ss. 75(1) and 75(2) of the Act. Specifically, it failed to issue and file a news release, and file a material change report, disclosing liquidity and liquidity-related events and the risk of a market disruption in the days leading up to the disruption in the ABCP market that occurred on August 13, 2007.

[17] Cornish and Tai were alleged to have authorized, permitted or acquiesced in the first, second and fourth allegations. The conduct of Coventree, Cornish and Tai was separately alleged to have been contrary to the public interest.

[18] The Commission dismissed the first and third particulars. However, it found that the second and fourth particulars were made out with respect to Coventree. It further found that Cornish and Tai, as senior officers and directors of Coventree, authorized, permitted or acquiesced in these breaches of Ontario securities law by Coventree. As a result, Cornish and Tai were deemed to have also not complied with Ontario securities law in accordance with s. 129.2 of the Act.

[19] The reasons for the decision are 133 pages in length, exclusive of appendices. The reasons are carefully reasoned, comprehensive and responsive to all of the arguments advanced by Coventree or the appellants at the hearing.

[20] The Commission found that the DBRS January Release, while an external event, constituted a change in Coventree's business that would reasonably be expected to have had a significant effect on the "market price or value" of Coventree's shares. Thus, it constituted a "material change" to Coventree's business and operations within the

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meaning of the Act. The Commission found that Coventree breached the Act by failing to issue a mandatory news release and failing to file a mandatory material change report about the January material change. The Commission reached this conclusion despite the fact that Coventree's mentions of the DBRS January Release in its February 14, 2007 letter to shareholders and in its May 14, 2007 MD&A did not result in any significant change in the price of Coventree shares. Given the opaque nature of the market and Coventree's failure to explain the impact of the DBRS January release on its business and operations, the Commission found that the market price of Coventree's shares could not, and did not, reflect the effect of the DBRS announcement on Coventree's business and, by necessary implication, the value of its shares.

[21] The Commission also found that by August 1, 2007, the following changes had occurred to Coventree's business and operations: (a) the inability to issue new ABCP; (b) difficulty rolling outstanding ABCP; (c) ABCP spread widening; (d) credit default swap spread widening; and (e) sales of assets. The Commission found that these constituted a "material change" to Coventree's business and operations within the meaning of the Act. Here again, it found that Coventree breached the Act by failing to issue a mandatory news release and failing to file a mandatory material change report. In reaching this conclusion, the Commission found that an investor would have considered the undisclosed information to be "critically important" in making an investment decision with respect to Coventree shares.

[22] In considering whether or not to exercise its public interest jurisdiction with respect to the appellants, the Commission noted that it was being asked to do so only with respect to proven contraventions of the Act. The Commission noted its public interest jurisdiction is protective and preventative and is intended to prevent likely future harm to Ontario capital markets. Therefore, general deterrence is an appropriate consideration and may indeed be a necessary consideration in making orders that are both protective and preventative. The Commission referred to a number of previous OSC cases and concluded, "It is clear that the Commission considers the failure to make timely disclosure in accordance with section 75 of the Act, and the making of inaccurate, misleading or untrue disclosure, to be contrary to the public interest." On this basis it concluded that the conduct of Coventree, Cornish and Tai was contrary to the public interest.

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[23] Following a separate hearing on October 26 and 27, 2011 to consider the appropriate sanctions, the Commission issued its Sanctions Order on November 8, 2011. It publicly reprimanded Mr. Cornish and Mr. Tai and:

(a) required them to resign as a director or officer of any reporting issuer, other than Coventree;
(b) prohibited them from becoming or acting as a director or officer of a reporting issuer for one year; and
(c) levied a $500,000 administrative monetary penalty against each.

[24] In addition to two administrative orders regarding trading activity, Coventree was ordered to pay an administrative monetary penalty of $1 million and costs of $250,000.

**(C) Jurisdiction**

[25] This court has jurisdiction to hear this appeal pursuant to s. 9 (1) of the *Securities Act*:

> Any person or company directly affected by a decision of the Commission, other than a decision under section 74, may appeal to the Divisional Court within thirty days after the later of the making of the final decision or the issuing of the reasons for the final decision.

## III. ISSUES

[26] The following issues are raised on this appeal:

(1) What is the appropriate standard of review?

(2) Were the Commission's findings that there were material changes within the meaning of the Act reasonable?

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(a) Did the Commission err in applying the "reasonable investor test" to determine materiality instead of the statutorily mandated "market impact test"?

(b) Did the Commission err in finding that there was a material change in the absence of any evidence capable of supporting that finding?

(c) Did the Commission err in failing to distinguish between a "material fact" and a "material change" in finding disclosure was required?

(3) Did the Commission err by making findings on matters not properly before it?

(4) Did the Commission unreasonably make orders in the public interest under s. 127 of the Act?

## IV. THE STANDARD OF REVIEW

[27] The appellants challenge the Commission's interpretation and application of its enabling statute, the *Securities Act*. In particular, they challenge the Commission's interpretation and application of the definition of "material change" under the Act, and the Commission's discretionary application of its public interest jurisdiction under s. 127 of the Act. The appellants also argue that the Commission made irrelevant and prejudicial findings against them contrary to the rules of natural justice and procedural fairness.

[28] The appellant, Cornish, submits that the appropriate standard of review for the definition of material change is correctness as it raises a question of central importance to the legal system and is outside the Commission's specialized area of expertise.

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Similarly, he argues that a correctness standard should be used to assess the Commission's decision to make an order in the public interest, as these orders were based on the Commission's erroneous interpretation of the material change provisions of the Act. The appellant, Tai, submits that all questions of law should be assessed on a standard of correctness. With respect to the denial of procedural fairness, Tai submits that if a denial of natural justice is found, then the decision cannot stand.

[29] The respondent submits that the reasonableness standard is appropriate for every issue raised on this appeal.

[30] In *Pezim v. British Columbia (Superintendent of Brokers)*, the Supreme Court of Canada determined that the interpretation and application of the B.C. Securities Commission's home statute draws upon the unique expertise of the Commission as a specialized tribunal, and, accordingly, is to be accorded strong curial deference:

> [T]he definitions in the *Securities Act* exist in a factual or regulatory context. They are part of the larger regulatory framework…. They are not to be analyzed in isolation but rather in their regulatory context. This is something that requires expertise and thus falls within the jurisdiction of the Commission.[5]

[31] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* the Supreme Court of Canada applied the analysis in *Pezim* to the Ontario Securities Commission, saying at para 49:

> In this case, as in *Pezim*, it cannot be contested that the OSC is a specialized tribunal with a wide discretion to intervene in the public interest and that the protection of the public interest is a matter falling within the core of the OSC's expertise. Therefore, although there is no privative clause shielding the decisions of the OSC from review by the courts, that body's relative expertise in the regulation of the capital markets, the purpose of the Act as a whole and s. 127(1) in particular, and the nature of the problem before the OSC, all militate in favour of a high

[5] *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 at para. 72 ["*Pezim*"].

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> degree of curial deference. However, as there is a statutory right of appeal from the decision of the OSC to the courts, when this factor is considered with all the other factors, an intermediate standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness.[6] [Emphasis added.]

[32] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, the Supreme Court of Canada reaffirmed and clarified the reasonableness standard of review is applicable when a tribunal interprets or applies its home statute. The majority in *Alberta Teachers' Association* reiterated that there should be deference on judicial review:

> [U]nless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.[7]
>
> [Emphasis added.]

[33] The Ontario Court of Appeal considered *Alberta Teachers' Association* in the securities law context in *Rowan v. Ontario Securities Commission* and applied the reasonableness standard of review:

> To decide whether or not Carmichael was under any duty imposed by Ontario securities law to supervise Rowan, the Commission would have to interpret and apply its home statute, regulations, rules and policies. That interpretative exercise would involve careful consideration of how those provisions operate in the complex world of the securities industry. It is difficult to imagine an issue

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[6] *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* 2001 SCC 37, [2001] 2 S.C.R. 132 at para. 49 ["*Asbestos* (SCC)"].

[7] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34.

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that more squarely fell with the province and expertise of the Commission.[8] [Emphasis added.]

[34] It is beyond question that the interpretation of material change under the *Securities Act* and the Commission's discretionary application of its public interest jurisdiction under s. 127 of the *Securities Act* are issues falling within the specialized expertise of the Commission. Thus, as the foregoing authorities make clear, the appropriate standard of review for the issues raised by the appellants is reasonableness.

[35] While the Supreme Court of Canada applied a correctness standard in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*[9], it did so in a context where both the courts and the Copyright Board were engaged in interpreting copyright legislation at first instance. The Court described this as an "unusual statutory scheme". In contrast, in the securities context, the courts have long recognized the special expertise of securities commissions in the regulation of securities markets.

[36] As for the allegation of a denial of procedural fairness, the Court does not apply a standard of review. The question is whether there was a denial of procedural fairness.[10]

## V. WERE THE COMMISSION'S FINDINGS THAT THERE WERE MATERIAL CHANGES WITHIN THE MEANING OF THE *SECURITIES ACT* REASONABLE?

### (A) Overview

[8] *Rowan v Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492 at para 79.
[9] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at para. 15.
[10] *London (City) v. Ayerswood Development Corp.* (2002) 167 O.A.C. 120 at para. 10 (C.A.)

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[37] Section 75 requires forthwith disclosure of material changes to a reporting issuer's business, operations or capital. The appellants both emphasize that s. 75 of the *Securities Act* must be read in light of the entire mandatory disclosure regime. Therefore, before considering their specific grounds of appeal, it will be helpful to review: (1) the importance of public disclosure in the regulation of securities markets; (2) the public disclosure requirements under the *Securities Act*; and (3) the proper approach to the determination of when a material change has occurred.

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**(1) The Importance of Public Disclosure in the Regulation of Securities Markets**

[38] One of the central policies underlying the *Securities Act* and its predecessors is the "protection of the investing public through full, true and plain disclosure of all material facts relating to securities being issued."[11] The importance of public disclosure in securities markets cannot be underestimated. Disclosure is fundamental to the fairness of Ontario's capital markets, and to the protective mandate of the Act. The Commission has repeatedly identified disclosure as the cornerstone of securities regulation:

> Disclosure is the cornerstone principle of securities regulation. All persons investing in securities should have equal access to information that may affect their investment decisions. The Act's focus on public disclosure of material facts in order to achieve market integrity would be meaningless without a requirement that such disclosure be accurate and complete and accessible to investors.[12]
> [Emphasis added]

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[11] *Re Ontario Securities Commission and Brigadoon Scotch Distributors (Canada) Ltd.*, [1970] 3 O.R. 714 (H.C.J.) at p. 717. This language was adopted by the majority in *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 at p. 126.

[12] *Re Philip Services Corp.* (2006), 29 O.S.C.B. 3941 (O.S.C.) at para. 7.

[39] In *British Columbia Securities Commission v. Branch*, the Supreme Court of Canada acknowledged the centrality of disclosure to the regulation of the securities industry:

> [A]lthough activity in the securities sphere is of immense economic value to society generally, it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust. Participants must conform with the extensive regulations and requirements set out by the provincial securities commissions. Many of these requirements are fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic. They are also essential to prevent and deter abuses of such asymmetries of information, and therefore to maintain the integrity of the securities system and protect the public interest.[13]
> [Emphasis added.]

[40] Disclosure also acts to enhance the accountability of corporate management, serves to level the playing field such that all investors have access to the same information upon which to make pricing and investment decisions, and contributes to the efficiency of capital markets by permitting investors to target particular securities. The policy of equal access to information that is reflected in the disclosure requirements under the Act has been characterized as the "most fundamental principle of securities regulation."[14]

[41] However, while disclosure is important "[t]oo much disclosure or information overload can be counter-productive"[15] in terms of enabling investors to make informed choices. As the U.S. Supreme Court noted in *TSC Industries, Inc. v. Northway, Inc.*:

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[13] *British Columbia Securities Commission v. Branch,* [1995] 2 S.C.R. 3 at para. 77.

[14] *Re Cartaway Resources Corp.*, [2000] B.C.S.C.D. No. 92 (B.C.S.C.) at para. 216.

[15] *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 (O.S.C.) at para. 89 ["*YBM Magnex International* (OSC)"].

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> We are aware, however, that the disclosure policy embodied in the proxy regulations is not without limit. … Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good. The potential liability for a Rule 14a-9 violation can be great indeed, and if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information -- a result that is hardly conducive to informed decision making. [16]
> [Emphasis added.]

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Thus, a central tenet of securities law is that disclosure obligations are limited to material matters.

**(2) Public Disclosure Requirements under the *Securities Act***

[42] Extensive information about newly issued common shares is available through a prospectus, which investors rely upon to educate themselves before making investment decisions. A prospectus must provide full, true and plain disclosure of all material facts relating to the securities offered. But this obligation does not extend beyond the date when the prospectus is filed. From the date it is filed through the date of the completion of the distribution, an issuer is not required to disclose new material facts; it is only required to disclose material changes.[17] Once shares are issued under a prospectus, they become freely tradeable and investors may sell their shares in the secondary market without providing the purchaser with a prospectus.[18]

[43] Once a corporation goes public, it becomes subject to the requirements of continuous and timely disclosure set out in the Act and its related instruments, which

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[16] *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438 (1976) at p. 384 ["*TSC Industries*"].

[17] *Securities Act*, ss. 56-57; *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331 at paras. 32, 37 and 43 ["*Kerr v. Danier Leather Inc.*"].

[18] *Re Rex Diamond Mining Corp.* (2008), 31 O.S.C.B. 8337 (OSC) at para. 260 ["*Rex Diamond* (OSC)"].

prescribe different disclosure requirements as between "material changes" and "material facts":

(a) With respect to material changes, s. 75(1) of the Act requires that "where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change." Section 75(2) requires the issuer to file a material change report within ten days of the date on which the material change occurred. This latter ten day filing requirement does not qualify the primary obligation to make public disclosure at once. A s. 75 disclosure obligation is not triggered until a material change has occurred. A finding of intent is not required for a breach of s. 75 of the Act; and

(b) With respect to material facts, there is no free-standing obligation to disclose or discuss material facts or risks on a timely basis. Rather, within a prescribed time after the end of the issuer's fiscal quarters and year end, an issuer must file financial statements in a prescribed form, along with a MD&A[19] in which management must "discuss important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in the future"[20] along with "known trends, demands, commitments, events or uncertainties that are reasonably likely to have an effect on your company's business."[21]

[44] On a continuing basis, investors rely on an issuer's up-to-date public filings in making their investment decisions and, therefore, it is essential that an issuer's public record comply with the disclosure requirements under the Act and provide accurate

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[19] National Instrument 51-102 – Continuous Disclosure Obligations, Parts 4 and 5 (2007) 30 O.S.C.B. (Supp-1) at pp. 42-55.

[20] Form 51-102F1 – Management's Discussion & Analysis Part 1(a) (2007) 30 O.S.C.B. (Supp-1) at p. 81.

[21] Form 51-102F1 – Management's Discussion & Analysis Part 2, Items 1.2 1.4(g) (2007) 30 O.S.C.B. (Supp-1) at pp. 83-84.

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information on a timely basis. The reasonable expectation of shareholders is that a reporting issuer will comply with all of its disclosure obligations.[22]

**(3) The Determination of When a Material Change Has Occurred**

[45] This is the central question in cases under s. 75 of the Act. A "material change" is defined in s. 1.1 of the Act as including:

> [A] change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer.

[46] The first part of the analysis under s. 75 of the Act requires a determination as to whether a change in the "business, operations or capital" of the issuer has occurred and, if so, when. The second part of the analysis requires an assessment of whether the change was material in the sense that it "would reasonably be expected to have a significant effect on market price or value of the securities."

[47] In *Re YBM Magnex International* (OSC), the Commission found that materiality should be assessed objectively from the perspective of an investor and prospectively through the lens of expected market impact:

> The test for materiality in the Act is objective and is one of market impact. An investor wants to know facts that would reasonably be expected to significantly affect the market price or value of the securities. The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities.[23]
> [Emphasis added]

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[22] *Rex Diamond* (OSC) at para. 260.

[23] *YBM Magnex International* (OSC) at para. 91.

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Or as the Commission put it "[t]he materiality standard applicable in this case is an objective test based on reasonable expectation."[24]

[48] The Commission has recognized that the concept of material change involves an exercise of judgment and that "a supercritical interpretation of the meaning of material change does not support the goal of promoting disclosure or protecting the investing public."[25] Thus, a technical interpretation of the language of the Act should not be relied upon to justify non-disclosure of material changes. Importantly, the Commission has recognized that "[i]f the decision is borderline, then the information should be considered material and disclosed."[26]

[49] Assessments of materiality are not to be made against a standard of perfection or with the benefit of hindsight.[27] In *Re AiT Advanced Information Technologies Corp.*, the OSC found that it was unfair to judge the respondents' disclosure decisions on the basis of what subsequently happened:

> Instead, we must objectively assess the facts that were available to the AiT board during the [r]elevant [p]eriod, to determine in all the circumstances whether the three events constituted a material change in the business, operations or capital of AiT that triggered its disclosure obligation under section 75. It is important therefore, to recognize the dangers of hindsight in coming to this conclusion and to be careful not to look at the situation based on what subsequently happened.[28]
> [Emphasis added.]

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[24] Reasons for Decision dated September 28, 2011 at para. 157.
[25] *YBM Magnex International* (OSC) at para. 518.
[26] *YBM Magnex International* (OSC) at para. 518.
[27] *YBM Magnex International* (OSC) at para. 90.
[28] *AiT Advanced Information Technologies Corp.*, 31 O.S.C.B. 712 (OSC) at para. 228 ["*AiT Advanced Technologies*"].

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[50] When a reporting issuer is considering material change disclosure, it must apply an objective test as to the expected market impact as it will not have the benefit of actual market impact information.

[51] Materiality is a highly contextual issue that requires the Commission to apply statutory obligations to a particular company in the context of its industry and the market. No single factor will be determinative of whether a material change occurred:

> Materiality is a question of mixed law and fact, i.e. do the facts satisfy the legal test? Some facts are material on their own. When one or more facts do not appear to be material on their own, materiality must also be considered in light of all the facts available to the persons responsible for the assessment.[29]

[52] In making determinations about materiality, common sense must prevail in assessing the broader factual context, or the "total mix":

> [T]he application of the probability/magnitude test to the investigation by U.S. law enforcement agencies as a discrete event is problematic. In essence, the fact of the investigation was incapable of the application of the probability/magnitude test. Probability could not be determined with perfect certainty. However, this does not mean that a fact cannot meet the test for materiality set out in the Act. One should not lose sight of the forest for the trees by assessing the materiality of individual facts piecemeal when the broader factual context suggests a risk faced by an issuer. Some facts may be material on their own, while others may only be material in the context of other facts. The probability/magnitude test is useful in assessing the occurrence of a future event, but common sense must prevail. The broader factual context, or total mix, must not be

[29] *YBM Magnex International* (OSC) at para 94.

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> overlooked when the risk facing the company is a current one.[30] [Emphasis added.]

[53] Since materiality is highly contextual, there is no "bright line" test to determine whether a material change has occurred. That assessment depends on particular circumstances and events. National Policy 51-201, the relevant Commission policy statement, which gives non-binding guidance to reporting issuers such as Coventree, states under the heading "Materiality Determinations" that many different factors should be taken into account, including the size of the company, the nature of its operations, the volatility of the company's securities, and prevailing market conditions.[31] Accordingly, a single factor such as share price movement will not conclusively determine whether a material change has occurred.

[54] A disclosure obligation arises when the material change actually occurs and, if the financial impact is experienced at a later date, the disclosure obligation is not delayed to that later date. This concept was made clear in the decision of the Supreme Court of Canada in *Kerr v. Danier Leather*:

> It almost goes without saying that poor intra-quarterly results may reflect a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves.[32] [Emphasis added.]

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[30] *YBM Magnex International* (OSC) at para. 101. The probability/magnitude test analyses the current value of information as it affects the price of securities discounted by the chances of it occurring.

[31] *AiT Advanced Technologies* (OSC) at paras. 214-215; National Policy 51-201, (12 July 2002), 25 O.S.C.B. 4492 at p. 4499.

[32] *Kerr v. Danier Leather Inc.* at para. 47.

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[55] In addition, the determination of whether a material change has occurred does not require deference to the business judgment of management. On the contrary, the "disclosure requirements under the [Securities] Act are not to be subordinated to the exercise of business judgment".[33] Mandatory disclosure cannot be avoided in circumstances where senior management or directors of a company believed or hoped that things would change. In *Rex Diamond Mining Corp. v. Ontario (Securities Commission)*, this Court confirmed that the test for the determination of material change is objective, and does not depend on the subjective assessment or optimistic personal views of company executives.[34]

[56] The determination of whether a material change has occurred may be assisted by evidence of price and volume fluctuations for a reporting issuer's shares. Thus, in *Rex Diamond*, where the issuer disclosed the material change at a later date by way of news release rather than disclosing it forthwith as required by the Act, there was evidence of share price and volume fluctuations following the disclosure. Additionally, there were accurate rumours in the market before Rex Diamond ultimately disclosed the information, and the share price and volume experienced abnormal fluctuations during that period. The Commission found that both of these market reactions demonstrated that the information was important to the investing public and therefore material.

[57] However, the Commission does not always need evidence of effect on market price to find a material change. As Iacobucci J. stated for a unanimous court in *Pezim*:

> As already mentioned, the present case turns partly on the definition of "material change". … Thus, not all changes are material changes; the latter are set in the context of making sure that issuers keep investors up to date. Consequently, it would seem wholly uncontroversial that the determination of what information should be disclosed is an issue which goes to the heart of the regulatory expertise and mandate of the

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[33] *Kerr v. Danier Leather Inc.* at paras. 54-55; *AiT Advanced Technologies* (OSC) at para. 228; *Rex Diamond* (OSC) at para. 238.

[34] *Rex Diamond Mining Corp. v. Ontario (Securities Commission)*, 2010 ONSC 3926, [2010] O.J. No. 3422 (Div. Ct.) at para. 6 ["*Rex Diamond* (Div. Ct.)"].

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> Commission, i.e., regulating the securities markets in the public's interest.[35]
> [Emphasis added.]

[58] Thus, no issue can be taken with the Commission's statement in this case that "[d]etermining questions such as whether a fact is a material fact, whether a material change has occurred, the effect of events or developments on the market price or value of securities and the adequacy of disclosure made, are matters squarely within our expertise as a specialized tribunal."[36] The Commission has repeatedly held that, as an expert tribunal, it does not require evidence from experts or investors in order to determine questions of disclosure and materiality. Thus, "such opinion or evidence may be relevant or useful but is not necessary."[37]

[59] Not only is such evidence not necessary, but it may not always be of assistance in a materiality analysis. There are at least three reasons why evidence of historical price and volume fluctuations for a reporting issuer's shares may not always be of assistance in this regard. First, if the reporting issuer is a new issuer, or if the issuer has never disclosed the same type of material change in the past, there may not be any relevant trading data to refer to for the purpose of determining how the market might react to a particular type of information. Second, where disclosure of the material change is limited or not made at all, a review of the market price and trading volume may not assist in the analysis of materiality. Third, if the material change is disclosed by the issuer along with other information, the market reaction to the combined disclosure may not be a reliable indicator of the market impact of the disclosure of one particular piece of information in isolation.

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[35] *Pezim* at para. 82. Similarly, this Court recognized in *Rex Diamond* (Div. Ct.), at para. 3 that "whether a material change has occurred is a matter that is central to the expertise of the Commission."

[36] Reasons for Decision dated September 28, 2011 at para. 157.

[37] *Re Biovail Corporation* (2010), 33 O.S.C.B. 8914 (OSC) at para. 80 ["*Re Biovail* (OSC)"]; *Re Magna International Inc.* (2010), 33 O.S.C.B. 6013 (OSC) at para. 40.

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**(B) Were the Commission's Findings That There Were Material Changes within the Meaning of s. 1 of the *Securities Act* Reasonable?**

**(1) Did the Commission err in Applying the "Reasonable Investor Test" to Determine Materiality Instead of the Statutorily Mandated "Market Impact Test"?**

[60] The appellants submit that the Commission erred by applying the wrong test in assessing whether a material change occurred. Rather than determining whether a change in the business, operations or capital of Coventree had occurred which was material, in that it "would reasonably be expected to have a significant effect on the market price or value" of Coventree's shares (the "market impact" test), the Commission's fundamental consideration was whether there was something not disclosed that "would be important to a reasonable investor in making an investment decision" (the "reasonable investor" test). The appellants submit in so doing the Commission made "exactly the error that it warned against making in its prior decision in *Re Biovail*."[38]

[61] In this regard, the appellants note that the Commission made repeated reference to the "reasonable investor" or the "reasonable shareholder". With respect to the DBRS January Release, the appellants object to the following references to the "reasonable investor" or the "reasonable shareholder" by the Commission in reaching its conclusion:

> As we have concluded above, the DBRS January Release gave rise to a change in Coventree's business.
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> …
>
> In our view, a reasonable shareholder or investor would consider Coventree's inability to carry out any future CDO related SFA

[38] *Re Biovail* (OSC). On this point, it is interesting to note that two of three Commission members in this case were also on the panel in *Re Biovail*.

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> transactions important information in making an investment decision with respect to Coventree shares. It is only common sense that a shareholder or investor would want to know that Coventree was unable to carry on in the future business that represented 40% of conduit assets.
>
> Accordingly, in our view, the DBRS January Release constituted a change in Coventree's business that would reasonably be expected to have had a significant effect on the market price or value of Coventree shares within the meaning of the term "material change" in the Act.
>
> …
>
> Further, by April 25, 2007, Coventree knew that DBRS was applying the DBRS January Release to all credit arbitrage transactions, not just CDO related SFA transactions...In our view, a reasonable shareholder or investor would consider Coventree's inability to carry out any future credit arbitrage transactions important information in making an investment decision with respect to Coventree shares.[39]
>
> [Emphasis added.]

[62] Similarly, with respect to the events of August 1, 2007, the appellants object to the following references:

> We would add that the test to determine materiality is whether any of the events and developments referred to in paragraph 590 of these reasons, considered separately or together, would reasonably be expected to have had a significant effect on the market price or value of Coventree shares. Clearly, an event or development that would have that effect would be important to a reasonable shareholder or investor in making an investment decision with respect to Coventree shares. It is clear to us that if Coventree had informed a reasonable shareholder or investor of [the enumerated] facts […] that shareholder or investor would have considered that information critically important in making an investment decision with respect to Coventree shares. That means, in our view, that those events and developments would reasonably be expected to have

[39] Reasons for Decision dated September 28, 2011 at paras. 335-338.

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> had a significant effect on the market price or value of Coventree shares. That is the common sense conclusion in all of these circumstances.[40] [Emphasis added.]

[63] The reasonable investor test was articulated in *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (1976). This case dealt with a proxy solicitation said to have omitted material facts contrary to § 14(a) of the *Securities Exchange Act of 1934*. The Court of Appeals had defined material facts as "all facts which a reasonable shareholder might consider important." [Emphasis added.] The Supreme Court rejected this standard as being too low as it would include facts that, although unlikely to do so, could possibly affect shareholder decisions. Rather the proper test for materiality was:

> [A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. … It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[41]
> [Emphasis added.]

[64] The appellants argue that it is an error to consider something that would be important to a reasonable investor as equal to, or as a substitute for, something that would reasonably be expected to have had a significant effect on price or value. The reasonable investor test is an overly broad test for materiality as it includes matters that may be important to an investor in making investment decisions which do not have a significant effect on the market price or value of securities of an issuer. Thus, the appellants submit the Commission erred when it concluded that a finding that facts

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[40] Reasons for Decision dated September 28, 2011 at para. 596.

[41] *TSC Industries Inc.* at p. 449.

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would be important to a shareholder or investor was equivalent to, or would necessarily result in, a significant impact on share price or value.

**(a) Did the Commission Use the "Reasonable Investor" Test Rather than the "Market Impact" Test?**

[65] The short answer to the appellants' complaint is that the Commission clearly recognized and applied the statutory market impact test for materiality. The Commission made repeated references to the proper test, including the following:

> In considering Staff's allegations and in determining materiality for purposes of this proceeding, the principal question we must address is what effect certain facts, events or developments would reasonably be expected to have had on the market price or value of Coventree shares.
>
> …
>
> Accordingly, in order for a "material change" to have occurred, there must be "a change in the business, operations or capital" of the issuer and that change must reasonably be expected to have a significant effect on the market price or value of the relevant securities. The latter element of that definition is the same objective test for materiality contained in the definition of "material fact".
>
> …
>
> The standard of materiality for both a material fact and material change is the same. A fact or change is considered to be material if it "would reasonably be expected to have a significant effect on the market price or value" of an issuer's securities. When we refer to "materiality" in these reasons, we are referring to the application of that test. Clearly, such a fact or change would be important to a reasonable investor in making an

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> investment decision with respect to the relevant securities.[42]
> [Emphasis added]

[66] The Commission did not only refer to the market impact test in its general discussion of the relevant law; it also specifically applied the test to its analysis of all four particulars, both those found to be substantiated and those that were not.

[67] The first particular alleged that Coventree had violated s. 56 of the Act and failed to make full, true and plain disclosure in the Prospectus by failing to disclose the fact that DBRS had written a letter to it in November 2006 adopting a more restrictive credit rating criteria for ABCP. The Commission concluded that the DBRS November Letter was not a material fact and, given the uncertainty about its meaning and application, it was difficult to assess the letter's impact on Coventree and its business. Most important for the present purposes, the Commission concluded:

> One way of asking whether the DBRS November Letter was a material fact is to ask whether, if disclosure of the DBRS November Letter had been made in the Prospectus, that disclosure would have significantly affected the price investors would have paid to purchase Coventree shares under the Prospectus. We consider that unlikely.
>
> Based on the foregoing, we have concluded, on balance, that the DBRS November Letter would not reasonably be expected to have had a significant effect on the market price or value of Coventree shares. Accordingly, the DBRS November Letter did not constitute a "material fact" at the date of the Prospectus within the meaning of the Act. We therefore find that Coventree did not contravene section 56 of the Act by failing to disclose the DBRS November Letter in the Prospectus.[43]
> [Emphasis added.]

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[42] Reasons for Decision dated September 28, 2011 at paras. 21, 139, 149.
[43] Reasons for Decision dated September 28, 2011 at paras. 214-215.

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[68] The second particular alleged that Coventree had violated s. 75 of the Act by failing to issue and file a news release, and file a material change report, disclosing that DBRS's decision in January 2007 to change its credit rating methodology resulted in a material change in Coventree's business or operations. In concluding that Coventree had contravened ss. 75(1) and 75(2) of the Act the Commission wrote:

> Cornish testified that approximately 40% of the assets of Coventree and Nereus sponsored conduits were attributable at the time to traditional securitizations, approximately 20% of assets were attributable to credit arbitrage transactions that did not involve CDOs and approximately 40% of conduit assets were attributable to CDO related SFA transactions. In our view, a reasonable shareholder or investor would consider Coventree's inability to carry out any future CDO related SFA transactions important information in making an investment decision with respect to Coventree shares. It is only common sense that a shareholder or investor would want to know that Coventree was unable to carry on in the future a business that represented 40% of conduit assets.
>
> Accordingly, in our view, the DBRS January Release constituted a change in Coventree's business that would reasonably be expected to have had a significant effect on the market price or value of Coventree shares within the meaning of the term "material change" in the Act. As a result, we conclude that Coventree was obligated to disclose that material change in accordance with section 75 of the Act on January 22, 2007, the day that Coventree confirmed with DBRS that the DBRS January Release required global style liquidity for CDO related SFA transactions.[44]
> [Emphasis added.]

[69] In dealing with this particular, the Commission also addressed the argument made by Coventree that the DBRS January release could not have constituted a material change because there was no change in the market price of its shares as a result of the

[44] Reasons for Decision dated September 28, 2011 at paras. 336-337.

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disclosure in its Q2 MD&A, which addressed the effect of the DBRS January Release on its credit arbitrage business. The Commission had a number of responses to this submission including the following reiteration of the market impact test:

> The legal question we are addressing is whether the DBRS January Release would reasonably be expected to have had a significant effect on the "market price or value" of Coventree shares. That is applying an objective test that focuses on both the market price and value of Coventree shares. Clearly, if disclosure when made actually has a significant effect on the market price of securities, that is strong evidence suggesting that the test for materiality may have been satisfied at an earlier time. One cannot assume, however, that the lack of impact on market price means that the information disclosed was not material. There may be a number of different explanations why particular disclosure has no market impact (such as those referred to in paragraphs 348 to 351 of these reasons). In any event, one must also consider whether particular information would reasonably be expected to have a significant effect on the "value" of securities even if that disclosure would not, for some reason, be expected to affect the market price of the securities. We find in these circumstances that the DBRS January Release would reasonably be expected to have had a significant effect on the value of Coventree shares.[45]
> [Emphasis added.]

[70] The third particular alleged that Coventree had violated s. 126.2(1) of the Act by making a statement that was misleading "in a material respect" and would reasonably be expected to have a significant effect on the market price or value of a security.[46] This

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[45] Reasons for Decision dated September 28, 2011 at para. 354.

[46] The phrase "in a material respect" is not defined in the Act. In the context of s. 122(1) of the Act, the Commission said in *Re Biovail* that "the meaning of the words 'in a material respect' is contextual and will vary depending on the nature of the document in which the statement is made, the nature of the statement itself and the circumstances in which the statement is made" (para. 75). While s. 122 does not require an assessment of market impact, this is expressly required by s. 126.2(1)(b) of the Act. The appellants concede that the Commission properly applied the market impact test here.

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related to presentations by Coventree to investors which suggested that the total U.S. subprime mortgage exposure of its sponsored conduits was 7.4% and did not provide investors with a breakdown of that exposure by conduit and ABCP note series. While the Commission found that the subprime statement was misleading, it did not find a violation of s. 126.2(1) of the Act saying:

> The foregoing analysis is relevant to determining whether an accurate subprime statement would have been important to any ABCP investors. However, the question we must determine is whether the subprime statement itself would reasonably be expected to have had a significant effect on the market price or value of any Coventree sponsored ABCP. That statement was to the effect that the total subprime exposure of Coventree sponsored conduits was 7.4%. Even if that statement was misleading (as we have found), we do not believe that the making of that statement would reasonably be expected to have had a significant effect on the market price or value of any Coventree sponsored ABCP (within the meaning of clause (b) of subsection 126.2(1) of the Act). That is to say that subsection 126.2(1) of the Act does not apply to misleading statements that have no impact or effect on the market price or value of a security. The making of a misleading statement may have other regulatory consequences, but it does not contravene subsection 126.2(1) of the Act.
>
> Accordingly, we find that the subprime statement made by Coventree in the April Investor Presentations, in the circumstances in which that statement was made on April 25 and 26, 2007, would not reasonably be expected to have had a significant effect on the market price or value of any Coventree sponsored ABCP. As a result, we find that the requirements of clause (b) of subsection 126.2(1) of the Act have not been established by Staff and that, accordingly, Coventree did not contravene

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> subsection 126.2(1) of the Act by making the subprime statement.[47] [Emphasis added.]

[71] The fourth particular alleged that Coventree had violated s. 75 of the Act by failing to issue and file a news release, and file a material change report, disclosing liquidity and liquidity-related events and the risk of a market disruption in the days leading up to the disruption in the ABCP market that occurred on August 13, 2007. In concluding that Coventree had contravened ss. 75(1) and 75(2) of the Act the Commission wrote:

> In our view, the events and developments referred to in clause (i) of paragraph 590 of these reasons constituted changes in Coventree's business or operations that would reasonably be expected to have had a significant effect on the market price or value of Coventree shares. Those events and developments therefore constituted a "material change" with respect to Coventree, within the meaning of section 75 of the Act, that occurred by the close of business on August 1, 2007.
>
> Further and in any event, the events and developments referred to in clauses (i) to (v) inclusive of paragraph 590 of these reasons, taken together, constituted changes in Coventree's business or operations that would reasonably be expected to have had a significant effect on the market price or value of Coventree shares. Those events and developments therefore constituted a "material change" with respect to Coventree within the meaning of section 75 of the Act, that occurred by the close of business on August 1, 2007.
>
> As a result of our conclusions in paragraphs 593 and 594 of these reasons, Coventree was required to forthwith issue a news release on August 2, 2007, and to file a material change report as soon as practicable and in any

[47] Reasons for Decision dated September 28, 2011 at paras. 401- 402.

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event within 10 days following that date. Coventree failed to do so. Coventree thereby breached subsections 75(1) and (2) of the Act.

We would add that the test to determine materiality is whether any of the events and developments referred to in paragraph 590 of these reasons, considered separately or together, would reasonably be expected to have had a significant effect on the market price or value of Coventree shares. Clearly, an event or development that would have that effect would be important to a reasonable shareholder or investor in making an investment decision with respect to Coventree shares. It is clear to us that if Coventree had informed a reasonable shareholder or investor of the facts that:

(a) its conduits were unable to carry out any new securitization transactions, whether traditional securitizations or credit arbitrage transactions;

(b) its conduits were unable to purchase assets from Coventree's traditional asset originators;

(c) its credit arbitrage business, which until very recently had represented approximately 80% of its revenues, was viewed by Coventree as dead or dying;

(d) the business of its wholly-owned subsidiary, Nereus, was no longer viable;

(e) its conduits were unable to issue any new ABCP for any purpose including for buying back maturing ABCP or funding possible collateral calls;

(f) its conduits were having increasing difficulty rolling their maturing ABCP and were doing so only with the reluctant market support of the Caisse de Dépôt et Placement du Quebec (the "Caisse") in rolling its holdings of Coventree sponsored ABCP;

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(g) interest rate spreads on Coventree sponsored ABCP had widened to an unprecedented level;

(h) its conduits were "perched on" collateral call triggers;

(i) its conduits were selling assets worth millions of dollars to accumulate cash to fund possible collateral calls;

(j) there was a very substantial supply/demand imbalance in the ABCP market (see paragraph 598 below); and

(k) Coventree had no way of knowing if or when market conditions would return to normal;

that shareholder or investor would have considered that information critically important in making an investment decision with respect to Coventree shares. That means, in our view, that those events and developments would reasonably be expected to have had a significant effect on the market price or value of Coventree shares. That is the common sense conclusion in all of the circumstances.[48]
[Emphasis added.]

[72] The appellants' submission that the Commission used the wrong test for materiality is based on a few paragraphs of the Commission's reasons read in isolation from the Commission's factual findings and the Commission's thorough analysis of the materiality issue. But, as this Court made clear in *Rowan v. Ontario Securities Commission*, this is not the correct approach:

> The appellant points to para. 161 of the Penalty Reasons as indicating that the Commission erred by referring to all the misconduct of Mr. Rowan as being a failure to comply with Ontario securities law. I agree that if this paragraph is looked at in isolation, that would be a reasonable interpretation of it. However, the Penalty Decision is 51 pages long. It is not reasonable to take one paragraph out of context and disregard

[48] Reasons for Decision dated September 28, 2011 at paras. 593-596.

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> everything that came before it. Paragraph 161 is merely a summary of findings previously made. Looked at in context and in light of what preceded it, it is abundantly clear that the Commission was fully aware that the only findings that amounted to a breach of Ontario security law were those with respect to s. 107.[49]
> [Emphasis added]

Rather than parsing a few sentences, taken alone, the Commission's reasons must be read as a whole and in context. When this is done, it is abundantly clear that, throughout its reasons, the Commission analyzed materiality in terms of the market impact test as required by the definition of a material change in s. 1.1. of the Act.

**(b) The Commission's References to the "Reasonable Investor" or "Reasonable Shareholder"**

[73] It is certainly true that the reasonable investor test sets a lower threshold for materiality than does the market impact test. This is precisely because the reasonable investor test does not require a reasonable expectation of "a significant effect on the market price or value of securities." Thus, as explained in V. Alboini in his text, *Securities Law and Practice*, 2nd ed.:

> The effect of focussing on price or value of the securities as the appropriate test may be to exclude, as material changes, matters that may influence, and may therefore be material to, an investor in making decisions but do not have the probable effect of significantly altering market price or value of any securities of the issuer.[50]

[74] The interrelationship between the two tests was described well in *Re Biovail* at para. 73:

> [I]f a statement would reasonably be expected to have a significant effect on the market price or value of a security, then that statement would clearly be important to an investor in making an investment decision.

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[49] *Rowan v. Ontario Securities Commission*, 2010 ONSC 7029, 103 O.R. (3d) 484 (Div. Ct.) at para. 20.
[50] V. Alboini, *Securities Law and Practice*, 2nd ed. (Toronto: Carswell, 1984), at p. 18-14.

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> However, it does not necessarily follow that a statement that is important to an investor in making an investment decision would reasonably be expected to have a significant effect on the market price or value of a security.[51]
> [Emphasis added.]

[75] Therefore, the concern with using the reasonable investor test rather than the market impact test is that it could broaden the definition of materiality to include matters that may be important to an investor in making investment decisions, but that would not reasonably be expected to have a significant effect on the market price or value of an issuer's securities.

[76] However, it is clear that the Commission made no such error. Contrary to the submissions of the appellants, the Commission did not rely on factors that, while possibly important to investors, could not reasonably be expected to affect the market. Rather it focussed on significant changes that would have an impact on the market precisely because such changes would be so obviously important in influencing the decisions made by investors.

[77] With respect to the DBRS January Release, the Commission focussed on the fact that: (1) it, in effect, prevented Coventree from carrying out any future collateralized debt obligation ("CDO"[52]) related structured financial asset transactions ("SFA transactions);[53] and (2) by April 25, 2007, Coventree knew that DBRS was applying the DBRS January Release to all credit arbitrage transactions, not just CDO related SFA transactions, preventing it from carrying out any future credit arbitrage transactions. The Commission correctly found that these changes would be important information to investors. What the Commission did not say explicitly, but is obvious from their

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[51] *Re Biovail* (OSC) at para. 73.

[52] A CDO is a form of credit arbitrage transaction where diversified debt instruments are owned by a special purpose entity referred to as a CDO trust. The CDO trust issues different tranches of securities, backed by the debt instruments. The different tranches have different risk profiles. Coventree sponsored conduits generally invested in AAA tranches of CDOs. CDOs may be cash CDOs or synthetic CDOs.

[53] An SFA transaction is a term typically used by DBRS to refer to credit arbitrage transactions. Cornish testified that SFA transactions include all credit arbitrage transactions, but not all SFA transactions are credit arbitrage transactions. A CDO related SFA transaction is an SFA transaction involving a CDO.

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reasons, is that this information was significantly negative in terms of Coventree's ability to carry on its business in the future. This is why disclosure of this information would not only influence investor decisions but would also reasonably be expected to have had a significant effect on the market price or value of Coventree shares. In other words, because investors could reasonably be expected to react negatively to this information, the market impact test was satisfied.

[78] With respect to the liquidity events of August 1, 2007, it is entirely unobjectionable that the Commission observed that events that would reasonably be expected to have had a significant effect on the market price or value of Coventree shares would be of interest to the reasonable shareholder or investor. This relationship had been explicitly recognized at para. 73 of *Re Biovail*. As for its other references to the reasonable investor, the Commission was merely engaging in the same analysis as it had applied to the DBRS January release. It listed 11 developments that it reasonably found to be important to investors. While the Commission did not explicitly say so, all of these factors were significantly negative in terms of Coventree's ability to carry on its business in the future. Here again, because investors could reasonably be expected to react negatively to this information, the disclosure of this information would reasonably be expected to have had a significant effect on the market price or value of Coventree shares.

[79] In conclusion, there is nothing objectionable to the foregoing references to the reasonable investor or shareholder. They simply reflect the reality that the market impact test subsumes the perspective of the reasonable investor.[54] That is, the determination of whether the disclosure of information would reasonably be expected to have a significant effect on the market price or value of a security turns on whether or not it can be reasonably expected to affect the investment decisions of reasonable investors or shareholders. Recognizing this connection does not, in any way, dilute the market impact test. Thus, it was reasonable and appropriate for the Commission to consider whether a change would constitute "important information" to reasonable

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[54] This is reflected in 4.1 of the National Policy 51-201 Disclosure Standards which says, referring to the market impact test and the reasonable investor test, "[d]espite these differences, the two materiality standards are likely to converge, for practical purposes, in most cases."

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investors in determining whether the change would reasonably be expected to have a significant effect on the market price or value of the issuer's securities.

### (2) Did the Commission Err in Finding That There Was a Material Change in the Absence of Any Evidence Capable of Supporting that Finding?

[80] The appellants rely on *Sharbern Holdings Inc. v. Vancouver Centre Ltd.*,[55] a case decided after the release of the decision in this case. They submit that *Sharbern* makes it clear how a trier of fact must assess materiality. *Sharbern* underscores that assessing materiality is a fact-specific inquiry and involves the application of a legal standard to a given set of facts. It holds that the burden of proving those facts lies with the party alleging materiality. It requires that, except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.

[81] The appellants submit that, without the benefit of *Sharbern*, the Commission erred in basing its findings of contraventions of the Act on speculation rather than on evidence and by relying on its expertise in the place of evidence. They reject the suggestion that it was a common sense inference that the DBRS January Release and the events leading up to August 1 would reasonably be expected to have a significant impact on market price or value. They point out that not only was there no evidence led to support this inference but, in fact, there was evidence to the contrary.[56]

[82] The appellants note that the Staff tendered no evidence regarding the volatility of Coventree's securities or prevailing market conditions. Staff also did not lead any evidence regarding how Coventree's shares were priced or valued by investors or the

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[55] *Sharbern Holdings Inc. v. Vancouver Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 ["*Sharbern Holding*"].

[56] The appellants point to the testimony of a Staff investigator, Christine George, who testified that she was simply unable to say whether disclosure would have had a significant effect on the market price of Coventree's shares, or whether investors would have perceived the disclosure as good news or bad news. However, in rejecting a motion by the appellants and Coventree to exclude Staff investigators as witnesses, the Commission made it clear that the investigators would not be testifying as expert witnesses. Therefore, Ms. George's testimony on this point was inadmissible and entitled to no weight.

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market in the first place, so it offered no basis for comparison of the price of value of the shares after the alleged material events. The appellants submit that the approach taken by the Commission was tantamount to taking judicial notice of a contested fact that should be proven through expert opinion or other evidence. In this regard, counsel for Tai relies on the decision of the British Columbia Court of Appeal in *Re Cartaway Resources Corporation* for the proposition that, while a specialized tribunal may use its expertise to draw inferences from the facts before it, this does not stop a reviewing court from determining whether a factual foundation existed from which to draw those inferences.[57]

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[83] The appellants argue that the Commission's use of a "common sense" inference was particularly improper since there was evidence that, in fact, the DBRS January release and the events of August 1, 2007 had no effect on the market price of Coventree's shares. They submit that it is an error for the Commission to speculate that there might be "other explanations" why this might be so, in the absence of any evidence of such other reasons. The effect of the Commission's reasoning was to shift the burden onto Coventree to disprove the Commission's speculation that there might be "other explanations" as to why this was so. The appellants submit it is a palpable and overriding error to come to a "common sense" conclusion of a market impact where the only evidence is that the disclosure had no impact on share price.

**(a) Was There an Evidentiary Basis for the Finding of Material Changes?**

[84] As mentioned above, the Commission stated that "[d]etermining questions such as whether a fact is a material fact, whether a material change has occurred, the effect of events or developments on the market price or value of securities and the adequacy of disclosure made, are matters squarely within our expertise as a specialized tribunal."[58] There is nothing novel about this proposition. The question in this case is whether the inferences drawn by the Commission were reasonable "bearing in mind that this

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[57] *Re Cartaway Resources Corp.*, 2002 BCCA 461, 218 D.L.R. (4th) 461 at paras. 22-24, rev'd on other grounds 2004 SCC 26, [2004] 1 SCR 672.

[58] Reasons for Decision dated September 28, 2011 at para. 157.

particular tribunal has special expertise in drawing inferences as to conduct in the securities marketplace."[59]

[85] The appellants suggest that, in using a common sense approach when determining whether a change is material, the Commission based its findings on speculation rather than evidence. This is incorrect and ignores the fact that the Commission based its decision on an evidentiary framework that included: detailed evidence of Coventree's business and operations; detailed evidence of market conditions for Coventree's ABCP product; Coventree's description of itself in its publicly filed disclosure documents; Coventree's historical share price; and the prevailing ABCP market conditions. In particular, the Commission had the following evidence before it:

**(i) Evidence Re the Materiality of the DBRS January Release**

[86] The evidence before the Commission about the significance of the DBRS January release in terms of Coventree's business included the following:

> (1) New Requirement for Global Style Liquidity The DBRS January Release was a statement that general market disruption liquidity, which backed Coventree-sponsored ABCP, would no longer be acceptable, and that global style liquidity would now be required for Coventree-sponsored ABCP. The appellants knew that Coventree could not obtain global style liquidity for its sponsored conduits. Tai swore an affidavit on March 1, 2007 stating that, "I know of no liquidity providers that are prepared to offer liquidity for credit arbitrage transactions on the terms required by DBRS." In a similar vein, Cornish wrote in a May 4, 2007 email that "DBRS has changed the rules for CDOs that will make it very unlikely, if not impossible, to do more CDOs in our conduits";

[59] *Johnson v. British Columbia (Securities Commission)*, 2002 BCCA 461, 218 D.L.R. (4th) 470 at para. 23. While these comments were directed to the B.C. Securities Commission they are equally applicable here.

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(2) The End of ECP The DBRS January Release also brought an end to a particular type of Coventree-sponsored ABCP – E Notes (which were also known as extendible notes or ECP). The maturity date of E Notes would extend if a general market disruption occurred. Coventree sponsored conduits had $8.5 billion in E Notes outstanding, representing 57 percent of all extendible ABCP in the market. In an ABCP presentation in April 2007, Coventree acknowledged that the DBRS January Release "rules out the use of ECP to fund SFA transactions".

(3) Review of Non-CDO-Related SFA Transactions The DBRS January Release also stated that non-CDO-related SFA transactions would be reviewed on a case-by-case basis by DBRS. Non-CDO-related SFA transactions were bonds that did not use CDO structures and comprised approximately 20-percent of Coventree's conduit assets.

[87] Thus, it was entirely reasonable and not speculative for the Commission to conclude that the DBRS January Release, which ended Coventree's ability to do any new CDO and LSS transactions, constituted a significant change in Coventree's business.

[88] In terms of the materiality of the foregoing changes, the Commission had evidence obtained from Coventree's public disclosure in February through April 2007 of the impact of the DBRS January Release on its business, including:

(1) Coventree's 2006 Annual Report that was publicly filed on February 14, 2007 contained a Letter to Owners that stated, in part, as follows:

> Also, the size of the Canadian ABCP market has expanded rapidly over the past two years, with growth largely being attributed to the contemporaneous proliferation of credit-arbitrage-type transactions. As a result, Dominion Bond Rating Service Ltd. ("DBRS"), the current sole provider of rating-agency services for asset-backed commercial paper conduits, is changing their ratings methodology to become more rigid and less accommodating. This could have a negative impact on Coventree's business, but likely will have a more serious effect on our majority-owned subsidiary Nereus, given that it is less diversified than Coventree. The change in ratings methodology will not affect any

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> existing transactions and thus will not alter our immediate financial results, but it will likely influence future growth prospects. (p.3)
>
> The one issue we would like to address here is that DBRS is increasingly concerned about the rapid growth in credit-arbitrage transactions, which now represent approximately 30% of the Canadian ABCP market. DBRS recently issued a letter stating that they are going to dramatically increase the criteria required to execute credit-arbitrage transactions. As we have discussed in previous letters, the leveraged super senior "arbitrage" transactions are finally going away as many new participants have entered the market to eliminate the arbitrage. [Emphasis added.];

(2) The testimony of David Allan, the head of Coventree's Capital Markets Group as of January 22, 2007, who testified that prior to the DBRS January Release, DBRS had tried unsuccessfully to slow the credit arbitrage market, but, each time, the bicycle kept on rolling. Then, in January, in Allan's words, DBRS said "... okay. Here comes the steel pipe through [the spokes]. You've got to have global style liquidity in order to do these transactions. And that stopped the bike dead in its tracks". In an ABCP Investor Presentation given in April 2007, Allan included a drawing of a bicycle with a pole going into the spokes of its wheel. Allan clarified that the bicycle was the credit arbitrage market;

(3) Coventree's Q2 MD&A publicly filed on May 14, 2007 which stated:

> [I]n January 2007, DBRS announced new criteria relating to transactions involving the purchase of structured credit products by Canadian ABCP conduits. The Company's view is that it will be very difficult, if not impossible, to satisfy these new criteria. As a result, these changes will have the effect of reducing the profitability of the Company by substantially curtailing its ability to grow, if not halt in the short-term, its credit arbitrage business.
> [Emphasis added.]; and

(4) An email from Jane Mowat, a Coventree director who testified at the hearing. Ms. Mowat emailed the appellants a few days after the above-

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noted MD&A disclosure and commented on the impact of the DBRS January Release on Coventree: "The recent DBRS changes have had a significant impact to the business and the MDA [sic] while stating this does need to make this plainer as well."

**(ii) Evidence Re the Materiality of the August 1, 2007 Liquidity Events**

[89] With respect to the August 1, 2007 liquidity events, the Commission found that five changes in Coventree's business or operations had occurred by the close of business on August 1, 2007. Those changes were:

(1) The Inability to Issue New ABCP The Commission had ample evidence to conclude that Coventree could not issue new ABCP. The Commission found that on July 30, 2007, Coventree could not fund the purchase of mortgages from Xceed Mortgage Corp. ("Xceed"), one of its important regular securitization assets providers. At the time, Coventree advised Xceed that the reason for the delay was "turbulent market conditions", a reason that had never before resulted in a delay of a transaction. The Commission found that Coventree's conduits were unable to carry out any new securitization transactions of any type. The inability to issue new ABCP also meant that Coventree could not carry out any new securitization transactions through its conduits and could not purchase any additional assets from its assets providers. Revenue from securitization activities represented 90 percent of Coventree's revenues.

(2) Difficulty Rolling Outstanding ABCP By August 1, 2007, Coventree-sponsored conduits were having difficulties rolling outstanding ABCP because of a lack of liquidity in the market. The dealers who sold Coventree's ABCP told Coventree they were finding it difficult to roll Coventree's ABCP because of specific market concerns related to Coventree's E notes and its notes with high U.S. subprime exposure. The dealers also reported that they were seeing a "flight to quality"; i.e. a movement away from Coventree ABCP towards bank sponsored ABCP that was viewed as a safer investment. The Commission found that a substantial amount of ABCP was being rolled on an overnight basis (reflecting an investment in ABCP for 1 day, instead of the usual 30 to 90 days), which resulted in an increase in the amount maturing on each subsequent day.

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This constituted a significant change in Coventree's business and operations. The Commission also found that Coventree knew that its single largest ABCP investor, the Caisse, wanted to reduce its holdings of Coventree-sponsored ABCP and its overall exposure to the ABCP market. This affected the ABCP market as a whole, but Coventree in particular.

(3) ABCP Spread Widening ABCP was sold as a very safe short-term investment and historically was issued at small interest rate increment or spread over the benchmark Canadian Depository Offering Rate (CDOR). The Commission found that there was a very substantial widening of interest rate spreads for Coventree-sponsored ABCP on August 1, 2007, meaning that the interest rate payable by Coventree's conduits on the ABCP that they were issuing was significantly increasing. Spread widening has a direct effect on the economics and viability of Coventree's securitization business because the business relies on the difference between the cost of funds and the returns on conduit assets.

Coventree was actively involved in setting the spreads which were offered on its ABCP. The Commission further found that Coventree considered this spread widening to be unprecedented and a reflection of a very significant change in the level of liquidity available in the market. Spreads on Coventree-sponsored ABCP relative to bank-sponsored ABCP had also widened dramatically, meaning that Coventree-sponsored ABCP was the less attractive investment.

Spread widening affected Coventree's revenues and net income as ABCP matured and was rolled into ABCP that paid higher interest rates. The Commission reasoned that the immediate financial impact of spread widening was only one quantitative consideration in assessing the materiality of spread widening. The qualitative impact of spread widening on Coventree's business also had to be considered as "any substantial increase in interest rate spreads could affect the viability of Coventree's business."

(4) Credit Default Swap Spread Widening In the relevant timeframe, there was also spread widening with respect to credit default swap contracts, which were derivative contracts used to hedge the risk of default in a reference portfolio of assets. Coventree sponsored conduits were credit protection sellers under such swaps and spread widening meant that Coventree sponsored conduits were close to triggers that would require them to post additional collateral for certain

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LSS transactions. The Commission found that if collateral calls occurred, the financial impact would be extreme given the high leverage in LSS transactions. The Commission also found that it was clear that, by August 1, 2007, the risk of collateral calls was increasing in LSS transactions because of unprecedented spread widening in credit default swaps and large increases in risk correlation among the relevant assets. This was of great concern to the appellants.

(5) Sales of Assets By July 20, 2007, Coventree was selling conduit assets to generate cash in the conduits. Coventree's initial objective in generating cash in the conduits was to be able to fund the repurchase of ABCP or to fund collateral calls. That was a factual change in the manner in which Coventree conducted its business made in response to external events.

[90] The Commission found that the inability to issue new ABCP constituted a material change in Coventree's business or operations by the close of business on August 1, 2007. Additionally, the Commission found that the five changes described above, taken together, were a material change in Coventree's business or operations by the close of business on August 1, 2007. There was clear support in the evidence for these findings. The Commission found that the impact on Coventree's business was uncharacteristic of the impact generally experienced by other issuers engaged in the same business. Coventree had a legal obligation to publicly disclose and explain the resulting material changes in its business.

**(iii) Conclusion Re Evidentiary Basis for Findings of Materiality**

[91] The Commission arrived at its conclusions after carefully reviewing extensive evidence, most of which was not in dispute. Also, unlike *Cartaway*, this case turned primarily on direct, rather than circumstantial, evidence. As the foregoing analysis demonstrates, the Commission based its conclusion not on speculation, but on a thorough review of all of the evidence. The evidence that was before the Commission supports its conclusions.

**(b) The Relevance of the Fact that the Market Price of Coventree Shares Did Not Change**

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[92] At the hearing, the appellants argued that the DBRS January Release was not material because there was no change in the market price of Coventree's shares when Coventree included some disclosure about it in its 2006 Annual Report and Q1 MD&A, publicly filed on February 14, 2007, and in its Q2 MD&A, publicly filed on May 14, 2007.

[93] The Commission rejected this argument, noting that the fact that this disclosure did not affect the share price did not mean that no material change had occurred. It observed that there may be a number of different explanations for why a particular disclosure has no market impact. Particularly relevant in this case were the following facts:

> (a) Disclosure by Coventree about the DBRS January release in the MD&A, rather than by the mandatory news release and material change report, may have caused investors to legitimately assume that no material change had occurred;
>
> (b) As Coventree had admitted in its prospectus, the ABCP market was opaque. This meant that public shareholders and investors had insufficient information to be able to fully understand and assess the implications of the MD&A for Coventree and its business.[60] In particular, investors did not know how important credit arbitrage and CDO-related SFA transactions were to Coventree's business; they would likely not have known that (i) the DBRS

[60] As the Commission pointed out at para. 66, "[t]here was no public reporting of the prices at which transactions in ABCP were effected, there were no securities law filings required in connection with the sale or trading of ABCP and there was no disclosure legally required with respect to the attributes of, or assets backing, ABCP. As a result, investors relied heavily on the credit rating of the ABCP and had very limited ability to carry out their own due diligence with respect to the ABCP and the assets backing it. The distribution and rolling of ABCP was carried out by dealers through sales to their clients. Coventree did not know who all of those clients were or how much Coventree sponsored ABCP was held by a particular client or dealer. Coventree had limited contact with purchasers of its ABCP. Accordingly, Coventree had to rely heavily on the dealers to provide market information with respect to the sale of its sponsored ABCP."

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January Release required global style liquidity for CDO-related SFA transactions and (ii) global style liquidity was not available to Coventree; and

(c) The absorption of information into the market was further hindered by the fact that the volume of trading in Coventree shares was relatively low, given that a majority of its outstanding shares were owned by the appellants and there were no other comparable public companies that were third-party sponsors of ABCP. That meant that information with respect to Coventree and its business was less likely to be reflected in the news media and reviewed and commented upon by analysts.

[94] In this regard, the Commission also stated:

> One cannot assume, however, that the lack of impact on market price means that the information disclosed was not material. There may be a number of different explanations why particular disclosure has no market impact … In any event, one must also consider whether particular information would reasonably be expected to have a significant effect on the "value" of securities even if that disclosure would not, for some reason, be expected to affect the market price of the securities. We find in these circumstances that the DBRS January Release would reasonably be expected to have had a significant effect on the value of Coventree shares. [Emphasis added.]

[95] The appellants suggest that all of the foregoing analysis is speculative and not supported by any evidence. They submit that the Commission's approach here reversed the burden of proof. They also object to a discussion of share value, distinct from share price, arguing that, in an efficient market, instances where the market price of a security will differ from its value are unusual and rare.

[96] The Commission's analysis here was not based on speculation. Rather, it was based on a careful analysis of detailed evidence of Coventree's business and operations; detailed evidence of market conditions for Coventree's ABCP product; Coventree's description of itself in its publicly filed disclosure documents; and the prevailing ABCP

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market conditions including, very importantly, the opaque nature of the market. These facts explain the lack of market impact from the disclosures and also provide a context in which the value of a security will not be reflected in its market price.

[97] The Commission did not reverse the burden of proof and require the appellants to disprove the other explanations as to why the DBRS January Release had no effect on the market price of Coventree's shares. Rather, it applied its expertise to the evidence before it and explained why the lack of a change in share price was not determinative of the material change issue.

**(c) Was Shareholder or Expert Evidence Required?**

[98] The appellants note that the Staff tendered no evidence regarding the volatility of Coventree's securities or prevailing market conditions. Nor did they lead any evidence regarding how Coventree's shares were priced or valued by investors and the market. They submit this is a crucial defect in the case against them as this left the Commission with no benchmark against which to assess whether or not disclosure would reasonably be expected to have had a significant effect on market price or value.

[99] As mentioned above, the determination of whether a material change has occurred is an issue which goes to the heart of the regulatory expertise and mandate of the Commission. Thus, while shareholder evidence or expert evidence may be relevant or useful, it is not necessary. This is not changed by the statement in *Sharbern* that, "except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention."[61] First, *Sharbern* does not deal with specialized tribunals. Second, it calls for evidence, not a particular kind of evidence. Third, and most important in this case, such evidence need not be called where one can conclude on the basis of common sense inferences that a change is material.

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[61] *Sharbern Holding* (SCC) at para. 58.

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[100] In this case, the Commission was well situated to make an assessment of materiality for Coventree, based on the evidence before it. Given (1) the significant impact of the DBRS January Release and the events leading up to August 1, 2007 on Coventree's business; and (2) the subsequent acknowledgment by Coventree and some of its principals of how significant these changes were, there was no need for further evidence, expert or otherwise. Not only was the conclusion that material changes had occurred an available common sense inference; it was the only reasonable inference available to the Commission on the evidence before it.

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**(3) Did the Commission Err in Failing to Distinguish Between a "Material Fact" and "Material Change" in Finding Disclosure Was Required?**

[101] The Commission clearly recognized the distinction between "material facts" and "material changes" and the legal consequences of their occurrence. At paragraph 148 it stated:

> The definition of "material fact" is broader than that of "material change". Not all material facts will arise from a "change in the business, operations or capital of the issuer". This distinction is fundamental to the application of section 75 of the Act, which applies only to material changes, and is a key consideration in this proceeding.[62]

[102] The Commission also noted that this court in *Rex Diamond* stated that "whether a material change occurred is a matter that is central to the expertise of the Commission".[63]

[103] The appellants argue that the Commission erred in determining the DBRS January Release and August 1 Events were "material changes" rather than "material facts" for the purposes of the Act. Specifically, they make the following submissions:

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[62] Reasons for Decision dated September 28, 2011 at para. 148.

[63] *Rex Diamond* (Div. Ct.) at para. 3.

(a) There is no duty to immediately report material facts or risks of future material changes as these are not yet material changes. The "changes" identified by the Commission either did not occur and were, at best, hypothetical changes that did not need to be reported until they actually materialized;

(b) Not every fact or risk that would be expected to have a significant effect on price or value is a material change. To constitute a material change it must be a change in the business, operations or capital of the issuer;

(c) Lower returns or profits do not, in and of themselves, constitute a material change; and

(d) The Commission improperly relied on hindsight in identifying changes.

[104] I will discuss each of these in turn.

**(a) Changes That Did Not Occur and Were Only Risks of Future Change**

[105] As mentioned above, the disclosure obligation in s. 75 of the Act is triggered by the occurrence of a change to the "business, operations or capital" of an issuer. If no such change has actually occurred, there is no duty to immediately disclose under s. 75. Changes that are external to the issuer such as political, economic or social developments that affect it may be material facts, even where they create a risk that a material change may occur at some unspecified future time. However, such material facts are required to be reported only in a company's periodic disclosure documents such as its MD&A. Such external changes need not be reported immediately under s. 75 unless they have actually resulted in a change in the "business, operations or capital" of an issuer.

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[106] The appellants submit that the Commission erred when it failed to conclude that the DBRS January Release and the August 1 Events were external developments that did not result in a change in Coventree's business or operations. They submit that neither the August 1 events nor the DBRS January Release changed the business of Coventree. Coventree continued to act as a securitization agent, to administer conduits sponsored by third parties and was an investor in other issuers. It also continued with its Chapter Two initiatives.

[107] Specifically with respect to the DBRS January Release, the appellants argue that it did not have any impact on existing credit arbitrage transactions arranged for the Coventree sponsored conduits as these were grandfathered by DBRS. Accordingly, Coventree's business was unchanged, although its ability to grow that business was affected by the DBRS January Release.

[108] The Commission found that five changes in Coventree's business or operations had occurred by the close of business on August 1, 2007: (1) the inability to issue new ABCP; (2) difficulty rolling outstanding ABCP; (3) ABCP spread widening; (4) credit default swap spread widening; and (5) sales of assets. The appellants argue that the first finding was a palpable and overriding error as Coventree issued new ABCP until August 13, 2007. The ABCP also continued to "roll" until market disruption on August 13, 2007. "Rolling" was central to Coventree's business, and it did not cease until August 13, 2007. As for changes (2), (3) and (4) the appellants submit that, as they were all phrased in the hypothetical, they had not, in fact, occurred and were therefore not material changes. Finally, the appellants submit that the sale of assets by Coventree was simply prudent fiscal management and did not constitute a material change in its "business, operations or capital."

[109] The suggestion that Coventree's business was not changed by the DBRS January release or the August 1, 2007 liquidity events is simply untenable. While Coventree continued in business, its business was radically changed given the impact of the changes identified by the Commission. As a result of the DBRS January Release, Coventree could no longer carry out any new CDO related SFA transactions through its conduits which had been a substantial part of their business. By August 1, 2007, Coventree was unable to carry out through Coventree or Nereus sponsored conduits either traditional securitizations or credit arbitrage transactions. Those transactions represented approximately 90% of Coventree's revenues for the period ending June 30,

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2007. The Commission's findings that these reflected material changes are reasonable and supported on the evidence.

[110] As for the other points made by the appellants with respect to the August 1, 2007 liquidity events, the Commission made no error in terms of Coventree's inability to issue "new ABCP" as it was referring to accretive issuances of ABCP, and not to rolling of maturing ABCP. By August 1, 2007, Coventree sponsored conduits were unable to issue any new ABCP because of the lack of liquidity in the market. The Commission made it clear that this alone constituted a material change and that the other changes mentioned above only made this conclusion more obvious and more serious. This conclusion was also reasonable and supported by the evidence.

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[111] The appellants argue that the material changes were merely external events. The Commission's reasons make it clear that public shareholders and other potential investors in Coventree shares would not have known either the fact of, or the implications of, those events and developments on Coventree and its business. While external developments gave rise to the January and August material changes, the Commission found that the changes in Coventree's own business or operations were the basis for requiring material change disclosure.

**(b) If There Were Changes They Affected the Conduits Not the Business, Operations or Capital of Coventree**

[112] The appellants submit that, to the extent that any of these changes constituted a material change, they were a material change to the conduits not to the business of Coventree. This submission has no merit. Coventree's business involved issuing ABCP to investors either through the conduits it sponsored or through the administration of conduits sponsored by third parties. Coventree's revenues were overwhelmingly derived from the activities of these conduits. The changes identified by the Commission significantly impaired Coventree's ability to continue to do so. The Commission's conclusion that this constituted a material change to Coventree's business is wholly reasonable. Indeed, Tai seemed to reject this distinction between Coventree and the conduits when he conceded in his factum that "the effect of the DBRS January Release was that Coventree would no longer be able to enter into certain kinds of securitization transactions."

### (c) The Possibility of Lower Returns Does Not Constitute a Material Change

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[113] There is no question that the changes identified by the Commission had a significant impact on Coventree's future revenues. Revenue from both traditional and credit arbitrage securitization transactions represented a critically significant 90 percent of Coventree's total revenue for the period ending June 30, 2007. Moreover, most of Coventree's revenue came from credit arbitrage transactions – 80 percent of Coventree's total revenue was derived from those transactions for each of the three-month periods ending December 31, 2006, March 31, 2007 and June 30, 2007, respectively.

[114] The appellants suggest that the only significance of these changes was that they would cause a change in future fees Coventree might expect to generate as a result of potential new credit arbitrage transactions in the conduits. Relying on *Danier Leather*, they argue that a change in results, in and of itself, is not a change in the business, operations or capital and therefore is not a material change for the purposes of the Act. They also argue that Coventree's revenue backlog was not affected by the DBRS January Release and that Coventree would continue to receive revenues from the existing credit arbitrage transactions for years to come. This would offset the loss of future fees and is another reason why the DBRS January Release did not result in a change in Coventree's business.

[115] However, the changes identified by the Commission go well beyond the poor sales results of leather clothing which occurred in *Danier* as a result of some unseasonably warm weather. As the Commission correctly pointed out, the present case is much more like *Rex Diamond*, where the Commission found that a change occurred in the business of a diamond mining company, when it received a final notice that it would no longer have a legal entitlement to access land and extract diamonds. The Commission concluded that:

> the inability of Coventree sponsored conduits to issue ABCP is analogous to the inability of Rex Diamond to access the relevant mining properties

> and to extract diamonds. In both cases, the result is that the relevant issuer became unable to carry on its principal business.[64]

[116] This conclusion is entirely reasonable on the evidence before it. The fact that Coventree's business managed to continue in a lesser form, despite these changes, does not detract from this.

[117] The Commission also rejected the submission that the DBRS January release was not a material change because of the revenue backlog. The Commission found that revenue backlog was a valuable asset to Coventree, but that continued completion of new securitization transactions was key to Coventree's ongoing business and financial performance. If Coventree could not carry out new securitization transactions, the revenue backlog would simply be declining revenues from winding down Coventree's securitization business.

**(d) Did the Commission Improperly Rely on Hindsight in Identifying Material Changes?**

[118] The appellants characterize the situation leading up to August 1, 2007 as a short-term difficulty in rolling ABCP, which amounted only to a risk that ABCP might not roll in the future. They point to the fact that members of Coventree's management team met with various ABCP market participants and were confident that a negotiated "soft landing" solution might be achieved. If the market had stabilized or if the soft landing solution had been implemented, then Coventree-sponsored conduits would have been able to issue new ABCP, purchase assets from its traditional asset providers and carry out traditional securitization transactions, including the Xceed transaction as anticipated.

[119] The appellants submit that the Commission inappropriately relied on hindsight when it found that Coventree could not carry on its securitization business because its sponsored conduits could not do any new fundings as of August 1, 2007, and presumed

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[64] Reasons for Decision dated September 28, 2011 at para. 583.

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that the market turbulence would continue indefinitely into the future and not merely be a transitory issue.

[120] The Commission was of the view that the possibility of a soft landing agreement did not have a high degree of likely success in the short term. More importantly, having found that a material change had occurred it concluded at para. 631:

> The effects on and changes to Coventree's business described in paragraph 590 of these reasons were immediate, direct and material; the possibility of a soft landing was contingent, uncertain, and highly speculative. Disclosure to shareholders of the material changes that occurred by the close of business on August 1, 2007 could not await the outcome of a possible negotiated solution among all of the market participants.[65]

[121] The Commission found that the subjective and optimistic hope of senior Coventree officers that they may be able to negotiate a different outcome or solution with a third party will not generally be sufficient to relieve an issuer from forthwith disclosing events that would otherwise constitute a material change. This is the same conclusion reached in *Rex Diamond*.

[122] Contrary to the submissions of the appellants, the Commission did not inappropriately use hindsight in its analysis. A review of the 154-page decision reveals that the Commission recognized that it should avoid using hindsight and arrived at its conclusions based on a thorough and detailed review of the facts that were known to the appellants and to Coventree at the time of the material changes in August 2007.

## VI. DID THE COMMISSION ERR BY MAKING FINDINGS ON MATTERS NOT PROPERLY BEFORE IT?

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[65] Reasons for Decision dated September 28, 2011 at para. 631.

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[123] The appellants argue that the Commission erred in fact and law by making irrelevant and prejudicial statements concerning Coventree's prospectus and the ABCP market in general. Tai submits that the Commission erred in making findings against the appellants that Staff had not asked the Commission to make and which were not part of the Statement of Allegations. Relying on the decision of the Commission in *Re Anderson*[66], he submits that this was a breach of procedural fairness that constitutes a denial of natural justice.

[124] Specifically, the appellants complain about findings of wrongdoing by the Commission on at least three matters that were not raised by the Statement of Allegations:

(1) The Commission found that Coventree's prospectus failed to make full, plain and true disclosure in various significant respects. This is despite the fact that it dismissed the first particular involving the prospectus;

(2) The Commission found that other public disclosures by Coventree, most notably its Q2 MD&A, were misleading; and

(3) The Commission concluded its reasons with the finding that "Coventree and a number of the dealers distributing ABCP from August 1, 2007 to August 13, 2007 had knowledge of liquidity related events and developments in the ABCP market that were important to investors considering the purchase of ABCP. It is unlikely that any investor would have purchased Coventree-sponsored ABCP, or any other ABCP, if they had been aware of those market events and corrections."

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[66] *Re Anderson* (2004), 27 O.S.C.B. 7955 (OSC).

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[125] The appellants contend that these statements made by the Commission were unfairly prejudicial to them and tainted the Commission's analysis of the materiality issue as well as the question of making orders in the public interest.

[126] This submission has no merit. The Commission quite properly considered the nature and quality of Coventree's disclosure in its prospectus, its Q2 MD&A, as well as elsewhere, in assessing the materiality of the changes caused by the January DBRS release. This was also necessary in order to respond to arguments made by the appellants that Coventree's existing disclosure was clear, accurate and comprehensive, and that no further disclosure was required with respect to the January and August material changes. The Commission did not find any breaches of the Act or impose any sanctions related to these findings. In addition, the appellants had ample opportunity to adduce and challenge evidence concerning the adequacy of Coventree's public disclosure and did so at the hearing.

[127] As for the concluding comments about the ABCP market, the Commission made it clear that this was an *obiter* statement saying in the preceding paragraph that "[t]hose questions are not the subject of this proceeding". This was just another way of expressing how serious the August liquidity events were to the ultimate customers of the business sponsored by Coventree and it was related to the Commission's finding that the ABCP market was opaque. The observation was reasonable, supported by the evidence and was not relied upon by the Commission in finding a breach of the Act or in sanctioning the appellants.

## VII. DID THE COMMISSION ERR IN MAKING ORDERS IN THE PUBLIC INTEREST UNDER S. 127 OF THE *SECURITIES ACT*?

[128] The Commission's public interest jurisdiction arises from the following words in s. 127 of the Act: "The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders…" The Commission may exercise this jurisdiction where there has been no breach of the Act. However, in this case, the Commission based its orders in the public interest solely on contraventions of the Act.

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[129] The Supreme Court of Canada has provided guidance as to how the Commission should exercise its public interest discretion. In *Asbestos* it stated:

> In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.[67]
> [Emphasis added.]

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[130] In *Cartaway Resources Corp.* the Supreme Court stated that "it is reasonable to view general deterrence as an appropriate and perhaps necessary consideration in making orders that are both protective and preventative".[68]

[131] After referencing the foregoing authorities, the Commission referred to prior decisions where the Commission found that violations of the Act pertaining to disclosure also constituted conduct contrary to the public interest.[69] On this basis, the Commission stated that "[i]t is clear that the Commission considers the failure to make timely disclosure in accordance with section 75 of the Act, and the making of inaccurate, misleading or untrue disclosure, to be contrary to the public interest." It then concluded that the conduct of Coventree, Cornish and Tai in contravening the Act was contrary to the public interest.

[132] The appellants challenge the Commission's conclusion that they acted in a manner that is contrary to the public interest. The parties are agreed that the Commission may conclude that not every breach of securities law requires a sanction in the public interest. However, they differ as to what factors should be considered in making this determination. The appellants submit, given the findings of the

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[67] *Asbestos* (SCC) at para. 45.

[68] *Re Cartaway Resources Corporation*, 2004 SCC 26, [2004] 1 S.C.R. 672 at para. 60.

[69] *Re Cineplex Corporation, Drabinsky and Gottlieb* (1983), 6 O.S.C.B. 3845; *Re Standard Trustco* (1992), 15 O.S.C.B. 4322 (OSC); *YBM Magnex International* (OSC); *Rex Diamond* (OSC); and *Re Biovail* (OSC).

Commission and the antecedents of the appellants, that there was no need to make such an order in this case.

[133] In this regard, the appellants point out that, while the Commission found that Cornish and Tai had permitted or acquiesced in Coventree's contraventions of s. 75 of the Act, the Commission added "there was no evidence before us that would lead us to conclude that either Cornish or Tai intentionally breached the Act or attempted to intentionally mislead public shareholders or investors." As well, referring to the liquidity events in July and August of 2007 the Commission noted that "[m]anagement and the directors of Coventree appear to have been acting responsibly in monitoring events as they unfolded with a view to Coventree complying with its disclosure obligations." The Commission also recognized that Coventree, Cornish and Tai had all fully co-operated with the investigation.

[134] Relying on *Re Mithras Management Inc.*,[70] the appellants emphasize that the purpose of the public interest remedy is to restrain future conduct, not to punish past mistakes. They argue that, where there has been no intentional misconduct, findings of conduct contrary to the public interest are not appropriate. Moreover, they distinguish the other non-disclosure cases relied on by the Commission on the basis that in those cases (1) the respondents had not acted diligently; (2) the non-disclosure related to internal events; and (3) in some of the cases, the respondents failed to make disclosure for personal gain. In this case, by contrast, the appellants acted diligently, were dealing with external events in a difficult, highly fluid and constantly changing environment and were found not to have acted for personal gain.

[135] The appellants argue that the extensive evidence of good character led with respect to both appellants is a relevant consideration in determining whether they acted in a manner that was contrary to the public interest. They also argue that, even if this court upholds the finding of material changes, the appellants reasonably believed they were not material due to the attention they paid to the matter, their reliance on the opinions of other expert Board members and the fact that all decision-making at Coventree was consensus-based by the whole management team.

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[70] *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1660 (OSC).

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[136] In *Gordon Capital Corp.* Justice Craig stated:

> There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion. [71]

Craig J. added that "the scope of the OSC's discretion in defining 'the public interest' standard… is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public." He concluded that the Commission should be "accorded a particularly broad latitude in formulating its opinion as to the public interest…"[72]

[137] The Ontario Court of Appeal in *Asbestos* characterized the scope of the Commission's discretion in acting in the public interest as "very wide" and stated that its discretion "is guided by the two broad purposes of the Act… to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in capital markets – and by the six 'fundamental principles' set out in s. 2.1…"[73]

[138] The disclosure cases cited by the Commission make it clear that it is not necessary for the Commission to conclude that a respondent acted willfully or deceitfully in order to exercise its public interest jurisdiction.[74] A breach of the disclosure requirements under Ontario securities law will generally involve conduct

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[71] *Gordon Capital Corp v. Ontario (Securities Commission)* (1991), 1 Admin. L.R. (2d) 199 (Div. Ct.) at p. 211 cited with approval in *Marchment & Mackay Ltd v. Ontario Securities Commission* (1997), 34 O.R. (3d) 284 (Div. Ct.) at p. 290.

[72] This analysis was cited with approval by this Court in *Marchment & Mackay Ltd* at p. 290 and by the Commission in *YBM Magnex International* [Ruling on Disclosure Motion], (2000) 23 O.S.C.B. 623 (OSC) at para. 20.

[73] *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission* (1999), 43 O.R. (3d) 257 (Ont. C.A.) at para. 41; aff'd *Asbestos* (SCC).

[74] *Re Standard Trustco* (OSC) at pp. 4359-4360; *Gordon Capital*, at p. 211; *Re YBM Magnex International* (OSC), at paras. 571-573.

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contrary to the public interest.[75] The prior good character of the appellants and the fact they acted in good faith, while relevant to sanctions, does not preclude a finding that their conduct was contrary to the public interest.

[139] The decision to intervene to protect the public interest is a matter which lies squarely within the Commission's expertise. As the Supreme Court of Canada made clear in the *Asbestos* case, such decisions are entitled to "a high degree of curial deference."[76] The Commission's conclusion that the conduct of Coventree and the appellants in contravening the Act was contrary to the public interest was entirely reasonable. This case did not involve trivial or technical breaches of securities law, but instead related to two failures to comply with clear statutory disclosure requirements which constitute the "cornerstone" of securities regulation, and which had a significant impact on Coventree's shareholders.

## VIII. CONCLUSION

[140] For the foregoing reasons, the appeals are dismissed.

[141] If the parties cannot agree on costs, they may make brief written submissions, through the Divisional Court office, within 30 days of the release of this decision.

Aston J.

Swinton J.

T. Ducharme J.

**Released:** March 19, 2013

[75] *Re Standard Trustco* (OSC) at pp. 4358-4359.
[76] *Asbestos* (SCC) at para. 49.

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**CITATION:** Cornish v. Ontario Securities Commission, 2013 ONSC 1310
**DIVISIONAL COURT FILE NOS.:** 33/12 and 35/12
**DATE:** 20130319

2013 ONSC 1310 (CanLII)

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**DIVISIONAL COURT**

**ASTON, SWINTON AND T. DUCHARME JJ.**

**BETWEEN:**

GEOFFREY CORNISH

Appellant

**- and -**

ONTARIO SECURITIES COMMISSION

Respondent

**AND BETWEEN:**

DEAN TAI

Appellant

**-and-**

ONTARIO SECURITIES COMMISSION

Respondent

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**REASONS FOR JUDGMENT**

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T. Ducharme J.

**Released:** March 19, 2013

# Tab 10

# COURT OF APPEAL FOR ONTARIO

CITATION: Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation, 2024 ONCA 105
DATE: 20240213
DOCKET: C70594

2024 ONCA 105 (CanLII)

Roberts, Paciocco and Thorburn JJ.A.

BETWEEN

The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee

Plaintiffs (Appellants)

and

Barrick Gold Corporation, Aaron W. Regent, Jamie C. Sokalsky, Ammar Al-Joundi and Peter Kniver

Defendants (Respondents)

Joel P. Rochon, Peter R. Jervis, Golnaz Nayerahmadi, and Matthew W. Taylor for the appellants

Kent E. Thomson, Steven G. Frankel, and Maura O'Sullivan, for the respondents

Heard: December 13, 2023

On appeal from the order of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated July 18, 2022 with reasons reported at 2022 ONSC 1767, and supplementary reasons, reported at 2022 ONSC 4216.

**Paciocco J.A.:**

## OVERVIEW

[1] The appellants, the Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee (whom I will refer to collectively, for convenience, as “Drywall”), are proposed representative plaintiffs in an intended class action proceeding relating to a failed South American gold mining project, the Pascua-Lama project. The proposed class action is based on allegations that the respondents, Barrick Gold Corporation and some of its officers and directors (whom I will refer to collectively, for convenience, as “Barrick”), made actionable misrepresentations about the project, contrary to s. 138.3(1) of the Ontario *Securities Act*, R.S.O. c. S.5 (“OSA”). Section 138.3(1) provides for one of several misrepresentation actions legislated in s.138.3 of the OSA.

[2] Leave is required under s. 138.8 of the OSA to bring a s. 138.3 action, including an action pursuant to s. 138.3(1). Drywall achieved only limited success in its initial leave application. Because the initial leave decision contained analytical errors, Drywall was successful on appeal in obtaining a second leave hearing on some of its misrepresentation allegations: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, leave to appeal denied, [2021] S.C.C.A. No. 202 (“*Drywall #1*”).

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[3] At the second leave hearing, Drywall once again achieved only limited success. The motion judge[1] granted Drywall leave to pursue alleged misrepresentation claims found in Barrick's fourth quarter and 2011 year-end report ("Q4 and 2011 year-end report") issued on February 16, 2012, and its Annual Information Form ("AIF") for the year ended December 31, 2011, issued by Barrick on March 28, 2012. In substance, the alleged misrepresentations in the February 16, 2012 and March 28, 2012 statements are identical. Those alleged misrepresentations relate to Barrick's capital expenditure budget ("capex budget") and the projected date of its first gold production ("production schedule"). The motion judge denied Drywall leave to pursue the other misrepresentation allegations it had advanced.

[4] This is an appeal from the motion judge's decision in the second leave hearing. However, Drywall is not appealing the motion judge's decisions to deny it leave to pursue most of its misrepresentation allegations. It appeals only the motion judge's denial of leave to pursue its claims that Barrick also made capex budget misrepresentations and production schedule misrepresentations in its third quarter ("Q3") 2011 Report, which was made public on October 27, 2011 ("Ground

[1] Although this motion judge was the second motion judge to address Drywall's leave application, I will refer to her, for convenience, as "the motion judge".

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of Appeal 1"). Drywall argues that the motion judge made extricable legal errors in arriving at this decision.

[5] Drywall also submits that the motion judge erred in identifying potential public correction dates for the alleged representations made on February 16, 2012, and March 28, 2012 for which she was granting leave ("Ground of Appeal 2"). Potential public correction dates are important because s. 138.3(1) actions are available to those who traded in securities between the time when a misrepresentation was made, and when it was corrected. The motion judge in the proceedings before us found that the "possible public correction(s) of [the] alleged misrepresentations [made on February 16, 2012, and March 28, 2012 for which she was giving leave] are Barrick's disclosures on May 2, 2012, and July 26, 2012". The effect of this latter order was to limit Drywall to pursing its action on behalf of persons who traded in Barrick securities between February 16, 2012 and July 26, 2012. Drywall argues that the motion judge made extricable legal errors in failing to find that further possible public corrections of the alleged February 16, 2012 and March 28, 2012 misrepresentations occurred on November 1, 2012, April 10, 2013, and June 28, 2013. This submission, if successful, would enlarge the class of potential plaintiffs.

[6] For the reasons that follow, I would deny both Ground of Appeal 1 and Ground of Appeal 2 and dismiss Drywall's appeal.

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## MATERIAL BACKGROUND FACTS

[7] Pascua-Lama was a complex open-pit mining project in an environmentally sensitive area of Chile and Argentina that Barrick Gold Corporation announced in 2009. After several years, the Pascua-Lama project failed.

[8] While the project was underway, Barrick Gold Corporation made numerous public representations and millions of dollars in Barrick Gold Corporation shares were exchanged. Drywall claimed at the outset of its litigation that many of these representations were material misrepresentations. Specifically, Drywall alleged that material misrepresentations were made by Barrick about the environmental impact of the project, its accounting, its capex budget, and its production scheduling.

[9] As I have indicated, after the initial s. 138.8 OSA leave hearing in July 2019, Drywall achieved only limited success. Specifically, it obtained leave to pursue only a single environmental misrepresentation claim. During the second leave hearing, Drywall again sought leave to pursue damages arising from multiple alleged accounting, capex budgeting, and production scheduling misrepresentations. In keeping with the numerous allegations made and the complexity of the case, the second leave application hearing was lengthy – five days – conducted after the cross-examination of affiants, in which approximately 30,000 pages of

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documentation was filed. The motion judge described the record before her as "enormous".

[10] On July 18, 2022, the motion judge issued her order, which she explained in two endorsements, the first released on March 22, 2022 (the "misrepresentation endorsement") and the second on July 18, 2022 (the "public correction endorsement").

[11] As the first motion judge had done, albeit on different grounds, the second motion judge denied Drywall leave to bring claims relating to alleged accounting misrepresentations. Drywall was again denied leave relating to most of the capex budget and production scheduling misrepresentations it alleged on the basis that Drywall had failed to demonstrate that its claim had a reasonable or realistic chance of success at trial. However, she came to a different decision relating to Barrick's Q4 and 2011 year-end report, issued on February 16, 2012, and its AIF for the year ended December 31, 2011, issued on March 28, 2012. The motion judge concluded that there was a reasonable possibility that Drywall could establish that assertions made in these reports that management considered its $4.7 - $5 billion capex budget and its mid-2013 production scheduling forecasts to be reasonable were misrepresentations. The motion judge also found there to be a reasonable or realistic possibility that Barrick could be found to have misrepresented the reasonableness of these projections by failing to disclose information suggesting that those projections may not be accurate. The potentially

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problematic non-disclosure consisted of: (1) information known to Barrick that the estimates prepared by its primary subcontractor Fluor-Techint ("F-T") which it relied upon in quantifying its capex budget were unreliable and inaccurate, and (2) internal estimates made by January 2012 that projected that Barrick's capex budget could be more than $4.7 - $5 billion.

[12] As I have indicated, the motion judge found that the "relevant possible public correction(s) of these alleged misrepresentations are Barrick's disclosures on May 2, 2012, and July 26, 2012."

[13] Drywall had argued against a finding that a public correction occurred on May 2, 2012, maintaining that "partial public corrections" occurred on four other dates, July 26, 2012; November 1, 2012; April 10, 2013; and June 28, 2013. The motion judge addressed Drywall's submissions in her public correction endorsement. She found that there was a reasonable possibility that Drywall could prove that the July 26, 2012 disclosure was a public correction, concluding that the July 26, 2012 statement, which I reproduce in material part below in the analysis section of this decision, "put the market on notice that the forecasts were not reliable." Reasoning that it was inescapable that this July 26, 2012 release "accurately corrected any pre-existing misrepresentation about the schedule and capex budget" she concluded that "no subsequent statement can be a public correction of the February and March 2012 alleged misrepresentations." On this basis she found that Drywall had failed to show a reasonable possibility that it could

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succeed with its claims that the disclosures that Barrick made on November 1, 2012; April 10, 2013, and June 28, 2013 were public corrections.

[14] Because Drywall disclaimed that the May 2, 2012 disclosure was a public correction, the motion judge did not closely analyze whether there was a reasonable possibility that the release made on this date could be shown to be a public correction at trial. Although Drywall did express some dissatisfaction before us with the motion judge's finding relating to May 2, 2012, it has not appealed her decision that May 2, 2012 is a possible public correction date. I will therefore say no more about the motion judge's identification of that date as a possible public correction date.

**THE ISSUES**

[15] I have introduced Drywall's general Ground of Appeal 1 and Ground of Appeal 2 in paras. 4 and 5 above. Each of those general grounds of appeal are predicated on specific alleged extricable errors that I will identify in the analysis below. The issues presented by the two general grounds of appeal can be posed as follows:

A. Did the motion judge commit an extricable error in denying leave to pursue the alleged October 27, 2011 misrepresentations?

B. Did the motion judge commit an extricable error in concluding that the November 1, 2012, April 10, 2013, and June 28, 2013 disclosures were not

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relevant possible public corrections of the alleged misrepresentations made on February 16, 2012, and March 28, 2012.

[16] The primary challenge that Drywall confronts in advancing these grounds of appeal is that unless the motion judge made extricable errors of law, the standard of review requires deference to her decisions, absent a demonstrated palpable and overriding error: *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, 166 O.R. (3d) 756, at paras. 9, 67; *Wong v. Pretium Resources Inc.*, 2022 ONCA 549, 163 O.R. (3d) 14, at para. 62. Drywall does not allege any errors by the motion judge in her articulation of the law relevant to either ground of appeal nor does it allege palpable and overriding errors of fact. It is fair to say that it argues, instead, that her legally erroneous evaluation is demonstrated by some of the reasoning she employed and is exposed by her failure to act on the evidence before her.

[17] Barrick disputes that the motion judge made extricable errors of law. It contends that Drywall's extricable error arguments represent no more than an impermissible attempt by Drywall to circumvent the deference that must be given to the leave decisions made by motion judges by rearguing the merits of its motion, including by introducing new submissions.

[18] I agree with Barrick.

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## ANALYSIS

### A. DID THE MOTION JUDGE COMMIT AN EXTRICABLE ERROR IN DENYING LEAVE TO PURSUE THE ALLEGED OCTOBER 27, 2011, MISREPRESENTATIONS?

[19] In support of this ground of appeal Drywall argues that the motion judge committed extricable errors of law by:

(1) weighing and rejecting credible evidence, and conducting a mini-trial, and

(2) failing to consider or trivializing major evidentiary gaps.

[20] Drywall also raised two subsidiary arguments that should be addressed, namely, that the motion judge committed extricable errors by:

(3) failing to consider material evidence from a July 25, 2012, presentation, and

(4) misapplying the test for misrepresentations.

[21] These submissions can best be explained and analyzed after the applicable legal principles are described.

#### The Legal Principles

[22] Unlike most other misrepresentation actions, the statutory causes of action in s. 138.3, including s. 138.3(1), do not require the plaintiff to prove reliance on a

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misrepresentation: *Green v. Canadian Imperial Bank of Commerce*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 11, 75, 183. In a s. 138.3(1) action such as this one, so long as the plaintiff traded in securities of the responsible issuer after the responsible issuer made a material misrepresentation, and before that misrepresentation was corrected, damages are available.

[23] Not only does s. 138.3(1) remove the usual requirement of proof of reliance applicable in other misrepresentation actions but it presumes that fluctuations in value during this period are attributable to the misrepresentation: *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 33.[2]

[24] All of the misrepresentation actions enacted by s. 138.3 are equally generous, and were developed by a pan-Canadian committee of securities regulators, the "Committee on Corporate Disclosure" (the "Allen Committee"),[3] to improve the enforcement of the disclosure regime in secondary markets, and to make remedies accessible to traders: *Theratechnologies Inc.* at para. 29.

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[2] *Theratechnologies Inc.* is not a case applying the OSA. It addresses an identical provision in s. 225.4 of Quebec's *Securities Act*, C.Q.L.R. c. V-1.1. Its reasoning has been found to be equally applicable to the regime under Part XXIII.1 of the OSA: *Green,* at paras. 121-122; *Rahimi v. SouthGobi Resources Ltd.,* 2017 ONCA 719, 137 O.R. (3d) 241, at para. 37, leave to appeal denied, [2017] S.C.C.A. No. 443. I will therefore rely on passages from *Theratechnologies Inc.* in stating the law, as if that decision speaks to s. 138.8 of the OSA.

[3] Committee on Corporate Disclosure, *Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change in the Definitions of 'Material Fact' and 'Material Change'*, (Toronto: Toronto Stock Exchange, CSA Notice 53-302, reproduced in (2000), 23 O.S.C.B. 7383)

[25] It was evident to the Allen Committee itself, and to Ontario's legislators that, given their generosity the s. 138.3 misrepresentation actions carry the risk of inviting unmeritorious claims and attracting "strike suits" launched to provoke unwarranted settlements: See *Green*, paras. 67- 69. Therefore, when the s. 138.3 misrepresentation actions were enacted, legislators included a leave requirement to address this risk, as recommended by the Allen Committee: see *Theratechnologies Inc.*, at para. 39; *Badesha v. Cronos Group Inc.*, 2022 ONCA 663, 163 O.R. (3d) 481, at para. 46, citing *Green*, at paras. 67-69; and *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241, at paras. 36 - 38, leave to appeal denied, [2017] S.C.C.A. No. 443.

[26] To ensure that this leave requirement is effective in preventing abusive actions, s. 138.8 of the OSA assigns a "robust" and "important gatekeeping role" to the judge conducting the leave hearing: *Theratechnologies Inc.,* at paras. 36, 38; *Mask v. Silvercorp Metals*, 2016 ONCA 641, 132 O.R. (3d) 161, at paras. 42, 67, leave to appeal requested but application for leave discontinued, [2016] S.C.C.A. No. 454. It imposes two statutory prerequisites to obtaining leave: (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.

[27] Only the reasonable possibility of success requirement is in issue before us. Abella J. described this requirement in *Theratechnologies Inc.*, at para. 39. She said, "[w]hat *is* required is sufficient evidence to persuade the court that there is a

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reasonable possibility that the action will be resolved in the claimant's favour" (emphasis original): *Theratechnologies Inc.*, at para. 39. Justice Abella then affirmed that this requirement is meant to "prevent … litigation with little chance of success": *Theratechnologies Inc.*, at para. 39.

[28] It can readily be seen that s. 138.8 calls for a qualitative evaluation of the proposed action. It is not enough under s. 138.8 to show that there is a triable issue: *Mask*, at para. 43. Similarly, it is not enough that the action has a "mere possibility of success": *Theratechnologies Inc.*, at para. 4. As the language of the provision directs, to secure leave "there must be a 'reasonable or realistic chance that [the action] will succeed'": *Green*, at para. 121, citing *Theratechnologies Inc.*, at para. 38.

[29] In order to satisfy this reasonable or realistic chance of success standard, a plaintiff must "'offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the [plaintiff's] claim'": *Green*, at para. 121, citing *Theratechnologies Inc.,* at para. 39. To meet the first of these conditions, the analysis of the applicable legislative provisions must provide a plausible legal foundation for the claim: *Markowich v. Lundin Mining Corp*., 2023 ONCA 359, 166 O.R. (3d) 732, at para. 67, leave to appeal to S.C.C. requested, 40853. To satisfy the second condition, the evidence relied upon by a plaintiff must be "credible". However, it must be emphasized that these two conditions – the plausible legal foundation, and the credible evidence inquiry - do not alone express

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the leave standard. These conditions must be satisfied *plus* the record before the leave judge must demonstrate that there is a realistic or reasonable chance that the action will succeed. Notably, in *SouthGobi*, at para. 38, Hourigan J.A. described these inquiries conjunctively when summarizing the governing case law:

> These cases establish that for there to be a reasonable possibility that a misrepresentation action will be resolved at trial in favour of the plaintiff under s. 138.8(1)(b), 'there must be a reasonable or realistic chance that it will succeed' and the plaintiff must 'offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim [Emphasis Added].

[30] As I will discuss below, at times Drywall proceeded as if the entire standard for obtaining leave is the "some credible evidence" standard. It attempted on a number of occasions to identify "credible evidence" favouring its case and then submitted on this basis that the motion judge should have granted leave. However, as Hourigan J.A. went on to state in *SouthGobi*, at para. 38, the "plaintiff must adduce 'sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the [plaintiff's] favour'" (emphasis added), citing from *Theratechnologies Inc.*, at para. 39. Put simply, to be sufficient, evidence must be credible, but even credible evidence may not be sufficient to show that there is a realistic or reasonable chance that a claim will succeed.

[31] It is for this reason that s. 138.8 does not call for a review, in isolation, of only evidence that supports the plaintiff's theory. "The motion judge must review

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all the evidence adduced by both parties to ascertain whether there is 'a reasonable or realistic chance that the action will succeed'": *Mask*, at para. 43, citing *Theratechnologies Inc.*, at paras. 38, 39; *SouthGobi*, at para. 46. Justice Abella commented in *Theratechnologies Inc*., at para. 38, that a motion judge "must undertake a reasoned consideration of the evidence to ensure that the action has some merit." As Hourigan J.A. further explained in *SouthGobi*, at para. 46, "[t]his must include some weighing of the evidence that both parties are required to proffer under ss. 138.8(2) and (3) and scrutiny of the entire body of evidence".

[32] Of importance, in applying the s. 138.8 leave test, evidence is not to be assumed to be true or taken at face value. As indicated, the credibility of the evidence is to be assessed, an inquiry that is facilitated by the cross-examination that is available under the OSA when supporting affidavits are filed during leave applications: *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at para. 56, leave to appeal requested but application for leave discontinued, [2015] S.C.C.A. No. 59; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22, 128 O.R. (3d) 481, at para. 33. Similarly, the evidentiary evaluation conducted during a s. 138.8 leave motion includes an assessment of the reliability of the evidence: *Bayens*, at para. 67. Therefore both the credibility and reliability of the evidence as a whole are

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material considerations in gauging whether the plaintiff has established a realistic or reasonable chance that their claim will succeed.[4]

[33] Within limits, the comparative strength of competing evidence is also to be considered; the evidence must be sufficiently strong to show a reasonable or realistic chance of success. Therefore, if evidence relied upon by the defendant is so compelling that there is no reasonable possibility that the appellant would succeed at trial, leave may be denied: *Nseir v. Barrick Gold Corporation*, 2022 QCCA 1718, at para. 46. It follows that if critical evidence offered by a plaintiff is shown by other evidence to be "completely undermined by flawed factual assumptions" a motion judge may choose not to act on that evidence: *Mask,* at para. 48. In *Mask*, for example, the plaintiff's geologist provided evidence that the defendant underreported the amounts of material delivered from a mine, while overestimating the grade of ore produced. The motion judge did not err in finding that this evidence was undermined by competing, uncontroverted evidence provided by the defendant explaining why the testimony of the plaintiff's geologist was inaccurate: *Mask*, at paras. 20-26, 48.

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[4] The law of evidence draws a helpful distinction between "credibility" and "reliability": see *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41; *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.) at p. 314. Evidence is "credible" when it represents the honest belief of the witness. Credibility assessments therefore engage whether the witness has been honest in providing the information. Evidence is "reliable" when it is not likely to be mistaken. Reliability assessments therefore probe considerations that could cause honest evidence to be inaccurate.

[34] It is in this context that the oft-repeated admonition that a s. 138.8 inquiry should not be treated as a "mini-trial" needs to be understood. Regardless of the limitations this admonition imposes, a s. 138.8 motion judge cannot be found to have engaged in a mini-trial simply because their decision turned on considerations of the credibility and reliability or weight of the evidence.

[35] The reach of the prohibition on conducting mini-trials can best be identified by considering its underlying purpose. In explaining her direction to motion judges not to engage in mini-trials, Abella J. focused on the concern that "a full analysis of the evidence" is not only unnecessary but would defeat the objective of a screening mechanism by replicating the trial: *Theratechnologies Inc.,* at para. 39. A second related, and equally powerful, concern is that it would be unfair for a motion judge to purport to conduct a "full analysis of the evidence" at the leave stage, because the leave application will occur before the plaintiff has enjoyed the benefit of documentary and oral discovery procedures: *SouthGobi*, at para. 48. And a third concern is that if the analysis undertaken by the motion judge purports to finally resolve truly contentious factual controversies that arise, the motion judge will be usurping the role of the trial judge without the benefit of a complete record.

[36] These underlying concerns give rise to at least three clear limitations that arise from the prohibition on conducting mini-trials.

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[37] First, it is the trial judge that is to determine whether the matter in issue has been proved on the balance of probabilities. It is not the motion judge's role to do so. In considering the comparative strength of the competing case, the motion judge is therefore required to keep in mind the "relatively low merits-based threshold" of a realistic or reasonable chance of success: *Mask*, at para. 45. A motion judge who effectively assesses the case against the ultimate burden rather than this standard will err by conducting a mini-trial: *Nseir*, at para. 46.

[38] Second, if a motion judge attempts to resolve realistic and contentious issues arising from conflicting credible evidence they will be lapsing into a mini-trial. In *SouthGobi*, at para. 75, the motion judge was found to have lapsed into a mini-trial by purporting to resolve a key issue that was in dispute because of conflicting, credible evidence. In *Cronos*, at paras. 77-78, the motion judge was found to have "tip[ped] into the realm of a mini-trial" by concluding that a misrepresentation was not material in the face of "credible, complex and competing evidence on whether misrepresentations have a material effect on share prices."

[39] Third, during the leave motion, judges must consider the evidence that is not before them: *SouthGobi*, at para. 48. More precisely, given the early stage at which leave inquiries are undertaken, motion judges must determine whether the lack of a complete record leaves uncertainty about whether a realistic or reasonable chance of success exists: *SouthGobi,* at para. 50. If a motion judge fails to inquire into whether the record is capable of determining the issue before them, the risk is

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presented that a motion judge will have intruded on the province of the trial judge by proceeding as though they are conducting a full analysis of the evidence, when they are not.

[40] Therefore, the completeness of the record should affect how a motion judge proceeds. If a motion judge determines that the record is capable of identifying the potential merit of the case, the motion judge may proceed on that record. But if the lack of a complete record could impede the evaluation, the motion judge must take the incompleteness of the record into account in coming to their decision. This is not to say that motion judges should operate on speculative assumptions that missing evidence would favour the plaintiff. After all, the motion judge is to engage in a "reasoned consideration": *SouthGobi*, at para. 46, citing *Theratechnologies Inc.*, at para. 38. Instead, motion judges who have reason to be concerned about the incomplete state of the record should be mindful to not impose a standard that is so exacting that, given evidential limitations, it "can work to the prejudice of plaintiffs who have potentially meritorious claims": *SouthGobi*, at para. 48.

**(1) Did the Motion Judge err by weighing and rejecting credible evidence, and conducting a mini-trial?**

[41] In light of the legal principles I have just expressed, I am not persuaded that the motion judge impermissibly "weighed and rejected 'credible evidence'", as

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Drywall suggests, or otherwise inappropriately conducted a mini-trial relating to Drywall's misrepresentation claim arising from Barrick's October 27, 2011 disclosure. I can best explain my reasoning by unpacking the alleged October 27, 2011 misrepresentations, the material evidence, and the underlying reasoning.

[42] The October 27, 2011 "misrepresentations" that Drywall sought leave to pursue are essentially the same statements that Barrick made on February 16, 2012, and repeated on March 28, 2012, for which the motion judge granted leave, namely that Barrick's management considered its capex budget and production scheduling forecasts – $4.7 to $5.0 billion and a mid-2013 expected production date – to be reasonable. However, the motion judge concluded that "there [was] no evidence in the record to suggest that, in October 2011, Barrick had any reason to be concerned about the accuracy of [F-T's definitive estimate] or schedule", and no other reason to believe its forecasts were inaccurate. Therefore, she found there to be no realistic or reasonable possibility that a trial court could find that on October 27, 2011, Barrick was making actionable misrepresentations rather than expressing reasonably mistaken conclusions. In contrast, the motion judge found that there was evidence before her that could cause a trial court to conclude that after October 27, 2011, and before February 16, 2012, Barrick had acquired information that exposed its capex budget and production schedules as unreasonable, rendering the repetitions of the

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reasonableness of that same capex budget and projected production schedule on February 16, 2012 and March 27, 2012 misrepresentations.

[43] First, evidence showed that after October 27, 2011, Barrick received a "definitive estimate" for its work from its primary subcontractor, F-T, that Barrick recognized to be unreliable. F-T then proved to be unable to generate a reliable definitive estimate, despite providing five total versions of its definitive estimate. Since F-T's budget influenced Barrick's own forecasts, the discovery that F-T could not generate a reliable definitive estimate raised real concerns about the reasonableness of Barrick's own forecasts.

[44] Second, by the end of 2011, Barrick's own project team and capital projects group began to raise concerns that its $4.7 to $5 billion forecast was "under pressure" as a result of a number of factors and was "too low".

[45] Drywall argues that the motion judge erred in coming to her conclusion about the October 27, 2011 statement, as there was "some credible evidence" before her that as of that date: (1) Barrick already knew that F-T's budget estimates were inaccurate, and (2) Barrick had received a July 2011 report prepared by its own consultant, Turner & Townsend (the "Report"), showing that its $4.7 to $5 billion

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capex budget forecast and its proposed production schedule were "fundamentally unreliable".[5]

[46] To put Drywall's submissions into perspective it is important to appreciate the kind of evidence Drywall relied upon. It did not identify any direct evidence establishing that prior to its October 27, 2011 disclosure, Barrick knew that F-T's budget was inaccurate or that its own capex budget forecast was "fundamentally unreliable." Instead, Drywall argued, in effect, that these conclusions can be inferred from Barrick's own documents, which were in evidence before the motion judge. In rejecting this submission, the motion judge did not take issue with the credibility of any of this documentary evidence or disregard it. Instead, she took issue with the inferences that Drywall was proposing, ultimately finding that there is no realistic or reasonable chance that those inferences would be drawn at trial. It is therefore inaccurate for Drywall to suggest that the motion judge weighed and disregarded credible evidence. Instead, she found as she was entitled to do, that on the record as a whole, there was no realistic or reasonable possibility that this claim would succeed.

[47] Drywall emphasizes two features of the Report as providing support for the inference that Barrick knew as early as October 27, 2011 that its own capex budget

[5] Although I have considered all of the "credible evidence" Drywall directed us to, I will follow its lead and focus on the F-T budget evidence and the Report, which clearly carry the weight of its submissions.

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was “fundamentally unreliable”. First, the Report asserted that in its June 2011 forecast Barrick had used a “straight-line adjustment” from its earlier budget projections, an approach the Report is critical of as not adhering to general estimating principles. Second, the Report asserted that a model using high-altitude rates was needed to benchmark the project. The Report undertook that “[d]uring the 4-6 weeks finalization period [before Barrick would release its projections, Turner & Townsend would] endeavour to benchmark these rates”. Drywall argued before the motion judge, and again before us, that this information exposed methodological problems in Barrick’s June 2011 budgeting forecast which rendered the capex budget reported on October 27, 2011 fundamentally unreliable.

[48] The challenge Drywall experienced in convincing the motion judge that there was a realistic or reasonable possibility that a trier of fact would draw the inference that Barrick’s projections were fundamentally unreliable was the considerable, largely uncontested, evidentiary record to the contrary.

[49] In his affidavit, Augustus Calder, the person who conducted the review that led to the Report, rejected any suggestion that the Report showed Barrick’s June 2011 forecast to be inaccurate or unreliable, or that Barrick’s projections were prepared improperly. Mr. Calder’s evidence was that the Report offered a “high level” view that was undertaken in less than a week based on incomplete

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information. Mr. Calder also attested that the problems the Report identified in the projections could be addressed with “relatively minor adjustments”.

[50] Moreover, after having reviewed the record as a whole, the motion judge described the evidence that the project budget was “reasonable” as “overwhelming”. For example, there was evidence before the motion judge that, unlike the high level and incomplete Report itself, the project budget had been carefully prepared and finalized over a long process based on numerous considerations. The evidence also showed that Barrick had “added a contingency to its base forecast that brought the confidence level to more than 95% - higher than the 85% confidence level the Pascua-Lama project team had recommended … which was already a high level of confidence for a project of this nature”. In addition, there was uncontested evidence that Barrick could adjust its production plan so as to stay on schedule, if necessary. Although she did not express it this way, the motion judge’s point, no doubt, was that there was a good deal of flexibility built into the capex budget to absorb adjustments without calling the budget itself or the proposed production schedule into question.

[51] In addition, there were contemporaneous documents showing that rather than losing faith in its capex budget as the result of the June Report, Barrick itself continued to rely on its forecast after October 27, 2011 and prior to January 2012. There was also an internal document entitled “Basis for Estimate for July 2011 Forecast Update” offering reasons why the claim in the Report that Barrick had

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used a “straight-line adjustment” was incorrect. This document lends support to the conclusion that the Report did not cause Barrack to lose faith in its 2011 capex budget.

[52] In the motion judge’s view, when all of these circumstances are considered, there is simply no realistic or reasonable possibility that a trier of fact would infer from the Report that early as October 27, 2011, Barrick management knew that its budget projections were unreasonable.

[53] In my view, the motion judge was entitled to come to this conclusion. She did not engage in impermissible weighing in doing so. As I have pointed out, Drywall’s submissions about the Report did not give rise to credibility issues that should have been resolved at trial. Its submissions instead raised the question of whether there was a reasonable or realistic chance that the inferences Drywall promoted would be drawn at trial, and carry the day, in all of the circumstances. The motion judge engaged in an appropriate assessment of the whole of the record, and in effect concluded that given the strength of the case to the contrary, there was no such possibility.

[54] In my view, Drywall’s associated attempt to promote the inference that by October 27, 2011, Barrick management no longer trusted F-T’s budget estimates fares no better. In support of this proposed inference, Drywall pointed to documentary evidence from Barrick showing that prior to October 27, 2011, Barrick

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had commenced a reforecasting process in which it asked F-T to prepare a definitive estimate. Drywall argued that the fact that Barrick undertook a reforecasting exercise and asked F-T to prepare a definitive estimate showed that Barrick believed before October 27, 2011 that F-T's budget, and hence its own project budget, was unreliable.

[55] Again, it is evident from her reasons that the motion judge was not persuaded that there was a reasonable or realistic possibility that this inference would be drawn at trial. There was evidence before her that budget reforecasting is not unusual. Moreover, uncontradicted evidence showed that Barrick asked F-T to complete a definitive estimate in order to pin down the cost of its work. Based on this evidence, and the "overwhelming" evidence that Barrick's October 27, 2011 budget was not only reasonable but cautious, the motion judge concluded that although there is a reasonable possibility that it may be inferred that "by sometime in October 2011, Barrick may have begun to wonder whether the ongoing pressures on the project might result in an increase in [F-T's] budget or schedule", there was no reasonable possibility that a trier of fact would infer that by October 27, 2011, Barrick no longer believed that its capex budget was inaccurate or unreasonable. Once again, I would not find that the motion judge committed any extricable errors of law in coming to this conclusion. She discharged the responsibilities that were assigned to her as a s.138.8 motion judge.

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[56] I would also reject Drywall's related submission that once the motion judge recognized that "by sometime in October 2011, Barrick may have begun to wonder whether the ongoing pressures on the project might result in an increase in [F-T's] budget or schedule" she had recognized that there was some credible evidence supporting its misrepresentation claim and should have granted leave on this basis alone. With respect, this submission illustrates the tendency that Drywall exhibited in its submissions to attempt to isolate credible evidence that supports its case, and to argue on this basis that it met the test for leave. As I have endeavoured to explain, the "some credible evidence" inquiry is not the leave test. The "some credible evidence" requirement is a necessary but not the sole sufficient condition to successfully establishing a realistic or reasonable chance of success, which is the leave test. Moreover, it is not enough to characterize evidence as sufficient when viewed in isolation. The record must be reviewed in its totality. The motion judge approached matters correctly.

[57] I would therefore reject Drywall's submission that the motion judge committed extricable errors by impermissibly weighing the evidence or its credibility, or otherwise engaging in a mini-trial.

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**(2) Did the motion judge err by failing to consider or trivializing major evidentiary gaps?**

[58] I would also reject Drywall's associated submission that the motion judge erred in her application of the leave test by failing to consider or trivializing the evidentiary gaps, contrary to the direction of this court in *SouthGobi*. In its submissions, Drywall featured the refusal by Barrick to produce documentation Drywall had been requesting, It also sought to illustrate the absence of evidence by referencing the remaining uncertainty as to whether Turner & Townsend developed and forwarded the project benchmark it believed to be appropriate.

[59] In my view, there is no basis for concluding that the motion judge failed to consider the evidentiary gaps in the record. She recognized that she was "obligated to consider what evidence is *not* before her" (emphasis original): quoting from *SouthGobi*, at para. 48. The motion judge noted that the proceeding "remains at an early stage" and said that she was "cognizant that production and discovery are not complete, and that there are categories of documents over which [Drywall] sought production but were refused." However, she found that given the "unusually well developed" record, which was massive consisting of thousands of pages of contemporaneous documents as well as affidavits from key witnesses that had been cross-examined, there were "no obvious gaps in the evidence before [her] that affect [her] analysis."

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[60] In my view, this is all that was required of the motion judge. As I have explained, her obligation was to consider whether the record "was sufficient, even without the benefit of discoveries and production, to properly assess whether there was a reasonable possibility of the success of the appellants' statutory action at trial": *Bayens*, at para. 73. The motion judge did this, concluding, as she was entitled to, that the record was adequate. Her reliance on the size of the record before her in making this determination was entirely appropriate: *Peters,* at para. 109. I see no basis for interfering with her conclusion in this regard. This evaluation was made without extricable error and is entitled to deference.

**(3) Did the motion judge err by failing to consider material evidence from a July 25, 2012 presentation?**

[61] In its submissions before us, Drywall placed heavy reliance on a July 25, 2012 presentation prepared by Barrick. It argued that this document shows that that Barrick knew its budget was not reasonable before the October 27, 2011 disclosure. Yet, the motion judge did not give this document close attention in either of her endorsements. On this basis, Drywall submits that the motion judge erred by failing to consider the record before her.

[62] I would not accept this submission. The motion judge refers to this document in her misrepresentation endorsement when addressing Barrick's decision to replace its in-house management team. She clearly considered it. Even if the

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motion judge had made no mention of July 25, 2012 presentation, I would not find on this record that she failed to give this evidence consideration. To be sure, the failure to mention evidence capable of supporting one of the parties can indicate a failure by a judge to consider that evidence, but whether this is so "will depend on a number of factors, including the nature of the evidence itself, the entirety of the evidence, the issues raised and the arguments made": *R. v. Sheeller*, 2014 ONCA 867, at para. 1. None of those factors support Drywall's submission.

[63] In terms of the nature of the evidence itself, where evidence does not strongly favour a submission, the failure of a judge to mention it may be attributable to nothing more than a determination by the judge that the evidence is not worthy of mention, or has minimal significance: *R. v. Curry*, 2019 ONCA 754, leave to appeal denied, [2014] S.C.C.A. No. 185, at para. 9; *R. v. K.C.,* 2015 ONCA 39, at para. 39. In my view, the July 25, 2012 presentation is not compelling enough to support an inference that the motion judge must have missed it or missed its significance. This document was created months after October 27, 2011 to explain the large budget increase that was reported in July 2012. It provides no basis for inferring that the concerns that gave rise to the review that led to those subsequent budget increases ought reasonably to have been recognized by Barrick prior to October 27, 2011. Although the July 25, 2012 presentation does allude to historical concerns that arose prior to October 27, 2011, they are described broadly, without reference to dates, and some of those concerns, such as the initial ineffective

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management structure, were publicly disclosed prior to October 27, 2011. This is not the kind of evidence one would necessarily have expected the motion judge to have addressed.

[64] In terms of the entirety of the evidence, the record was enormous, and the motion judge issued two lengthy judgments addressing multiple issues and submissions. Given the scope or her task, it is not surprising that the motion judge may not have explicitly mentioned all of the evidence that she considered.

[65] Moreover, if a litigant does not consider a document to be sufficiently important to focus on in their submissions, an appeal court is not likely to infer that the document is of sufficient importance that it should have been referred to in the judge's ruling. This, essentially, is the situation before us. Drywall presented no confirmation that this document was featured, let alone referred to, in its written or oral submissions before the motion judge relating to the alleged October 27, 2011 misrepresentations that are now under appeal.

[66] Therefore, I would not find that the motion judge failed to consider this document or the record before her. Nor, for the same reasons I have expressed in para. 62 above, would I accept Drywall's submission that the July 25, 2012 presentation shows that it has a reasonable possibility of succeeding with its October 27, 2011 misrepresentation claim.

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**(4) Did the motion judge err by misapplying the test for misrepresentations?**

[67] Drywall submits that the motion judge erred by conducting a purely subjective inquiry when considering whether a misrepresentation occurred on October 27, 2011. I take no issue with the general proposition that the disclosure requirements under the OSA are not to be determined based on the subjective beliefs of the responsible issuer and must ultimately turn on how those representations would reasonably be viewed: see *Wong*, at para. 103; *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, at para. 55. However, I am not persuaded that the motion judge conducted a purely subjective inquiry.

[68] First, as the passage from her misrepresentation endorsement that I quoted above in para. 42 demonstrates, the motion judge considered whether there was any evidence on the record "to suggest" that "Barrick had any reason to be concerned". This is an objective inquiry, and on its own, undermines Drywall's submission.

[69] Second, when the motion judge spoke in her misrepresentation endorsement to what Barrick knew, she was responding to Drywall's own claims about Barrick's subjective knowledge, namely, that Barrick knew as early as October 2011 that F-T's budget was unreliable, and that its own projections were

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fundamentally flawed. Put simply, since Drywall put Barrick's subjective knowledge in issue, it cannot fairly be inferred from the motion judge's reference to Barrick's subjective knowledge that she misconceived the law relating to misrepresentations.

[70] I would therefore deny this ground of appeal. I am not persuaded that the motion judge committed any extricable errors of law in denying Drywall leave to pursue its October 27, 2011 misrepresentation allegation.

**B. DID THE MOTION JUDGE COMMIT AN EXTRICABLE ERROR IN CONCLUDING THAT NOVEMBER 1, 2012, APRIL 10, 2013, AND JUNE 28, 2013 WERE NOT RELEVANT POSSIBLE PUBLIC CORRECTIONS OF THE ALLEGED MISREPRESENTATIONS MADE ON FEBRUARY 16, 2012 AND MARCH 28, 2012?**

[71] A "public correction" of an alleged misrepresentation will serve as a "necessary time-post for the proposed [s. 138.3(1) action] and any eventual damages calculation": *Drywall #1*, at para. 66; *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838, 159 O.R. (3d) 241, at para. 46. A motion judge considering whether leave should be granted pursuant to s. 138.8 must therefore determine "whether [an] alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Drywall #1*, at para. 76.

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[72] Recall that the material alleged misrepresentations in this case made on February 16, 2012 and March 28, 2012 were that Barrick's management considered its capex budget and production scheduling forecasts – $4.7 to $5.0 billion and a mid-2013 expected production date – to be reasonable and presented these projections as accurate without disclosing information that indicated otherwise. The motion judge accepted Drywall's submission that there was a reasonable possibility that Barrick's disclosure made on July 26, 2012 was a public correction of these alleged misrepresentations.

[73] This determination is solidly grounded in the evidence. In the July 2012 public disclosure, Barrick described challenges it had encountered with the Pascua-Lama project, admitted that its earlier projections had proved incorrect, and disclosed that a detailed review of its schedule and costs estimate was required. It then stated, in material part:

> While the review is not yet complete, preliminary results currently indicate that initial gold production is now expected in mid-2014, with an approximate 50-60 percent increase in capital costs from the top end of the previously announced estimate of $4.7-$5.0 billion …

[74] This disclosure was followed by a $1.45 drop in the value of each share. Evidence showed that it was greeted with shock by analysts and the market given its magnitude.

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[75] Not surprisingly, the motion judge concluded that this disclosure "put the market on notice that the forecasts were not reliable." She then found it to be inescapable that this July 26, 2012 release "accurately corrected any pre-existing misrepresentation about the schedule and capex budget" and concluded that "no subsequent statement can be a public correction of the February and March 2012 alleged misrepresentations". In making this point, the motion judge commented, at paras. 26 and 27 of her public disclosure endorsement, that "it was not reasonably possible that [Drywall] could prove that, in July 2012, Barrick misrepresented that its then-disclosed budget and schedule were based on assumptions Barrick considered reasonable". The motion judge said that this "finding leads inescapably to the conclusion that Barrick had accurately corrected any pre-existing misrepresentation about the schedule and capex budget by July 2012."

[76] Drywall argues that in finding the July 26, 2012 public correction to be a complete correction of the material alleged misrepresentations that the motion judge was granting leave to pursue, and in finding that as a result no subsequent disclosures could be possible corrections of the alleged misrepresentations, the motion judge misapplied the test and exceeded her role by encroaching on the jurisdiction of the common issues judge.

[77] I am not persuaded by these submissions. In identifying possible public correction dates a motion judge's ultimate task is to determine if there is a reasonable possibility that a trial court will find that a public disclosure was a public

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correction, an inquiry that requires a reasoned consideration of the evidence: *Drywall #1*, at para. 53. As I have indicated above, this inquiry may alternatively be profitably framed by asking "whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Drywall #1*, at para. 76; *Imperial Metals*, at paras. 47, 54. The motion judge stated this test correctly, and came to a reasoned conclusion on its application. Indeed, her logic is unassailable. Once Barrick disclosed on July 26, 2012 that its capex budget was being revised and that 50-60 percent increases were then being anticipated, and that its projected production date was now expected to be a year later than it had claimed on February 16, 2012 and March 28, 2012, there was no longer a realistic or reasonable possibility that investors could credibly treat Barrick as continuing to represent that its February 16, 2012 and March 28, 2012 representations were reasonable or accurate. It follows, as well, that public disclosures made after July 26, 2012 are not reasonably capable of being understood in the secondary market as correcting the already completely corrected impugned statements that had been made on February 16, 2012 and March 28, 2012.

[78] Drywall offered a volley of contrary arguments as to why this reasoning cannot be accepted as a proper application of the test. I would not accept any of them.

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[79] First, Drywall proposes that, at the leave stage, the question is whether there is "some linkage or connection between the alleged misrepresentation and the alleged public correction", and it argues that the fact that the disclosures of November 1, 2012, April 10, 2013, and June 28, 2013 also address the capex budget and projected production schedules is enough to satisfy the linkage test. In my view, a mere coincidence in subject matter is not enough on its own to establish a sufficient linkage or connection. As Strathy C.J.O., as he was then, explained "[a] linkage or connection will assist the judge in determining how the alleged corrective disclosure would be understood in the secondary market" (emphasis added): *Imperial Metals*, at para. 54. Chief Justice Strathy described the "overarching question", namely, "whether the alleged public correction [is] reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Imperial Metals*, at para. 47, quoting *Barrick #1*, at para. 76. It necessarily follows that a sufficient linkage or connection will exist if the alleged public correction can reasonably be taken as correcting the alleged misrepresentation, but not otherwise. A mere coincidence in subject matter will not suffice. The motion judge cited the linkage or connection inquiry and, in my view, applied it correctly.

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[80] I would also reject Drywall's submission that the motion judge encroached on the jurisdiction of the common issues judge administering the class action. The motion judge recognized the overlap that arises in proposed class action proceedings under s. 138.3(1) between leave inquiry determinations relating to public corrections, and the identification of sub-classes on a certification motion. She also recognized that the usual practice of having those issues resolved by the same judge in a single hearing was not possible in this instance, given that this court's order to retry the leave issue resulted in separate judges addressing the leave and certification questions. After considering the purpose of the screening role at a leave hearing, the motion judge reasonably concluded that she could best achieve judicial economy and access to justice by using the leave test to screen possible public corrections, thereby avoiding a duplication of efforts by the parties and the courts. As I have indicated, the motion judge confined herself to the leave test when determining the possible public correction dates. I can find no error in the sensible and careful manner in which she proceeded.

[81] I would reject, as well, Drywall's narrower challenges to the motion judge's reasoning. Specifically, I do not accept its submission that, in paras. 26 and 27 of her public disclosure endorsement, the motion judge erred by "improperly concluding that a disclosure that is not a misrepresentation cannot constitute a partial public correction." The motion judge made no such finding. As I have explained, she reasoned, in effect, that after the alleged misrepresentations of

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February 16, 2012 and March 28, 2012 had been completely corrected by the July 26, 2012 disclosure, there was no reasonable possibility that post-July 26, 2012 investors could reasonably link their investments to those alleged misrepresentations and no realistic or reasonable possibility that the subsequent disclosures would be found to be corrections for what had already been corrected. She did not confuse the misrepresentation and public correction issues.

[82] Similarly, I see no error by the motion judge in deciding, without examining the specific evidence relating to November 1, 2012, April 10, 2013, and June 28, 2013, that these disclosures are not reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement. Given her finding that "inescapably" the July 26, 2012 disclosure fully corrected the alleged misrepresentations of February 16, 2012 and March 28, 2012, there can be no reasonable possibility that the November 1, 2012, April 10, 2013, and June 28, 2013 disclosures would be accepted as publicly correcting what had already been fully corrected. The "robust analysis" that Drywall insists upon would have been pointless.

[83] Nor do I accept Drywall's related argument that the motion judge erred by resolving this issue based on a literal interpretation of the public disclosure of July 26, 2012 without considering Drywall's econometric expert evidence relating to how the November 1, 2012, April 10, 2013, and June 28, 2013 alleged corrections would be understood in the market. I fully agree that where there may

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be multiple explanations for a negative market response to a public disclosure, including a possible correction of the alleged misrepresentation, a purely semantic and mechanical approach cannot be taken in determining whether a public correction of the alleged misrepresentation has occurred, and available expert evidence must be closely consulted: see *Barrick #1*, at para. 50, citing with approval, *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin*, 2016 ONSC 5784, at para. 45. However, that is not the issue the motion judge was facing. The questions she was addressing on the facts before her were whether the July 26, 2012 disclosure completely corrected the alleged misrepresentations of February 16, 2012 and March 28, 2012 and if so, whether given this, the November 1, 2012, April 10, 2013, and June 28, 2013 releases could reasonably be found to be public corrections.

[84] The former question – whether the July 26, 2012 disclosures completely corrected the alleged misrepresentations – had everything to do with the semantic or mechanical language used, and the motion judge came to the only conclusion that was reasonably available to her. Given that on July 26, 2012, Barrick publicly disclosed that the capex budget it had included in its February 16, 2012 and March 28, 2012 disclosures was now expected to increase 50 - 60 percent, and its project completion date was now believed to have been one year too early, it was indeed inescapable that the alleged misrepresentations had been completely corrected.

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[85] The latter question – whether, given that the July 26, 2012 disclosures completely corrected the misrepresentations, the November 1, 2012, April 10, 2013, and June 28, 2013 disclosures could reasonably be found to be public corrections of the already corrected alleged misrepresentations – was a matter for judicial evaluation, not economic calculation by econometric experts. I can see no fault with the motion judge's judicial evaluation. I agree with her that if a misrepresentation is already completely corrected, it would not be reasonable to credit subsequent statements with doing so.

[86] Ultimately, s. 138.3(1) of the *OSA* is meant to provide generous access to justice to those whose trading decisions may have been tainted by misrepresentations. It would not be in keeping with this objective or with judicial economy to permit misrepresentation actions to be pursued on behalf of those who trade in securities after alleged misrepresentations have been completely publicly corrected, since a complete public correction will have removed any realistic prospect that those trading decisions may have been tainted.

[87] I therefore see no extricable legal errors in the motion judge's rejection of November 1, 2012, April 10, 2013, and June 28, 2013 as possible public corrections of the alleged misrepresentations of February 16, 2012 and March 28, 2012. I would deny this ground of appeal.

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**CONCLUSION**

[88] I would dismiss the appeal.

[89] As agreed between the parties. I would award costs on this appeal of $60,000 to the respondents on a partial indemnity basis, inclusive of all applicable taxes and disbursements.

Released: February 13, 2024 “L.B.R.”

“David M. Paciocco J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. Thorburn J.A.”

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# Tab 11

2016 ONSC 5784
Ontario Superior Court of Justice

**Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.**

2016 CarswellOnt 14793, 2016 ONSC 5784, [2016] O.J. No. 4918, 271 A.C.W.S. (3d) 307

**THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND and 0793094 B.C. LTD. (Plaintiffs) and SNC-LAVALIN GROUP INC., IAN A. BOURNE, DAVID GOLDMAN, PATRICIA A. HAMMICK, PIERRE H. LESSARD, EDYTHE A. MARCOUX, LORNA R. MARSDEN, CLAUDE MONGEAU, GWYN MORGAN, MICHAEL D. PARKER, HUGH D. SEGAL, LAWRENCE N. STEVENSON, GILLES LARAMEE, MICHAEL NOVAK, PIERRE DUHAIME, RIADH BEN AISSA and STEPHANE ROY (Defendants)**

Perell J.

Heard: August 29, 2015
Judgment: September 15, 2016
Docket: 12-CV-453236CP

Counsel: Douglas Worndl, Michael Robb, Ronald Podolny, Peter Jervis, for Plaintiffs
Steve Tenai, Andrew McCoomb, for Defendants, SNC-Lavalin Group Inc., Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal and Lawrence N. Stevenson
Steven Sofer, for Defendant, Pierre Duhaime
Patricia Jackson, for Defendant, Michael Novak
Clifford Lax, Q.C., for Defendant, Gilles Laramée
Laura Young, for Defendant, Stéphane Roy

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Securities; Torts

**Securities --- Trading in securities — Civil liability for secondary market disclosure**

Defendant SNC Inc. allegedly made misrepresentations in its core documents, and manipulated corporation's financial records to cover up bribes — When representations were allegedly publicly corrected, stock prices of SNC Inc.'s shares, which traded in secondary market, plummeted, causing over billion dollar loss to plaintiffs and class members — Plaintiffs, trustees of pension fund and numbered company, brought statutory cause of action for misrepresentations in secondary market under Part XXIII.1 of Securities Act, which was certified as class action — SNC Inc. and its defendant directors (together, defendants) brought motion for summary judgment to determine issue about whether alleged misrepresentations were "publicly corrected" — Plaintiffs brought motion for summary judgment to decide four common issues — Defendants brought motion to have plaintiffs' summary judgment motion permanently or temporarily stayed — Motion granted; both summary judgment

motions were permanently stayed — Plaintiffs' summary judgment motion raised genuine issues requiring trial and provided little utility — Defendants' summary judgment motion raised genuine issue requiring trial — Corrective disclosure issue could not be summarily adjudicated by mechanical comparison of meaning of words in core documents with meaning of words in corrective disclosures, or with meaning of words of pre-emptive corrective disclosure alleged by defendants — Determination of whether corrective disclosure was corrective depended on semantic analysis of what public correction meant, and also on analysis of how words would be understood in efficient market and statistical analysis of effect of those words on market's evaluation of value of securities that had been misrepresented to marketplace — Statistical analysis and semantic analysis of what counted as public correction raised genuine issues, which were too complicated and nuanced to be fairly determined summarily.

**Civil practice and procedure --- Summary judgment — Practice and procedure — Miscellaneous**

Defendant SNC Inc. allegedly made misrepresentations and manipulated corporation's financial records to cover up bribes — When representations were allegedly publicly corrected, stock prices of SNC Inc.'s shares plummeted, causing over billion dollar loss to plaintiffs and class members — Plaintiffs, trustees of pension fund and numbered company, brought statutory cause of action for misrepresentations in secondary market, which was certified as class action — SNC Inc. and its defendant directors (together, defendants) brought motion for summary judgment to determine issue about whether alleged misrepresentations were "publicly corrected" — Plaintiffs brought motion for summary judgment to decide four common issues — Defendants brought motion to have plaintiffs' summary judgment motion permanently or temporarily stayed — Motion granted — Both summary judgment motions were permanently stayed and motion material was to be treated as evidence for examination for discovery — There was jurisdiction to permanently stay motions pursuant to Rules of Civil Procedure and s. 12 of Class Proceedings Act, 1992 — Plaintiffs' summary judgment motion raised genuine issues requiring trial, given intricacy of issues, evidentiary record, sophistication of economic evidence, and provided little utility — Defendants' summary judgment motion sought determination of discrete issue of whether corrective disclosure existed, which was genuine issue requiring trial — Determination of whether corrective disclosure was corrective depended on semantic analysis and statistical analysis of words, which raised genuine issues, which were too complicated and nuanced to be fairly determined summarily.

MOTION by defendants for directions as to whether and in what manner summary judgment motions should proceed.

***Perell J.*:**

**A. INTRODUCTION**

1 The Plaintiffs, The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and 0793094 B.C. Ltd., bring a statutory cause of action under Part XXIII.1 of the Ontario Securities

Act, R.S.O. 1990, c. S.5 for misrepresentations in the secondary market. Leave has been granted to assert the statutory cause of action, and the action has been certified as a class action under the Class Proceedings Act, 1992, S.O. 1992, c. 6. See: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 (Ont. S.C.J.).

2 A synopsis of the Plaintiffs' and the Class Members' statutory cause of action, is that in its "core documents," SNC-Lavalin made misrepresentations or failed to disclose the information that it was required to disclose under the Ontario Securities Act, The Plaintiffs allege that the Defendants' representations were false because, among other reasons, in contravention of its own standards and policies for conducting business, employees of SNC-Lavalin bribed public officials with respect to three projects and covered up the bribes by manipulating the corporation's financial records. The three projects were: (1) the Padma Bridge Project in Bangladesh; (2) the McGill University Health Centre ("MUHC") Project in Montréal, Québec; and (3) the Canadian National Resources Limited ("CNRL") Froth Treatment Plant Project in Fort McMurray, Alberta. The Plaintiffs allege that the Defendants' representations were revealed to be false (i.e., publically corrected) when media reports and press releases, were made revealing police investigations of the employees' allegedly criminal activities. The Plaintiffs allege that with the revelation of the falsity of the information in SNC-Lavalin's documents, the stock prices of SNC-Lavalin's shares, which traded in the secondary market, plummeted causing over a billion dollar loss to the Plaintiffs and to the Class Members.

3 The Plaintiffs' action relies on Part XXIII.1 of the Ontario Securities Act, and the analogous provisions of the securities legislation of the other Canadian provinces and territories. The Plaintiffs accuse the Defendants of breaching the continuous disclosure provisions of the *Act*. The Plaintiffs also allege that the Defendants Pierre Duhaime, Gilles Laramée, Riadh Ben Aïssa, and Stéphane Roy knew that the disclosure documents contained misrepresentations. In particular, the Plaintiffs allege that the Defendants are liable for contravening s. 138.3 (1) of the *Act* which provides a right of action for damages where a responsible issuer releases a document that contains a misrepresentation. The right of action is available to a person or company who buys or sells the responsible issuer's security "during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected."

4 Now before the court is a "meta-motion" for directions. It is a meta-motion because it is a motion about other motions, and, in particular, the purpose of the meta-motion is to decide whether and in what manner one or two summary judgment motions should proceed.

5 The first summary judgment motion is brought by the "SNC-Lavalin Defendants," who are comprised of SNC-Lavalin Group Inc. and its outside directors, who are: Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, and Lawrence N. Stevenson.

6 In their summary judgment motion, the SNC-Lavalin Defendants bring what might be called a surgical motion to determine a discrete and supposedly narrow and manageable issue about whether the alleged misrepresentations, which are at the heart of the action, were "publicly corrected" as pleaded by

the Plaintiffs.

7 In their proposed summary judgment motion, the SNC-Lavalin Defendants submit that none of the Plaintiffs' pleaded "corrective disclosures"; i.e., the public corrections of the misrepresentations, were corrective of the alleged misrepresentations and, therefore, the Plaintiffs' statutory cause of action should be dismissed. The SNC-Lavalin Defendants submit that if their summary judgment motion is successful, then an enormously lengthy common issues trial involving 20 common issues, including questions of whether SNC-Lavalin bribed for its contracts in Bangladesh, Quebec, and Alberta, will become unnecessary. The action will be over for all parties.

8 In response to the SNC-Lavalin Defendants' summary judgment motion, the Plaintiffs submit that it is neither possible nor fair to determine the corrective disclosure common issue without deciding the misrepresentation common issues. Thus, the Plaintiffs bring a summary judgment to decide four common issues. The corrective disclosure common issue is included but the other three common issues that the Plaintiffs seek to have determined are about whether SNC-Lavalin's documents make representations that were subsequently revealed to be false. The Plaintiffs submit that these common issues can be determined without the court determining whether any of the SNC-Lavalin Defendants actually perpetrated bribes.

9 The SNC-Lavalin Defendants submit, however, that only their narrow single issue summary judgment motion should go forward, or alternatively, they submit that their motion should be disposed of before any hearing of the Plaintiffs' summary judgment motion. Thus, in this meta-motion, the SNC-Lavalin Defendants move to have the Plaintiffs' summary judgment motion permanently or temporarily stayed. The SNC-Lavlin Defendants submit that unlike their own summary judgment motion, the Plaintiffs' summary judgment motion, which is a partial summary judgment motion, is outside the scope of a what can be properly be decided by a summary judgment motion.

10 There are five separately-represented Defendants, namely; Michael Novak, Gilles Laramée, Pierre Duhaime, Stéphane Roy, and Riadh Ben Aïssa. Of these, all but Mr. Ben Aïssa, who has been noted in default, appeared on the return of the motion for directions. Messrs. Novak, Laramée, Duhaime, and Roy supported the position of the SNC-Lavalin Defendants on the meta-motion.

11 In addition, should the court allow the Plaintiffs' summary judgment motion to proceed, Messrs. Duhaime and Roy, who along with Mr. Ben Aïssa, have been charged in criminal proceedings, seek orders safeguarding their constitutionally protected right against self-incrimination.

12 Such being the requests of the parties, I foreshadow the outcome by saying that I shall decide the meta-motion by permanently staying both summary judgment motions.

13 I direct that this action proceed to examinations for discovery. The motion material delivered to date shall be treated as evidence for the examination for discovery. Given this outcome, it is not necessary to make a ruling about the requests of Messrs. Duhaime and Roy.

14 The costs incurred to date with respect to the two summary judgment motions and with respect to

this motion for directions shall be in the cause.

**B. EVIDENTIARY BACKGROUND TO THE META-MOTION**

15 The evidentiary background for the meta-motion was comprised of: (a) the SNC-Lavalin Defendants' Notice of Motion for the meta-motion; (b) the Certification Order of September 19, 2012; (c) a set of the pleadings in the action; (d) the SNC-Lavalin Defendants' Notice of Motion for their summary judgment motion; (e) the Notice of Motion for the Plaintiffs' Cross-Motion for summary judgment; (f) a document entitled "Plaintiffs' Disclosure of Proposed Rule 39 Examinations on Motions for Summary Judgment Including the Bases for the Examinations and Expected Duration"; (g) a letter from Class Counsel to counsel for the SNC-Lavalin Defendants dated July 21, 2016; and (h) a 434-page Compendium filed by the Plaintiffs.

16 The Plaintiffs' Compendium consisted of: (a) the Notice of Motion for the Plaintiffs' Cross-Motion for summary judgment; (b) the expert report of S.P. Kothari, dated June 29, 2016; (c) the expert report of Gordon Richardson, dated June 27, 2016; (c) Certification of filings of Duhaime and Laramée, year ended December 31, 2009; (d) Certification of filings of Duhaime and Laramée, year ended December 31, 2010; (e) certified translations of eight productions from the SNC-Lavalin Defendants and from Messrs. Roy and Duhaime; (f) Brief of Selected Productions of the Plaintiffs; (g) a document entitled "Plaintiffs' Disclosure of Proposed Rule 39 Examinations on Motions for Summary Judgment Including the Bases for the Examinations and Expected Duration"; (h) an email chain between Class Counsel and Counsel for the SNC-Lavalin Defendants; (i) the Certification Order; and (j) the Reasons for Decision for the Certification Order.

17 Also available for the meta-motion was the still developing motion records for the SNC-Lavalin Defendants' summary judgment motion record and for the Plaintiffs' cross-motion for summary judgment. These works in progress consisted of: (a) the SNC-Lavalin Defendants' four-volume Motion Record for Summary Judgment; and (b) the Plaintiffs' eight-volume Summary Judgment Motion Record, which was filed as the Plaintiffs' responding material to the SNC-Lavalin Defendants' motion and as the supporting material for their cross-motion.

18 The SNC-Lavalin Defendants' four-volume Summary Judgment Motion Record consisted of: (a) a notice of motion; and (b) an affidavit of Andrew McCoombs sworn on January 14,2016.

19 Mr. McCoombs is a lawyer at Norton Rose Fulbright Canada LLP, the lawyers of record for the SNC-Lavalin Defendants.

20 The Plaintiffs' eight volumes of combined responding and supporting motion material consisted of: (a) a notice of motion; (b) an affidavit and expert's report from Dr. S.P. Kothari; (c) an affidavit and an expert's report from Dr. Gordon Richardson; (d) an affidavit from Laura-Marie Paynter dated June 29, 2016; (e) a second affidavit of Laura-Marie Paynter dated June 28, 2016 pursuant to a *Wagg* Order; and (f) a third affidavit of Laura-Marie Paynter dated June 28, 2016.

21 Dr. Kothari is the Gordon Y. Billard Professor of Accounting and Finance at the Sloan School of

Management, Massachusetts Institute of Technology in Cambridge, Massachusetts.

22 Dr. Richardson is a Professor of Accounting at the Rotman School of Management at the University of Toronto.

23 Ms. Laura-Marie Paynter is a law clerk with the law firm of Siskinds LLP, co-Class Counsel for the Plaintiffs. The other co-Class counsel is Rochon Genova LLP.

24 As will be revealed in the discussion below, the Plaintiffs wished to augment their responding material and their supporting material by cross-examinations and examinations of ten witnesses. If the motions were to continue, it would be necessary to schedule a timetable for: (a) the delivery of the SNC-Lavalin Defendants' reply material in their own motion, which would also be responding material in the cross-motion; (b) the reply material in the cross-motion; (c) the completion of the examinations and cross-examinations; and (d) the date for a hearing of both motions.

**C. OVERVIEW**

***1. The Arguments of the Parties***

25 A review of the motion records in the rival summary judgment motions, which, as noted above are still a work in progress, contain lengthy notices of motion, which read more like factums. The notices of motion and factums for the meta-motion reveal that the design of the SNC-Lavalin Defendants' summary judgment motion is to advance what I shall describe as a "semantic argument" about the operation of what is a "public correction," sometimes called "corrective disclosure" under Part XXIII.1 of the Ontario Securities Act.

26 The SNC-Lavalin Defendants' argument is semantic, because it is about the meaning and about the truth or falsity of the meaning of words used in SNC-Lavalin's core documents and in the pleaded public correction documents.

27 To be more precise, the major premise of the SNC-Lavalin Defendants' semantic argument is that the constituent elements of the statutory cause of action under Part XXIII.1 of the Ontario Securities Act are: (1) a false statement in a core document; and (2) a corrective disclosure, which is a statement that reveals that the statement in the core document is false.

28 The minor premise of the SNC-Lavalin Defendants' argument is that it can be logically and interpretatively shown that the instances of corrective disclosure pleaded by the Plaintiffs do not count for a corrective disclosure either because: (1) the statement made in the alleged corrective disclosure document does not logically connect with the statement in the core document and, therefore, the statement says nothing about the truth or falsity of the statement in the core document; or (2) the falsity of the statement in the core document has already been publically disclosed and, therefore, the subsequent corrective disclosure had no operative effect.

29 Thus, SNC-Lavalin submits that there is no genuine issue requiring a trial that none of the pleaded

corrective disclosures were corrective of the alleged misrepresentations and, therefore, an essential element of the Plaintiffs' statutory cause of action is missing and the action should be dismissed.

30 During the course of the run up to the meta-motion, in response to the Plaintiffs' response to the SNC-Lavalin Defendants' summary judgment motion, which included a lengthy expert report from Dr. S.P. Kothari, the SNC-Lavalin Defendants discovered that they also had what I shall describe as a "statistical argument" that complemented their semantic argument.

31 The statistical argument arises from the feature of Part XXIII.1 of the Ontario Securities Act that in addition to corrective disclosure having the function of revealing the falsity of the statement in the core document, corrective disclosure also provides a mechanism for determining the Class Period, Class Membership, and the measure of damages. From these uses of a corrective disclosure, it emerges that a necessary ingredient of a corrective disclosure is that it must have a significant impact on the valuation of the securities that were being traded in the secondary market during the period between the statement in the core document and the corrective disclosure. In other words, a necessary identifier of a corrective disclosure is its having a statistically significant impact on market prices.

32 After Dr. S.P. Kothari advanced his analysis of corrective disclosure in response to the SNC-Lavalin Defendants' summary judgment motion, the Defendants advanced the statistical argument that some of the alleged corrective disclosures pleaded by the Defendants were not public corrections because they had had no appreciable effect on the market value of the SNC-Lavalin securities.

33 It may be noted that the semantic argument and the statistical argument both involve the mechanical interpretative exercise of determining whether the meaning of the statements in the core statements has been logically negated by the meaning of the statements in the public correction. The Defendants submitted that this mechanical interpretative exercise could be undertaken by assuming that the statements in the core documents were untrue and all that then needed to be done was to let the documents speak for themselves.

34 The mechanical nature of the SNC-Lavalin Defendants' argument is evidenced by the fact that the motion record for the SNC-Lavalin Defendants' summary judgment motion is comprised of a lengthy notice of motion that is essentially a factum accompanied by a supporting affidavit that is a collection of the core documents and the alleged corrective disclosure documents. The record for the summary judgment motion is essentially all documentary.

35 The Defendants submitted that this surgical summary judgment motion had the advantageous prospect that if the Defendants' interpretative arguments based on the documents proved correct, then an enormously lengthy and expensive trial would be avoided.

36 Further, on the meta-motion, the SNC-Lavalin Defendants argued that their surgical summary judgment motion should not be coupled with the Plaintiffs' evidentiary heavy cross-motion that was geometrically expanding with experts' reports and with long lists of witnesses and parties to be summonsed.

37 Moreover, the SNC-Lavalin Defendants submitted that, notwithstanding the Plaintiffs' submission that the underlying allegations of bribery would not have to be decided, this would not be the case, because the truth or falsity of the representations could not be proven without deciding whether bribery had occurred, and, in any event, the Plaintiffs' cross-motion would inevitably require the determination of numerous factual issues and numerous issues about the credibility of the witnesses that were beyond what was possible or proper for a summary judgment motion.

38 The SNC-Lavalin Defendants submitted that unlike the determination of the meaning of documents, the determinations required by the Plaintiffs' cross-motion could not be properly determined on a summary judgment motion, and, moreover, even if these cumbersome evidentiary matters could be summarily determined, the outcome of the action itself would still have to be determined, because the Defendants had free-standing defences and an assessment of damages would also be necessary.

39 For their part, on the meta-motion, the Plaintiffs submitted that it was neither possible nor fair to determine only the corrective disclosure issue. The Plaintiffs submitted that a purely mechanical exercise to determine the existence of a corrective disclosure was not possible because the falsity of the statements in SNC-Lavalin's documents could not be assumed and had to be judicially proven as part of the process of deciding whether there was a corrective disclosure. Moreover, the Plaintiffs submitted that even if it was proven that some of the pleaded corrective disclosures did not count for corrective disclosures, all that would mean is that the Class Period would be altered and that would not provide a reason to dismiss their statutory cause of action.

40 The Plaintiffs submitted that while it would be impossible and unfair to proceed only with the SNC-Lavalin Defendants' summary judgment motion, it would be all of possible, fair, and productive to complete the evidentiary record for both motions and hear them together. On the summary judgment motion, the Plaintiffs proposed a schedule for the consolidated motions that would see the motions argued in September 2017.

41 The SNC-Lavalin Defendants submitted that the proposed schedule for a consolidated summary judgment motion was unfair and unrealistic and could not be completed until the spring of 2018 while their surgical summary judgment motion could be heard in the winter of 2017.

### *2. Synopsis of the Reasons for Permanently Staving Both Summary Judgment Motions*

42 As noted above, I shall not allow either summary judgment to proceed. I have the jurisdiction to permanently stay these motions pursuant to the Rules of Civil Procedure and the court's jurisdiction to manage class actions provided by s. 12 of the Class Proceedings Act, 1992. Section 12 of the *Act* empowers the Court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination."

43 As I shall elucidate below, putting aside the issue of corrective disclosure, I agree with the SNC-Lavalin Defendants' arguments that the Plaintiffs' summary judgment motion raises genuine issues

requiring a trial. There is very little utility to the Plaintiffs' summary judgment motion. The outcome of the Plaintiffs' partial summary judgment motion would not be dispositive, even if the Plaintiffs were successful, and if the action went on to trial, there would be no forensic economies because the summary judgment motion would be just a partial dress rehearsal for a full-blown trial where the same evidence would have to be regurgitated.

44 Turning to the issue of corrective disclosure, which is a component of both proposed summary judgment motions, I disagree with the SNC-Lavalin Defendants that the corrective disclosure issue can be summarily adjudicated by a mechanical comparison of the meaning of the words in the core documents with: (a) the meaning of the words in the corrective disclosures; or (b) the meaning of the words of a pre-emptive corrective disclosure alleged by the Defendants in their summary judgment motion.

45 In my opinion, as I shall explain in more detail below, the determination of whether a corrective disclosure is corrective depends not only on a semantic analysis of what the public correction means but also on an analysis of how the words would be understood in an efficient market and also a statistical analysis of the effect of those words on the market's evaluation of the value of the securities that had been misrepresented to the marketplace. Put somewhat differently, a semantic analysis of whether a corrective disclosure was made is necessary, but it is not sufficient to determine the existence or non-existence of a corrective disclosure. What is required is an analysis of the literal meaning of the words, which is in any event not a purely mechanical exercise but one that involves evidence, opinion, and argument, and also an analysis of the perceived or effective meaning of the words in the secondary market, which once again is not a mechanical exercise, but rather one that involves evidence, opinion, and argument. The determination of this complex issue is not appropriate for a summary judgment motion.

46 And directly to the point of this meta-motion about whether the summary judgment motions should proceed, the key point is that what is both necessary and sufficient for a determination of whether a corrective disclosure exists is a genuine issue requiring a trial. The SNC-Lavalin Defendants are mistaken in thinking that the existence of a corrective disclosure can be determined just by a mechanical exercise of interpreting and comparing documents; a trial is required.

47 To determine whether a corrective disclosure exists, expert evidence about a variety of matters is necessary, and notwithstanding the robustness of the modern summary judgment rule, the corrective disclosure issue requires a full-fledged trial. I conclude that in the immediate case - indeed in every case - the issue of whether or not there has been a public correction of a misrepresentation cannot be resolved by a purely semantic argument of interpreting statements.

48 In my rejecting the availability of a summary judgment motion to decide the discrete corrective disclosure issue, I do so for reasons different than those advanced by the Plaintiffs. I disagree with them that for the purposes of determining whether a corrective disclosure exists, it is not possible to assume the falsity of the statements in the core documents; this is indeed possible, but it does not follow that the corrective disclosure issue can be determined without a regular trial. I also disagree with the Plaintiffs

that for the purposes of determining whether a corrective disclosure exists, it is necessary to prove that the statements in the core documents were false.

49 To summarize, my reason for rejecting the availability of a summary judgment motion is that a purely mechanical interpretative exercise is not enough and the discrete issue of whether a corrective disclosure exists is a genuine issue requiring a trial. Moreover, the determination of whether a corrective disclosure exists also entails a determination of the Class Period, the Class Membership and the measure of damages, if any, for the statutory cause of action. These determinations also raise genuine issues for trial as do possible defences to the SNC-Lavalin Defendants' argument about the role of public correction in the determination of liability and in quantifying the measure of damages.

**D. THEORETICAL, FACTUAL, AND PROCEDURAL BACKGROUND**

***Introduction***

50 The statutory cause of action established by s. 138.3 (1) of the Ontario Securities Act is prescribed for "*the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected*." The legal battleground for the meta-motion and for both proposed summary judgment motions is about the meaning and operation of these words. Most particularly, the legal territory fought over by parties is about the issue of what, under the Ontario Securities Act, counts as a "public correction" or "corrective disclosure." There are comparable provisions in the *Securities Acts* of the other provinces and territories.

51 The phrase "publicly corrected" is not defined in the *Act*, and the idea of public correction is actually a term of art from economic theory about how to measure damages for misrepresentations that affect of the value of securities trading in the primary or secondary market. Thus, at the centre of this meta-motion is an issue of statutory interpretation. To interpret a statute, the words of the statute are interpreted in their ordinary grammatical sense unless there is something to show that the Legislature intended to use the words in a special sense: *Victoria (City) v. Bishop of Vancouver Island* (1921), 59 D.L.R. 399 (Jud. Com. of Privy Coun.) at p. 402; *Xerox of Canada Ltd. v. Ontario Regional Assessment Commissioner, Region No. 10*, [1981] 2 S.C.R. 137 (S.C.C.). Where the purpose of the statute is to regulate a particular trade, business, or profession, and the words of the *Act* employ language that has a particular or special meaning to the practitioners of the trade, business, or profession, then the words are interpreted to have that particular meaning where it differs from the common or ordinary meaning of the words: *R. v. Manuel* (1982), 38 O.R. (2d) 321 (Ont. C.A.); *College of Physicians & Surgeons (Ontario) v. Larsen* (1987), 62 O.R. (2d) 545 (Ont. H.C.); *Unwin v. Hanson*, [1891] 2 Q.B. 115 (Eng. C.A.) at p. 119. When a statute is addressed to a specialized audience about a technical subject, the ordinary grammatical sense of its words may give way to the technical meaning of the words: *Unwin v. Hanson*, *supra*; *Great Western Railway v. Carpalla United China Clay Co.*, [1909] 1 Ch. 218 (Eng. C.A.) at p. 236.

52 In the above description of the arguments of the parties for the meta-motion, I have already

described the SNC-Lavalin Defendants' theory of what counts for public correction or corrective disclosure under the Ontario Securities Act. In this next section of my Reasons for Decision, I will briefly repeat that description and then briefly describe the Plaintiffs' theory of corrective disclosure, which derives from the opinion of Dr. Kothari. In the discussion of the factual background that next follows the discussion of the theoretical background, I will provide a few illustrations of how the parties would apply their respective theories about public correction or corrective disclosure to the facts of the immediate case.

53 The SNC-Lavalin Defendants have commissioned an expert to respond and critique Dr. Kothari's report, but that expert's opinion has not been completed and so is not before the court for this meta-motion, and so the soundness of Dr. Kothari's theory has not been tested. I will have something more to say about the soundness of either party's theory, and I make my own analysis of public correction or corrective disclosure in the discussion and analysis section of these Reasons for Decision, but for the immediate purposes of describing the factual and procedural background, it is possible to just describe without critique the parties' competing theories about public correction or corrective disclosure.

54 For the purposes of deciding the meta-motion, I can be brief about both parties' theories and what I say about the competing theories is not intended to be binding or to create any issue estoppels for future courts.

55 The issues on the meta-motion are, largely, unexplored legal territory. There are no cases that have directly addressed the questions raised in the immediate case. The paucity of legal authority is another reason why the issues in the immediate case would be best resolved at a trial where the court would have a better opportunity to explore the policy issues on a dynamic, not static, evidentiary record.

*1. Theoretical Background*

56 As already described above, the theory behind the SNC-Lavalin Defendants' submissions and arguments about public correction and corrective disclosure is that a public correction is a statement that reveals what is the falsity of a statement in a corporation's core documents, which is a statutory defined term that includes numerous types of documents. A public correction can come from virtually any source, including press releases and media reports. It is the SNC-Lavalin Defendants' theory that a public correction can be identified by the interpretative act of comparing and contrasting the meaning of the words in the core document with the meaning of the words of the public correction. A public correction can also be identified by its statistically material effect on the value of the corporation's securities trading in the secondary market.

57 It is a corollary of the SNC-Lavalin Defendants' theory that a statement does not qualify as a public correction or corrective disclosure if it can be shown that the statement does not logically connect with the statement in the core document because a non-connective statement says nothing about the truth or falsity of the statement in the core document. Further, it is a corollary of the SNC-Lavalin Defendants' theory that a statement does not qualify as a public correction or a corrective disclosure if the falsity of the statement in the core document has already been publically disclosed, because the subsequent

corrective disclosure can have no operative effect because the misrepresentation will already have been corrected. Further still, it is a corollary of the SNC-Lavalin Defendants' theory that a public correction or corrective disclosure that has no statistically significant impact on the market value of the corporation's securities does not qualify as a public correction or corrective disclosure. The legal theory of the SNC-Lavalin Defendants then postulates that a corrective disclosure is a constituent element of the statutory cause of action and if there is no public correction or corrective disclosure, then the statutory cause of action must be dismissed.

58 As already mentioned above, the SNC-Lavalin Defendants apply their theory to the facts of the immediate case and submit that there were no disclosures that were corrective and, therefore, the Plaintiffs' statutory cause of action should be dismissed.

59 In contrast, the Plaintiffs' theory of what counts for a public correction is based in part on legal argument and in part on the expert opinion of Dr. Kothari, who was commissioned by the Plaintiffs as an expert witness to respond to the SNC-Lavalin Defendants' summary judgment motion.

60 Dr. Kothari opined that when an issuer's securities are traded in an efficient market, material information affects the security's price. Materially positive information tends to increase the price and materially negative information tends to decrease the price of a security. Dr. Kothari says that there is a great deal of academic literature about what information is material to investors, and he uses that knowledge to determine whether in the immediate case, the information expressed in the Impugned Documents, which are listed below, and in the corrective disclosures, which are noted below, were material to investors.

61 In Dr. Kothari's opinion, a "corrective disclosure" or a "public correction" occurs when a statement discloses to the market that an issuer's previous representations were materially false. If the corrective disclosure is of materially negative news about the issuer, then the implication is that during the pre-corrective disclosure period, when the market was misled by a materially false positive representation of the issuer, the issuer's share price would have been artificially inflated.

62 In Dr. Kothari's opinion, the magnitude of the impact of the public correction can be measured by an event study methodology, which is a statistical technique designed to answer a variety of economic questions. He opines that if a significant share price impact is revealed by the event study, then an economic analysis will determine whether and to what extent the impact was caused by the corrective disclosure.

63 According to Dr. Kothari, an event study begins by specifying a model of what share price movements are "expected" based on market factors and then calculates abnormal returns using the parameters of this model. To determine whether the returns were abnormal, a rolling regression analysis model is used. This statistical model provides a measure of what the expected return would have been had there been no disclosure and then subtracts the realized (actual) returns to obtain a measure of the abnormal return, which is a measure of the impact of the information released on the date of the corrective disclosure. The abnormal returns then provide the basis for tests as to whether the

deviations from expected price movements on a set of event dates of interest are sufficiently large that simple random movement can be rejected as the cause.

64 In the immediate case, Dr. Kothari performed an analysis to determine whether SNC-Lavalin's shares traded in an efficient market, and he concluded that they did. Then, he considered whether the information provided in the impugned core documents was material information. His opinion was that the representations about the effectiveness of internal controls and compliance with ethical practices and financial reporting regulations was material to investors with the potential for a significant share price impact.

65 Performing an event study analysis, Dr. Kothari found that there was a statistically significant share price reaction for six of the seven Plaintiffs' Alleged Corrective Disclosure events. He then analyzed the news articles and analysts' reports around the dates of the corrective disclosure events. If the news articles and analysts' reports contained no new information, Dr. Kothari concluded that all of the significant share price reaction was attributable to the corrective disclosure. If the news articles and analysts' reports contained new information he used a statistical and economic analysis to parse out the share price impact attributable to the corrective disclosure and to measure the portion attributable to the new information.

66 Dr. Kothari also performed an event study analysis to determine the soundness of the SNC-Lavalin Defendants' arguments that there were other corrective disclosures not relied upon by the Plaintiffs that pre-empted a subsequent public correction from having any materially significant effect on share prices.

67 In a point of opinion that apparently will be contested by SNC-Lavalin's expert, whose report will now have to be disclosed in the normal course of litigation, Dr. Kothari opined that corrective disclosure can occur by multiple partial disclosures. In his report at para. 54, he stated:

> In my opinion, it is common for the revelation of bad news, such as a material misstatement, to be gradually disseminated to investors and impounded into share price over time. I base this opinion on my experience as an expert witness in securities class action lawsuits, where I have previously concluded that alleged material misstatements were gradually disseminated to investors. Consistent with this opinion, one of the seminal academic studies on this topic, Skinner (1994), highlights that *managers have incentives to gradually disseminate bad news to investors to discourage litigation*. Given this background, as part of my analysis, I investigate whether Plaintiffs' assertion that news related to the Impugned Representations was gradually released to investors is descriptive of the economic circumstances of this case.

*2. Factual Background*

68 SNC-Lavalin is a Canadian-based engineering and construction company with global operations. It is organized and continued under the Canada Business Corporations Act, R.S.C., 1985, c. C-44. SNC-Lavalin is a "reporting issuer" in Ontario and in all other provinces of Canada. Its shares trade on the

Toronto Stock Exchange among other exchanges. SNC-Lavalin is a reporting issuer in Ontario, and it is required to make disclosure in accordance with the Continuous Disclosure Obligations of the Ontario *Securities Act*.

69 Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, and Lawrence N. Stevenson were directors of SNC-Lavalin between November 6, 2009 and February 27, 2012. Gilles Laramée was, between November 6, 2009 and February 27, 2012, an Executive Vice-President and the Chief Financial Officer of SNC-Lavalin. Michael Novak was, between November 6, 2009 and February 27, 2012, an Executive Vice-President of SNC-Lavalin, and the Chairman of SNC-Lavalin International Inc., a wholly-owned subsidiary of SNC-Lavalin. Pierre Duhaime was, between November 6, 2009 and February 27, 2012, the Chief Executive Officer and a Director of SNC-Lavalin. He resigned from those positions effective March 26, 2012. Ben Aïssa was, between November 6, 2009 and February 27, 2012, an Executive Vice-President of SNC-Lavalin. Stéphane Roy was, between November 6, 2009 and February 27, 2012, a Vice-President Controller of SNC-Lavalin. He resigned from SNC-Lavalin on February 9, 2012.

70 In their current Statement of Claim, the Fourth Fresh as Amended Statement of Claim, the Plaintiffs plead that in the Impugned Documents issued by SNC-Lavalin between November 6, 2009 and November 4, 2011, SNC-Lavalin made various misrepresentations including the following:

- SNC-Lavalin was a "socially responsible company" and a "responsible global citizen";
- SNC-Lavalin had in place controls, policies and practices that were designed to ensure compliance with anti-bribery laws;
- SNC-Lavalin had "internal control over financial reporting" ("ICFR") and "disclosure controls and procedures" ("DC&P") that were properly designed and operating effectively; and
- SNC-Lavalin's business was conducted in compliance with its Code of Ethics.

71 Further, the Plaintiffs plead that SNC-Lavalin omitted to disclose in the Impugned Documents the material fact that it made payments to agents in multiple jurisdictions in the amount of $56 million and that it engaged in criminal activity connected to the Padma Bridge Project in Bangladesh during the Class Period.

72 The Impugned Documents of SNC-Lavalin are: (a) Management's Discussion and Analysis ("MD&A") for the quarter ended September 30, 2009; (b) MD&A and Audited Annual Financial Statements for the financial year ended December 31, 2009; (c) Annual Information Form ("AIF") for the year ended December 31, 2009; (d) Management Proxy Circular with respect to SNC's annual meeting of shareholders held on May 6, 2010; (e) MD&A and Interim Financial Statements for the quarter ended March 31, 2010; (f) MD&A and Interim Financial Statements for the quarter ended June 30, 2010; (g) MD&A and Interim Financial Statements for the quarter ended September 30, 2010; (h) MD&A and Audited Annual Financial Statements for the financial year ended December 31, 2010; (i)

AIF for the year ended December 31, 2010; (j) Management Proxy Circular with respect to SNC-Lavalin's annual meeting of shareholders held on May 5, 2011; (k) MD&A and Interim Financial Statements for the quarter ended March 31, 2011; (1) MD&A and Interim Financial Statements for the quarter ended June 30, 2011; and (m) MD&A and Interim Financial Statements for the quarter ended September 30, 2011.

73 The Plaintiffs plead that the statements in the Impugned Documents were false or misleading because during the Class Period: (a) SNC-Lavalin was paying bribes to foreign government officials or persons in Canada in relation to the Padma Bridge Project; (b) SNC-Lavalin was paying bribes which were disguised as agent payments of $33.5 million that were documented to construction projects to which they did not relate; (c) SNC-Lavalin was paying bribes of $22.5 million for the MUHC Project as purported agent payments for other projects; (d) the aforesaid payments totaling $56 million to agents and related agency agreements violated SNC-Lavalin's Policy on Commercial Agents/Representatives and its Code of Ethics; (e) as a result of the $56 million in agent payments, SNC-Lavalin's ICFR and DC&P were not effective as a result of material weaknesses in their design and operation leading to non-compliance with and ineffective controls over compliance with, the Agents Policy and Code of Ethics; and (f) some or all of SNC-Lavalin's financial statements during the Class Period were not prepared in accordance with GAAP because they did not properly account for the $56 million in agent payments.

74 The Plaintiffs plead that on *February 28, 2012*, SNC-Lavalin issued a press release in which it announced that its Board of Directors had initiated an independent investigation, led by the Audit Committee, of the facts and circumstances surrounding $35 million in payments made in Q4/2011 that were documented to construction projects to which they did not relate. The press release indicated that independent counsel had been hired and that the Board had taken steps to initiate changes arising from the investigation. The press release indicated that SNC-Lavalin was delaying its earnings announcement.

75 The Plaintiffs plead that the February 28, 2012 press release was a partial public correction or corrective disclosure revealing that SNC-Lavalin's ICFR and DC&P were materially ineffective and that SNC-Lavalin was not conducting business in compliance with its Code of Ethics.

76 In his affidavit for the Plaintiffs in their cross-motion for summary judgment Dr. Richardson, the accountancy expert, analyzes SNC-Lavalin's ICFR and DC&P from an accounting perspective and compares what was actually in place during the material time with the representations made by SNC-Lavalin. He concludes that there were material weaknesses in SNC-Lavalin's ICFR and DC&P during the material period of time and that SNC-Lavalin's certifications to the contrary in the relevant MD&A were materially false. Dr. Richardson explains that the false accounting of $22.5 million in MUHC agent payments was in breach of relevant accounting standards, Canadian Securities Administrators National Instrument 52-109, and SNC-Lavalin's own Code of Ethics. He opines that the false accounting resulted in material misstatements in SNC-Lavalin's 2010 annual and interim financial statements.

77 With the release of the February 28, 2012 press release, there was a 23% drop in SNC-14 Lavalin's share price in heavy trading on the 28 and 29 of February. Dr. Kothari opines that the February 28,

2012 press release was a partial public correction of the misrepresentations that had a statistically significant price impact of-16.06%, 16%, representing a loss of approximately $1.17 billion of SNC-Lavalin's then $7.31 billion market capitalization.

78 In their summary judgment motion, the SNC-Lavalin Defendants submit that the February 28, 2012 press release was not corrective of the alleged misrepresentations.

79 In their summary judgment motion, the SNC-Lavalin Defendants submit that on *March 25, 2012*, there was a corrective disclosure — one not pleaded by the Plaintiffs — with the release of the 2011 MD&A. This MD&A identified material weaknesses in SNC-Lavalin's ICFR as of December 31, 2011 and disclosed that:

> ... the absence of conclusive findings of the Independent Review does not exclude the possibility that, if additional facts that are adverse to the Company became known, including matters beyond the scope of the Representative Agreements that were the subject of the Independent Review, sanctions could be brought against the Company in connection with possible violations of law or contracts, actual or alleged, could adversely affect our business and the market price of our publicly traded securities ...

80 In their notice of motion for their summary judgment motion and in their factum for the meta-motion, the Plaintiffs' submit that a further partial corrective disclosure incurred on *March 26, 2012* with SNC-Lavalin's release of its MD&A that disclosed that: (a) the independent investigation referred to in the February 28, 2012 press release had led the Audit Committee to investigate the MUHC Project and the CNRL Project; and (b) the Audit Committee concluded that expenses amounting to $56 million were misallocated to projects to which they did not relate. The Plaintiffs submit that the 2011 MD&A provided details of the misallocated expenses, including the schedule of payments made pursuant to the agency contracts. The March 26, 2012 MD&A contained information about the activities of Messrs. Ben Aïssa, Novak, Duhaime, and Laramée. The 2011 MD&A revealed non-compliance with SNC-Lavalin's Code of Ethics and its Policy on Commercial Agents/Representatives.

81 It was Dr. Kothari's opinion that the March 26, 2012 MD&A resulted in a -2.60% share price impact on the value of SNC-Lavalin's securities trading in the secondary market.

82 In their factum for the meta-motion, the SNC-Lavalin Defendants dispute that the Plaintiffs pleaded the March 26, 2012 MD&A as a corrective disclosure.

83 The Plaintiffs plead that a further partial corrective disclosure occurred on *April 13, 2012* following the release of information in the media that the RCMP conducted a search of SNC-Lavalin's headquarters in Montreal.

84 It was Dr. Kothari's opinion that the April 13, 2012 corrective disclosure resulted in a -2.84% share price impact on the value of SNC-Lavalin's securities trading in the secondary market.

85 In their summary judgment motion, the SNC-Lavalin Defendants submit that the April 13, 2012

media reports were not corrective of the alleged misrepresentations.

86 I pause here to use the April 13, 2012 public correction as an illustration, as promised above, of Dr. Kothari's theory about corrective disclosure. I make no findings about Dr. Kothari's opinion, but the illustration is useful to appreciate the nature of the findings that both parties wished the court to make summarily.

87 Dr. Kothari, in his report, had the following to say about ICFR and DC&P and the significance of the April 13, 2012 disclosure of information to the marketplace:

> 24. The April 13, 2012 Plaintiffs' Alleged Corrective Disclosure communicated that the police raided SNC, employees were barred from the building, and search warrants were issued. On March 26, 2012, SNC indicated that these misallocated payments were isolated incidents. The news that RCMP was raiding SNC in April would have intensified investors' concerns about whether the misallocated payments were indeed isolated incidents and whether the police investigation might uncover additional issues with SNC's internal controls, disclosure controls and procedures, and anti-bribery controls. In addition, the March 26, 2012 press release also caused investors to revise their estimate of the magnitude of the losses associated with SNC's internal controls, and disclosure controls and procedures. Thus, my opinion is that the Plaintiffs' Alleged Corrective Disclosure on April 13, 2012 partially corrected the Impugned Representations that SNC had effective internal controls and disclosure controls and procedures.
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> . . .
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> 42. In my opinion, SNC's representations that: (a) it had established ICFR and DC&P; and (b) the CEO and the CFO evaluated those controls and concluded they were effective were material to investors. Effective internal controls and disclosure controls and procedures are the foundation of a firm's financial reports, and they are instrumental in SNC's ability to credibly convey financial information to investors. Without effective ICFR and DC&P, investors would not have confidence in SNC's publicly disclosed financial information.
>
> 43. There is extensive academic research consistent with my opinion. In the ICFR context, much of this literature focuses on U.S. firms and examines whether firms with poor internal controls experience some form of negative economic outcome. Generally, these studies find that internal controls are economically significant. For example, firms with weak internal controls are found to have a higher cost of capital, less efficient operations, lower quality accounting reports, and more losses through insider trading. These findings indicate that weak internal controls are associated with negative economic consequences. A second set of studies investigates whether investors react to the disclosures made about the quality of a firm's internal controls. At least two papers on this topic find that, on average, a firm's share price declines significantly when investors learn it has weak internal controls.
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> 44. In the DC&P context, academic research documents a variety of economic benefits accruing to

firms providing high quality financial disclosures. Several studies indicate that higher quality disclosure, measured through a variety of different constructs, is associated with a lower cost of debt and equity capital.

45. A large body of literature examines the effect of breakdowns in firms' disclosure controls and procedures. The salient portion of this literature examines the market reaction to firms that restate their financial statements because of irregularities. A paper by Hennes, Leone, and Miller, 2008, finds that when firms restate their financial statements due to irregularities, their share prices experience an average decline of 14%. Similarly, Palmrose, Richardson, and Scholz, 2004, find that the market reacts negatively to restatements of earnings (an average reaction of -9.2%), and especially for restatements due to fraud (-20%).

. . .

112. On April 13, 2012, several press articles indicated that the RCMP raided SNC's offices and that the RCMP had a search warrant. One article, in particular, highlighted that in addition to the raid by the RCMP, "other signs also point to a long, international investigation in several countries."

113. On March 26, 2012, management indicated that they would cooperate with authorities. Investors were, therefore, aware that there would be an exchange of information between SNC and legal authorities at some point. The news that was released on April 13, 2012 revealed that the authorities were the RCMP, the RCMP conducted a "raid," SNC's headquarters were being "swarmed" with police, and access to the building was being blocked during the raid. The characterization of the interaction between the RCMP and SNC by the press suggests that, as opposed to SNC providing information to authorities, authorities were searching for information that SNC did not provide.

114. In my opinion, disclosures that the RCMP searched for information regarding improper payments were material to investors. Specifically, it appears that on April 13, 2012 investors updated their expectations regarding the magnitude of the improper payments and the severity of the internal control weaknesses. On March 26, 2012, SNC had disclosed that it had determined that the misallocated payments were isolated and that they would share the information with authorities. News that the RCMP was raiding SNC offices and barring access to the building indicates that the RCMP did not accept management's disclosure at face value and that RCMP was searching for additional evidence of improper payments.

115. As a result, investors updated their expectations of the extent to which SNC had weak internal controls and the magnitude of the losses SNC would suffer from these weak internal controls. Thus, in my opinion, the April 13, 2012 disclosures partially corrected the Impugned Representations. The disclosures informed investors that there were additional issues with ICFR and DC&P, and the costs of remediating these issues were greater than previously expected.

116. My review of the analyst reports issued after April 13, 2012 indicates that, consistent with my

opinion, analysts considered the Plaintiffs' Alleged Corrective Disclosures to be material and related to the Impugned Representations.

117. For example, The National Bank Financial analyst report dated April 16, 2012 noted that:

> A visit from the RCMP should not come as a surprise to investors, as Chairman Gwyn Morgan indicated SNC would assist however possible, so it is logical that evidence may be collected from headquarters. Unfortunately, the negative publicity from this event and resulting impact on share price is exacerbated by the company's recent string of setbacks (including last week's allegations of a bribe in Tunisia), the media's attraction to SNC's woes, the perception of police "raiding" a company's HQ, and challenging equity markets.

118. The Altagroup issued a report dated April 16, 2012 indicating that:

> The market hates uncertainty as much as it hates the arrival of police in the company's offices. SNC shares showed on Friday (-4.5% vs. peers at -2% for the day) how much the combination of the two spooked investors when RCMP officers went up to SNC's executive floor. Even though the event was well telegraphed by management in its Q4/11 conference call and pertains to people who are no longer with the firm, the share price correction suggested that investors treated this as a "new" development. The negative events of the missing moneys, departure of the CEO have happened already. There are 2 lingering questions, however, that remain. First, will there be a potential fine for the so-called "agency arrangements", and, second, will SNC's clients continue working with the company despite the headline.

119. In addition, management had an "investor lunch" with analysts and discussed the raid. This is also consistent with my opinion that investors considered the raid to be a material event. The views contained in the analyst reports are also consistent with my opinion that investors updated their concerns over the quality of the controls SNC had in place to ensure that it was in compliance with anti-bribery laws, and the potential costs of the investigation. In particular, one analyst raised concerns over the fines that SNC will have to pay due to the "so-called 'agency arrangements,'" and several analysts raised concerns over the cost of the investigation.

120. My search of the news articles on April 12, 2012 and April 13, 2012 reveals that no other material news was disclosed on these dates.

121. Overall, my opinion is that investors considered the RCMP raid to be a material event, and as a result of this event investors updated their expectations of the extent to which SNC had weak internal controls and the magnitude of the losses SNC would suffer from these weak internal controls.

88 The Plaintiffs plead that a further partial corrective disclosure occurred on *June 22, 2012* following the release of information in the media that two former employees of SNC-Lavalin had been charged with criminal offences under the *Corruption of Foreign Public Officers Act* in relation to Padma Bridge.

89 It was Dr. Kothari's opinion that the June 22, 2012 corrective disclosure had no impact on the value of SNC-Lavalin's securities trading in the secondary market.

90 In their summary judgment motion, the SNC-Lavalin Defendants submit that the June 25, 2012 media reports were not corrective of the alleged misrepresentations because there had already been multiple public disclosures of the investigations by Canadian police and the World Bank concerning alleged corruption in relation to the Padma Bridge Project, including: (a) a September 2, 2011 article in the *Wall Street Journal;* (b) a September 6, 2011 press release issued by SNC-Lavalin about the investigations concerning the Padma Bridge Project; (c) discussion in the March 25, 2012 MD&A about the investigations; and (d) a April 2, 2012 press release issued by SNC-Lavalin and media reports reporting that the World Bank had temporarily barred SNC-Lavalin from bidding on new World Bank projects because of the Padma Bridge Project.

91 The Plaintiffs plead that a further corrective disclosure occurred on *November 26, 2012* as a result of the release of information in the media that Swiss authorities were investigating illegal or improper payment by SNC-Lavalin of approximately $139 million and that these payments were in addition to the $56 million agent payments.

92 It was Dr. Kothari's opinion that the November 26, 2012 corrective disclosure resulted in a -2.23% share price impact on the value of SNC-Lavalin's securities trading in the secondary market.

93 In their summary judgment motion, the SNC-Lavalin Defendants submit that the media reports of November 26, 2012 were not corrective of the alleged misrepresentations because: (a) the information did not relate to any of the alleged misrepresentations; and (b) by at least April 29, 2012, it had been publicly disclosed through media reports that Mr. Ben Aïssa had been arrested and was being held by Swiss authorities on accusations of corrupting a public official, fraud and money laundering tied to his dealings in North Africa.

94 The Plaintiffs plead that a further corrective disclosure occurred on *November 28-29, 2012* as a result of the release of information in the media that the Mr. Duhaime had been arrested and charged with fraud and other criminal offences related to the contract awarded to SNC-Lavalin with respect to the MUHC Project.

95 It was Dr. Kothari's opinion that the November 28-29, 2012 corrective disclosure resulted in a -5.76% share price impact on the value of SNC-Lavalin's securities trading in the secondary market.

96 In their summary judgment motion, the SNC-Lavalin Defendants submit that the November 28-29, 2012 media reports were not corrective of any of the alleged misrepresentations because months earlier: (a) various media outlets had reported on the police investigation of the MUHC Project and the execution of search warrants in September and October 2012 by Quebec police at the headquarters of the MUHC; and (b) it had been disclosed that approximately $22.5 million of the already disclosed $56 million of unauthorized payments had been paid by SNC-Lavalin to MUHC to win the MUHC contract and that such payments had been commissioned by Mr. Ben Aïssa and approved by Mr. Duhaime.

97 The Plaintiffs plead that a further corrective disclosure occurred on *July 13, 2013* from the release of information in the media that SNC-Lavalin had paid a secret $13.5 million "commission" that was linked to the CNRL Froth Treatment Plant Project in Alberta, the import being that the commission was a bribe.

98 It was Dr. Kothari's opinion that the July 13, 2013 corrective disclosure resulted in a -2.20% share price impact on the value of SNC-Lavalin's securities trading in the secondary market.

99 In their summary judgment motion, the SNC-Lavalin Defendants submit that the media reports of July 13, 2013 were not corrective of the alleged misrepresentations because the $13.5 million commission for the CNRL Froth Treatment Plant Project was a part of the already disclosed misallocation of $33.5 million sum that had been previously identified by SNC-Lavalin in its Internal Review in March 2012 and because this had been reported by the *Globe & Mail* on March 18, 2013.

100 According to Dr. Kothari the aggregate share price impact attributable to the multiple corrective disclosures was -31.62% meaning that the price of SNC-Lavalin shares was overpriced by 31.62% because of the pleaded misrepresentations. In their summary judgment motion, the SNC-Lavalin Defendants submit that the Ontario Securities Act, and the other comparable provincial securities statutes, do not provide for claims based on multiple corrections of the same alleged misrepresentation.

*3. Procedural Background*

101 On May 9, 2012, the Plaintiffs commenced this action under the Class Proceedings Act, 1992, S.O. 1992, c. 6. The Plaintiffs sought damages for alleged misrepresentations that affected the market value of the shares of SNC-Lavalin, which shares trade on the Toronto Stock Exchange, among other exchanges. The Plaintiffs sought damages of $1 billion.

102 As repeatedly noted above, the Plaintiffs' action relied on Part XXIII.1 of the Ontario Securities Act, and the analogous provisions of the securities legislation of the other Canadian provinces and territories. At the outset of the action, the Plaintiffs also advanced a common law negligent misrepresentation claim and an oppression remedy claim, but these claims were subsequently withdrawn.

103 By order dated September 19, 2012, I granted an unopposed motion for: (1) leave under Part XXIII.1 of the Ontario Securities Act; (2) approval of the discontinuance of the Plaintiffs' common law negligence and oppression claims; and (3) certification of the action as a class proceeding. See *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 (Ont. S.C.J.).

104 The Class Period is: November 6, 2009 to February 27, 2012.

105 The Class Definition is:

> All persons, wherever they may reside or be domiciled, who acquired securities of SNC during the

Class Period, except for: (1) the Excluded Persons; and (2) those persons resident or domiciled in the Province of Québec at the time they acquired SNC securities during the Class Period, and who are not precluded from participating in a class action by virtue of Article 999 of the Québec *Code of Civil Procedure*, R.S.Q., c. C-25.

106 The common issues are as follows:

**Statutory Secondary Market Liability - Impugned Documents**

(a) Did the Impugned Documents contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?

(b) If the answer to (a) is yes, then when and by what means were the misrepresentations contained in the Impugned Documents publicly corrected?

(c) If the answer to (a) is yes:

(i) did the defendants Gilles Laramée ("Laramée"), Michael Novak ("Novak"), Pierre Duhaime ("Duhaime"), Riadh Ben Aïssa ("Ben Aïssa") and Stéphane Roy ("Roy"), or any of them, authorize, permit or acquiesce in the release of the Impugned Documents which contained one or more misrepresentations?

(ii) did Duhaime, Laramée, Ben Aïssa and Roy actually know that the Impugned Documents contained misrepresentations at the time such documents were released?

(iii) if any of Duhaime, Laramée, Ben Aïssa and Roy did not actually know that the Impugned Documents contained misrepresentations at the time such documents were released, then does recklessness or willful blindness with respect to the misrepresentations suffice for purposes of the knowledge requirement of s. 138.7(2) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(iv) if the answer to clause (iii) above is yes, were Duhaime, Laramée, Ben Aïssa and Roy, or any of them, reckless or willfully blind as to the existence of the misrepresentations in the Impugned Documents at the time such documents were released?

**Statutory Secondary Market Liability - Certifications**

(d) Did the Certifications contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?

(e) If the answer to (d) is yes, then when and by what means was the misrepresentation contained in the Certifications publicly corrected?

(f) If the answer to (d) is yes:

(i) did Duhaime and Laramée, or either of them, authorize, permit or acquiesce in the release of the Certifications which contained a misrepresentation?

(ii) if the answer to clause (i) above is yes, with respect to Duhaime and Laramée:

(1) did they actually know that the Certifications contained the misrepresentation at the time such documents were released?

(2) at or before the time the Certifications were released, did they deliberately avoid acquiring knowledge that the Certifications contained the misrepresentation? or

(3) were they, through action or failure to act, guilty of gross misconduct in connection with the release of the Certifications?

(iii) if the answer to clause (i) above is yes, and if either of Duhaime or Laramée did not actually know that the Certifications contained the misrepresentation at the time such documents were released, then does recklessness or willful blindness with respect to the misrepresentation suffice for purposes of the knowledge requirement of s. 138.7(2) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(iv) if the answer to clauses (i) and (iii) above is yes, was either of Duhaime or Laramée reckless or wilfully blind as to the existence of the misrepresentation in the Certifications at the time such documents were released?

**Due Diligence**

(g) If the answer to (a) or (d) is yes:

(i) before the release of the Impugned Documents and Certifications, as the case may be, did the applicable Defendant conduct or cause to be conducted a "reasonable investigation" in accordance with s, 138.4(6) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(ii) at the time of the release of the Impugned Documents and Certifications, as the case may be, did the applicable Defendant have no reasonable grounds to believe that the documents contained the misrepresentations?

**Assessment of Damages**

(h) If the answer to (a) or (d) is yes, did the Class Members suffer damages caused by the misrepresentations and, if so, on what basis are the damages suffered by Class Members to be determined?

(i) For purposes of s. 138.5 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory), what amount, if any, of the change in the market price of SNC's securities after the corrective disclosure and during the 10 trading days thereafter was unrelated to the alleged misrepresentations?

(j) What are the applicable limits on damages, if any, for each Defendant under s. 138.7 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

**Proportionate Liability**

(k) If the answer to (a) or (d) is yes, for each applicable Defendant found liable, what is that defendant's respective responsibility for assessed damages pursuant to s. 138.6 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

**Administration Costs**

(l) Should the Defendants pay any of the costs of administering and distributing the recovery? If so, which Defendants should pay, and how much should each such Defendant pay?

107 Leave having been granted under the Ontario Securities Act, on September 20, 2012, the Plaintiffs delivered their Fresh as Amended Consolidated Statement of Claim. The Statement of Claim was subsequently amended, and the current set of pleadings includes the Fourth Fresh as Amended Statement of Claim.

108 Statements of Defence from the SNC-Lavalin Defendants and respectively from Messrs. Novak, Laramée, Duhaime, and Roy have been delivered.

109 The Plaintiffs have delivered Replies to the various Statements of Defence.

110 Mr. Ben Aïssa did not deliver a Statement of Defence, and he has been noted in default.

111 It should be noted that the current set of pleadings followed an unsuccessful motion by the Plaintiffs to amend their Second Fresh as Amended Statement of Claims and their Replies. See *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2014 ONSC 660 (Ont. S.C.J.), leave to appeal refused 2014 ONSC 3438 (Div. Ct.).

112 On January 14, 2016, the SNC-Lavalin Defendants served their motion record for a summary judgment motion in respect of the corrective disclosure issue.

113 On June 30, 2016, the Plaintiffs served their cross-motion for a summary judgment based on four common issues.

114 From the above list of common issues, the common issues relevant to the Plaintiffs' summary

judgment motion are as follows:

**Statutory Secondary Market Liability - Impugned Documents**

(a) Did the Impugned Documents contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?

(b) If the answer to (a) is yes, then when and by what means were the misrepresentations contained in the Impugned Documents publicly corrected?

**Statutory Secondary Market Liability -Certifications**

(d) Did the Certifications contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim? (e) If the answer to (d) is yes, then when and by what means was the misrepresentation contained in the Certifications publicly corrected?

115 For the Plaintiffs' proposed summary judgment motion, they plan to conduct ten oral examinations pursuant to rules 34.07 and 39.03, six involving Defendants (Laramée, Novak, Duhaime, Roy, Morgan, and Ben Aïssa) and four involving non-party witnesses who are current or former SNC-Lavalin employees (Leslie Quinton, Marie-Josée Bérubé, Ronald Denom, and Gabrielle Lacasse).

116 The Plaintiffs wish to conduct these examinations before completing their motion record, I note that this is contrary to standard practice under the Rules of Civil Procedure, which requires that all affidavits be delivered before any examinations of witnesses; the *Rules* require that the parties must submit their evidence before any cross-examinations of opposing parties: rule 39.02(1). Assuming that I would permit a different approach, the Plaintiffs would then complete their motion record by January 31, 2017, and then they propose that the Defendants have one month to file their responding motion record to the cross-motion, with the cross-examinations and examinations to be completed within 28 days of the Plaintiffs' filing reply affidavits. The Plaintiffs' proposed schedule envisions a hearing of the consolidated summary judgment motions after September 30, 2017.

117 I agree with the Defendants that the Plaintiffs' proposed schedule is none of realistic, feasible, or fair. If the Plaintiffs' proposed summary judgment were to proceed, a hearing would have been scheduled for the spring of 2018.

118 In contrast, if only the SNC-Lavalin Defendants' summary judgment were to proceed, they propose to serve all reply evidence by November 15, 2016, which would include a rebuttal to the expert evidence of Drs. Kothari and Richardson, have cross-examinations completed by mid-January with a hearing date in March 2017.

119 For the reasons that I shall next explain, all this proposed scheduling is for naught. I am

permanently staying both summary judgment motions. What needs to be scheduled is the completion of the examinations for discovery.

**E. DISCUSSION AND ANALYSIS**

***Introduction***

120 To explain my reasons for permanently staying both summary judgment motions, I shall first discuss my reasons for permanently staying the Plaintiffs' summary judgment cross-motion.

121 Second, I shall explain my reasons for permanently staying the SNC-Lavalin Defendants' summary judgment motion. That discussion will include an analysis of the role of public correction in the statutory cause of action under Part XXIII.1 of the Ontario Securities Act and then using the particular circumstance of the immediate case, I will explain why corrective disclosure raises genuine issues requiring a trial.

*1. Permanently Staying the Plaintiffs' Cross-Motion for Summary Judgment*

122 Rule 20.04(2)(a) of the Rules of Civil Procedure provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04(2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
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> 2. Evaluating the credibility of a deponent.
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> 3. Drawing any reasonable inference from the evidence.

123 In *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) and *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.), the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers enacted when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

124 If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04(2.1) and (2.2). As a matter of

discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

125 At para. 22 of her judgment in the companion case of *Combined Air Mechanical Services Inc. v. Flesch*, *supra*, Justice Karakatsanis summarized the approach to determining when a summary judgment may or may not be granted; she stated:

> Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

126 The jurisdictional test for granting a summary judgment is that there is no genuine issue requiring a trial, and at the heart of this test is a judicial gut check. Although she did not put it in quite that way, in *Hryniak v. Mauldin* at paras. 49 and 50, Justice Karakatsansis noted that in the context of an adversarial system, if a judge is going to decide a matter summarily, then he or she must have confidence that he or she can reach a fair and just determination without a trial. She expressed this sentiment, as follows:

> 49. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
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> 50. These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

127 Part of this confidence or gut check that a summary judgment is fair and just is achieved if the judge is satisfied that he or she can justly and fairly decide the matter without the advantages of

participating in the dynamic of a trial, where witnesses testify in their own words and can be observed through the rigours of both examination-in-chief and cross-examination, and where the judge has an extensive exposure to the evidence and sees the story of the case unfold without having to piece it together in chambers working from affidavits, transcripts, and factums. In *Hryniak v. Mauldin* at paras. 51-55, Justice Karakatsanis described how a judge might determine whether he or she was satisfied that a trial was required rather than using the forensic resources of the summary judge rule to decide the matter summarily; she stated:

> 51. We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
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> 52. In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.
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> 53. We wish to emphasize the very important distinction between "full appreciation" in the sense we intend here, and achieving familiarity with the total body of evidence in the motion record. Simply being knowledgeable about the entire content of the motion record is not the same as folly appreciating the evidence and issues in a way that permits a fair and just adjudication of the dispute. The full appreciation test requires motion judges to do more than simply assess if they are capable of reading and interpreting all of the evidence that has been put before them.
>
> 54. The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.
>
> 55. Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record - as may be supplemented by the presentation of oral evidence under rule 20.04(2.2)- the judge cannot be "satisfied" that the issues

are appropriately resolved on a motion for summary judgment.

128 This meta-motion brings into focus the question of whether either of the parties' rival summary judgment motions are appropriate or whether the issues they raise should be decided by a trial. A motion for summary judgment may be accompanied by a preliminary motion for directions or it may be countered by a motion by the responding party to stay or dismiss the motion as premature or as an inappropriate means to resolve the dispute between the parties.

129 Although in *Hryniak v. Mauldin*, the Supreme Court of Canada commanded a very robust summary judgment procedure, it did not foreclose lower courts from simply dismissing the summary judgment motion and ordering that the action be tried in the normal course: *Gubert v. 1536320 Ontario Ltd.*, 2015 ONSC 3294 (Ont. S.C.J.). Where there are genuine issues for trial and the lower court concludes that employing the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits, the court should not decide the matter summarily: *Mitusev v. General Motors Corp.*, 2014 ONSC 2342 (Ont. S.C.J.) at para. 79; *Gon (Litigation guardian of) v. Bianco*, 2014 ONSC 7086 (Ont. S.C.J.) at paras. 41-47; *Yusuf (Litigation guardian of) v. Cooley*, 2014 ONSC 6501 (Ont. S.C.J.); *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 (Ont. C.A.) at para. 44. In *Baywood Homes Partnership v. Haditaghi*, *supra* the Court of Appeal held that where the motion is for a partial summary judgment, the motions judge is obliged to assess the advisability of a partial judgment in the context of the litigation as a whole.

130 In *Ghaffari v. Asiyaban*, 2012 ONSC 2724 (Ont. S.C.J.), which was not a class action, Justice Ferguson stated that a summary judgment motion should only be stayed in the clearest of cases and only after the court had considered: (a) whether the party seeking a stay has put its best foot forward to show that there is a genuine issue for trial or that the matter was too complicated for a judge to achieve a full appreciation of the case; and (b) whether the complexity of the matter, the nature of the issues, and the nature of the evidence indicated that the case was not amenable to a judgment without a full trial. See also *Stever v. Rainbow International Carpet Dyeing & Cleaning Co.*, 2013 ONSC 241 (Ont. S.C.J.), leave to appeal refused 2013 ONSC 1574 (Ont. S.C.J.).

131 In considering whether to allow the summary judgment motion to go ahead or how it should go forward, the court should consider factors such as: (a) the nature and complexity of the issues; (b) the extent of the anticipated record; (c) the comparative prospects that the record will be sufficient to satisfy the test for a summary judgment with or without examinations for discovery; (d) whether the responding party have production and oral discovery similar to that available in the normal course; and (e) whether more efficient means could be developed to ensure the just, most expeditious and least expensive determination of the case on its merits: *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001 (Ont. S.C.J. [Commercial List]) at paras. 53-55.

132 Putting aside the issue of corrective disclosure, which I will discuss next, I agree with the SNC-Lavalin Defendants' arguments that the Plaintiffs' summary judgment motion should not go forward. Having regard to the high degree of intricacy of the legal, policy, and factual issues raised in the class action, the growing evidentiary record for the summary judgment motion, the sophistication, density,

and intricacy of the economic evidence that has been and will be brought, there is very little utility to the Plaintiffs' summary judgment motion and some dysfunctionality. Moreover, the outcome of the Plaintiffs' partial summary judgment motion would not be dispositive, even if the Plaintiffs were successful, and if the action went on to trial, there would be no forensic economies because the summary judgment motion would be just a partial dress rehearsal for a full-blown trial where the same evidence would have to be regurgitated.

133 While nothing in this decision turns on it, my belief is that the Plaintiffs tactically brought their cross-motion not because they actually wanted it to be heard, but because they wanted neither summary judgment motion to be heard. Their summary judgment motion, which their factum damned with faint praise for the economies it would achieve was replete with the types of complex factual issues that would be fundamentally unfair to decide by way of a summary judgment. Their suggestion that it would not be necessary to determine whether or not bribes had been made and not necessary to determine the how and why of the alleged manipulation of financial records made no sense. The Plaintiffs' summary judgment motion raised numerous issues that could not be fairly decided summarily.

134 In my opinion, the Plaintiffs' summary judgment motion raises genuine issues that must be tried and not decided summarily. I, therefore, permanently stay the Plaintiffs' summary judgment motion.

*2. Permanently Staving the SNC-Lavalin Defendants' Motion for Summary Judgment*

135 As I shall now explain, I am also permanently staying the SNC-Lavalin Defendants' summary judgment motion. Notwithstanding the circumstance that both parties' summary judgment motions include this issue, it would not be jurisdictionally or jurispmdentially appropriate to decide this issue summarily; the determination of whether there has been a corrective disclosure is a genuine issue requiring a trial.

136 Before explaining why this is so, it is necessary first to explain in more detail the role of public correction or corrective disclosure in the context of Part XXIII.1 of the Ontario Securities Act. In this regard, the most pertinent provisions of the *Act* are sections 1(1), 138.3 and 138.5, excerpts of which are set out in Schedule "A" to these Reasons for Decision.

137 Beginning with the details with the general scheme of Part XXIII.1, subject to the court granting leave to assert the claim, Part XXIII.1 of the Ontario Securities Act provides a statutory cause of action for persons who buy or sell securities in a secondary market such as a stock exchange. Leave to bring the statutory cause of action will be granted only if the court is satisfied that: (1) the action is being brought in good faith; and (2) there is a reasonable possibility that the action will be resolved in favour of the plaintiff.

138 The statutory cause of action is against six types of entity, including: (a) the "responsible issuer," which is the corporation whose securities are trading in the secondary market and, (b) the directors and officers of the responsible issuer. The potential defendants are assigned reporting and disclosure requirements under the Ontario Securities Act*;*

139 The statutory right of action is with respect to a misrepresentation made by on or behalf of a responsible issuer in its core documents or in public oral statements. Core documents are documents that the responsible issuer is obliged to publically file with the Ontario Securities Commission and include a prospectus, a take-over bid circular, an issuer bid circular, a director's circular, a rights offering circular, MD&A, an AIF, a proxy circular, annual financial statements, interim financial statements, and material change reports.

140 The statutory cause of action is also with respect to the failure of the responsible issuer to make timely disclosure of a material change. Under the *Act*, reporting issuers are required to disclose material changes forthwith by press release and a material change report.

141 The statutory cause of action for damages is available without regard to whether the person or company relied on the representation in the core documents or public oral statements. The absence of reliance as a constituent element is a major difference between the statutory cause of action for misrepresentation and the common law tort of negligent misrepresentation.

142 The statutory cause of action is available to a person or company who acquired or disposed of the responsible issuer's securities (shares of debentures) during the period between the time when a "core document" was released and the time when the misrepresentation contained in the document was "publicly corrected".

143 The public correction does not have to be made by the corporation, and while it can come from the corporation, the sources of a public correction can come from market analysts, short-sellers, newspaper articles, and credit rating agencies: *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348 (Ont. S.C.J.) at paras. 29-30.

144 There are statutory defences for certain situations including: (1) due diligence; (2) properly qualified forward-looking information; (3) plaintiff knew of material change or misrepresentation; (4) material change was confidentially disclosed to the Ontario Securities Commission; (5) corrective action; and (6) reasonable reliance on third party's public filing.

145 Turning to the details of the nature and role of public correction, sometimes called corrective disclosure, public correction of the misrepresentation is a constituent element and a necessary pre-requisite for a cause of action under s. 138.3 of the Ontario *Securities Act*: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2014 ONSC 660 (Ont. S.C.J.), leave to appeal refused 2014 ONSC 3438 (Div. Ct.), *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348 (Ont. S.C.J.) and *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 (Ont. S.C.J.).

146 In *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, I stated at para. 44:

44. Further, I agree with SNC's argument that the pleading of a representation by omission should be struck because the Plaintiffs have failed to plead one of the constituent elements of the statutory cause of action under the Ontario Securities Act The constituent elements for a cause of action

under s. 138.3(1), Part XXIII.1 of the Ontario Securities Act are: (a) a misrepresentation; (b) corrective disclosure; and (c) damages. It is necessary to plead the material facts of a misrepresentation that are linked to a pleaded public correction and resulting damages. Full particulars of the material facts must be pleaded.

147 *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, *supra*, was a successful motion for leave to assert a statutory claim under Part XIII.1 of the Ontario Securities Act. Justice Belobaba was satisfied on the evidence that both the alleged misrepresentation and the public correction had been sufficiently established and that there was a reasonable possibility that the action will be resolved in the plaintiff's favour at trial. In the *Swisscanto* case, one issue to be determined was whether - from a pleadings and from a low threshold merits test standpoint - the public correction constituent element had been satisfied. In answering this question, Justice Belobaba discussed the nature of public correction, and he stated at paras. 57-66 (footnotes omitted):

**First principles**

57. It is well understood that the objectives of Part XXIII.1 of the OSA are to deter misrepresentative disclosure and provide a remedy for injured investors, while at the same time preventing strike suits against issuers. The wrong targeted by Part XXIII.1 is the misrepresentation. In order to provide a fixed and identifiable time period for liability and the statutorily prescribed assessment of damages set out in s. 138.5(1) and (2), s. 138.3(1) provides a statutory right of action for damages sustained between two time-posts: the time that the document containing the alleged misrepresentation was publicly released and the time that the misrepresentation was publicly corrected.

58. As a time-post for damages assessment, the public correction requirement in s. 138.3 performs a relatively modest role. Unlike in the U.S. where the plaintiff must prove that shareholder losses were caused by the misrepresentation and "corrective disclosure" is often used to establish "loss causation", this is not the purpose of the public correction requirement in Part XXIII.1 of the OSA. Once the plaintiff meets the requirements of s. 138.3(1) by showing a misrepresentation and a public correction, causation is presumed and damages are implied. Under the "attribution defence" that is provided under s. 138.5(3), the onus is on the defendant to show that the decline in share price was not caused by the misrepresentation. In other words, for the statutory right of action provided in s. 138.3, causation is transformed into a defence under s. 138.5(3).

59. Some judges have referred to the public correction requirement in s. 138.3 of the OSA as "corrective disclosure." There is no harm in doing so, provided that both court and counsel understand that "corrective disclosure" as used in American case law carries additional (causation) baggage and for this reason this American usage should be handled with care.

**The case law thus far**

60. The phrase "publicly corrected" is not defined and the case law interpreting or dealing with this

requirement is sparse. In my brief discussion of the public correction requirement in *Mask*, I noted that "it is obviously a matter of fairness to the defendant that both the start point (the misrepresentation) and the end point (the public correction) be identified with some precision."

61. I also agreed with the observations of Justice Perell in *SNC-Lavalin* that the plaintiff is obliged to specifically "identify and articulate" the "falsity" in the initial representation, which the court can then use as a "benchmark to determine when and whether there was a corrective disclosure"; and that the plaintiff must "link" that misrepresentation to a "pleaded public correction", providing full particulars of "the necessary material facts with sufficient clarity and precision so as to give the other party fair notice of the case they are required to meet".

62. In the case law to date, one can find two further contributions to the discussion about the scope and content of the public correction requirement. First, that the correction need not be a "mirror-image" of the alleged misrepresentation or "a direct admission that a previous statement is untrue;" and second, that the correction need not be issued by the company itself. The public correction can emanate from third parties, including media reports and even anonymous internet postings.

63. One can also add the following. The plain meaning of the word "corrected" means to "set right" or "mark the errors". It follows from this that the public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact — that is, the existence of a misrepresentation.

**The criteria for a public correction**

64. In attempting a more principled articulation of the public correction requirement in s. 138.3, it is important to reiterate that the public correction requirement plays a relatively modest role in the statutory scheme. It provides a "time-post" prerequisite for the statutory right of action. The public correction requirement does not involve a causation analysis, Issues of causation are left to be resolved under the attribution defence in s. 138.5(3).

65. In my view, the public correction requirement in s. 138.3 of the OSA can be satisfied as follows:

(i) The public correction must be *pleaded with sufficient precision* to provide fair notice to the defendant. The plaintiff must point to specific words or figures that allegedly constitute the public correction of the alleged misrepresentation. Because the function of the public correction requirement under s. 138.3(1) is to establish the second "time-post" for fixing liability, the plaintiff must also identify the timing of the public correction.

(ii) The pleaded public correction need not be a "mirror-image" of the alleged misrepresentation or a direct admission that a previous statement is untrue. But there must be *some linkage or connection* between the pleaded public correction and the alleged misrepresentation — at the very least, the pleaded public correction must share the same subject matter as, and in some way relate back to, the misrepresentation. The fact that an alleged public correction is over or under-inclusive relative to the misrepresentation is not a

bar to establishing that the words or figures constitute a public correction. Of course, the more tenuous the connection between the public correction and the misrepresentation, the more likely that the defendant will be able to show under s. 138.5(3) that shareholder losses were unrelated to the misrepresentation.

(iii) The public correction *must be reasonably capable of revealing to the market the existence of the alleged misrepresentation*. However, the public correction need not prove, or help prove, that the earlier statement or omission was in fact a misrepresentation as defined by s. 1(1) of the OSA. Moreover, the public correction need not be understood by the ordinary investor as revelatory of the existence of a misrepresentation. It may be the case that only market participants with specialized knowledge and expertise (e.g., analysts or traders) are able to understand that particular words or figures constituted the public correction of a misrepresentation. But that will be sufficient.

(iv) The public correction may take "any of a number of forms" and *need not emanate from the defendant corporation*. The source of the public correction can be third parties, including media reports or internet postings.

66. These are the criteria that, in my view, define the scope and content of the public correction requirement.

148 I agree with Justice Belobaba's analysis, but as this meta-motion reveals, in a particular case, the public correction component of the statutory cause of action can play much more than a relatively modest role in the statutory scheme. In addition to being a constituent element in the determination of liability, the public correction of the misrepresentation plays a fundamental ingredient in quantifying that liability; that is, public correction plays a fundamental role in the calculation of damages.

149 A class member will suffer damages from a misrepresentation in two circumstances; that is: (1) he or she paid too much to acquire the security; or (2) he or she disposed of a security for too little. Thus, the *Act* provides two general formulae for the calculation of damages, both of which make public correction an operative element in the quantification of damages.

150 In the immediate case, during the Class Period, it is alleged that the Class Members paid too much for their shares of SNC-Lavalin. In these circumstances, under the Ontario Securities Act, subject to the damage limits and subject to several adjustments, which for present purposes can be ignored, the formula for Class Members who overpaid operates as follows:

• For a Class Member who overpaid and disposed of his or her shares during the ten days after the public correction of the misrepresentation, then damages are calculated as the Class Members actual loss; i.e., the average purchase price of the shares during the Class Period times the number of shares minus the disposition price of those shares.

• If the Class Member who overpaid disposed of his or her shares after the ten days after the public correction of the misrepresentation, then damages are calculated as the average purchase price of

the shares during the Class Period times the number of shares minus the lesser of (a) the trading price during the ten day period after the corrective disclosure times the number of shares or (b) the disposition price of those shares.

• For the shares of the Class Member who overpaid that are retained, the damages are equal to the average purchase price of the shares during the Class Period times the number of undisposed shares minus the trading price during the ten day period times the number of shares. In every case, the damages are reduced to the extent that the Defendant can prove that the loss in value of the shares was attributable to a change in the market price that was unrelated to the misrepresentation or the failure to make timely disclosure. However, assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

151 By way of example, if a Class Member purchased 10 shares at an average price of $100 during the Class Period and sold those 10 shares for $700 during the ten-day period after the public correction, then his or her compensatory damages would be $300. If he or she sold those shares after the ten-day period for $700 but the trading price during the ten-day period was $72 per share, then his or her compensatory damages would be $280. If he or she sold the shares for $700 but the trading price during the ten-day period was $68 per share, then his or her damages would be $300.

152 With this background to the general role and very important roles played by public correction or corrective disclosure, subject to first addressing an argument from the Plaintiffs about the nature of public correction with which I do not agree, I can turn to the matter of explaining why the determination of the existence of a public correction is a genuine issue that cannot be resolved summarily but rather requires a trial.

153 In their argument urging the court to consolidate the summary judgment motions, the Plaintiffs diminish the role of corrective disclosure. The Plaintiffs submitted that the corrective disclosure requirement is no more than a "time-post" used to determine a temporal limit on who might exercise the right of action pursuant to s. 138.3 of the Ontario Securities Act that plays no role in establishing liability. In other words, the Plaintiffs submitted that the corrective disclosure element is only relevant to defining the Class Period and in defining Class Membership. The purport of the Plaintiffs' argument is that without deciding the misrepresentation issues, the corrective disclosure issue was neither possible nor dispositive and, therefore, not worthy of being the subject matter of a free-standing summary judgment motion.

154 I agree with the Plaintiffs that corrective disclosure is relevant to defining the Class Period and to defining the Class. I disagree, however, with the Plaintiffs that corrective disclosure is not otherwise relevant. The public correction of the misrepresentation is an element of the statutory cause of action; it is a surrogate for causation, and it has a fundamental operative role in the calculation of damages. It is certainly a worthy enough matter to be the subject matter of adjudication, and notwithstanding the arguments of the Plaintiffs, it appears to be a potentially dispositive issue, much like a limitation period defence can be a free-standing dispositive issue.

155 But the fact that corrective disclosure is a more than about defining the class period and a worthy topic for adjudication begs the question raised by this meta-motion, which is how is the existence or non-existence of a corrective disclosure to be determined as a matter of civil procedure; i.e. can the determination of corrective disclosure be appropriately made summarily and without a trial? To be even more precise, the issue becomes: can the tests proposed by the parties to determine whether or not there has been a corrective disclosure be fairly and properly determined summarily?

156 With respect to the determination of whether there has been a corrective disclosure, it seems that the parties are in agreement that part of the analysis to determine the existence of a corrective disclosure, is to determine whether or not the public correction had a materially significant effect on the market price of the public issuer's securities. At first blush, this would appear to be a straightforward mathematical exercise, but further analysis reveals that determining whether there has been a public correction is far more complicated than just comparing the market value of the shares, the day before and the day after the announcement.

157 According to Dr. Kothari, the statistical analysis actually involves formulating an economic and mathematical model to determine the "expected price", which is a measure of the what the share price would have been had the statement in the core document not been made. The model then subtracts the realized (actual) returns to obtain a measure of the "abnormal return," which is a measure of the impact of the information released on the date of the corrective disclosure. The abnormal return is then tested to determine its statistical validity. Built into this modeling are a host of non-mathematical judgments, including decisions about what counts for material information; i.e. information that influences investors.

158 What is material information for investor has been the study of economists, and is a matter of analysis and debate. For example, Dr. Kothari relies on what he says is extensive academic research to opine that investors are interested in and make trading decisions based on the apparent strength or weakness of a corporation's internal controls. This is a very significant conclusion for the immediate case because the Plaintiffs' allege that the core documents contained misrepresentations that SNC-Lavalin's ICFR and its DC&P were properly designed and operating effectively.

159 Upon analysis, the statistical analysis turns out to be very sophisticated, very theoretical, and far from the mechanical exercise that is posited by the SNC-Lavalin Defendants' arguments about what can be proven summarily on the static record of documents and transcripts.

160 In any event, in the immediate case, it turns out that apart perhaps for the corrective disclosure about the Padma Bridge Project, that there is arguable case that six of the seven posited public corrections would satisfy the statistical analysis. Thus, even assuming that the statistical analysis is amenable to being decided by a summary judgment, it would still be necessary to consider the semantic analysis proposed by the SNC-Lavalin Defendants and the question once again to be determined is whether this analysis raises genuine issues requiring a trial.

161 Addressing the semantic analysis, I agree with Justice Belobaba that there must be a connection

between the misrepresentation and the public correction, which is to say a connection in the meaning of both statements, and I agree with Justice Belobaba that the correction need not be a mirror-image of the alleged misrepresentation or a direct admission that a previous statement is untrue. I also agree with him that the public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact. For present purposes, the point to emphasize is that contrary to the submissions of the SNC-Lavalin Defendants, making the connection between the impugned documents and the public correction is not just a mechanical interpretative exercise of interpreting and comparing documents that can speak for themselves.

162 The reality is that the semantic analysis involves a host of determinations that go far beyond comparing the language of the core document and the language of the public correction. Whether or not the documents are actually both about the same topic is a matter of an argument that involves not only determining the literal meaning of the words used in the documents but the effective meaning of those words and whether that effective meaning is material information and it involves determining the extent to which that material information is influential on investor's trading decisions. It is a matter of complex legal and factual argument about the extent to which the documents are connected and about the extent to which that connection has any operative effect. It is a matter of complex legal and factual argument about the extent to which the impact on the market price can be imputed to the public correction and about the extent to which the drop or rise in market prices can be attributed to random or other factors that might influence investors.

163 My point here is that both the statistical analysis and even more so the semantic analysis of what counts for a public correction raise numerous genuine issues and in my opinion these genuine issues are far too complicated and nuanced to be fairly and justly determined summarily.

164 There is another point worth mentioning. The underlying theory of the SNC-Lavalin Defendants' argument may, and I emphasize the word may, be unsound. The underlying theory of the SNC-Lavalin Defendants' argument is that there is no genuine issue for trial when a constituent element of the statutory cause of action, the public correction, has not been proven. What may be unsound in this theory is that while the public correction is indeed a constituent element of the statutory cause of action, it is somewhat of a shape-shifter constituent element that does not lend itself to being resolved summarily.

165 As a constituent element, public correction operates much differently than say misrepresentation operates as a constituent element in the statutory cause of action or in the common law tort of negligent misrepresentation. As noted by Justice Belobaba, the issue of whether there has been a public correction is transformed into a matter of defence. In this regard, it is worth repeating what Justice Belobaba had to say at para. 58 of *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, *supra;* which was:

> 58 Once the plaintiff meets the requirements of s. 138.3(1) by showing a misrepresentation and a public correction, causation is presumed and damages are implied. Under the "attribution defence" that is provided under s, 138.5(3), the onus is on the defendant to show that the decline in share price was not caused by the misrepresentation. In other words, for the statutory right of action

provided in s. 138.3, causation is transformed into a defence under s. 138.5(3).

166 For present purposes, the takeaway from the last point is that at this early stage of the development of the law about the statutory cause of action, there are genuine issues that genuinely do require the forensic machinery of a trial and one of those genuine issues for trial is the nature of corrective disclosure as a constituent element and the nature of corrective disclosure as an aspect of the calculation of damages. Combined with the feature that both the statistical analysis and the semantic analysis are sophisticated and complex matters that will involve sophisticated and complex economic theories and opinion evidence, a summary judgment motion is not the way to resolve those genuine issues, which do indeed require a trial to be determined.

**F. CONCLUSION**

167 For the above reasons, I permanently stay both summary judgment motions. I direct that this action proceed to examinations for discovery. A case conference may be scheduled to resolve the schedule for the examinations for discovery and to deal with the matter of safeguarding Messrs. Duhaime's, Roy's, and Ben Aïssa's constitutionally protected right against self-incrimination. The motion material delivered to date shall be treated as evidence for the examination for discovery.

168 The costs incurred to date with respect to the two summary judgment motions and with respect to this motion for directions shall be in the cause.

*Motion granted; summary judgment motions stayed.*

**Schedule"A" — Excerpts - Ontario Securities Act**

Definitions

1. (1) In this Act, ...

"misrepresentation" means,

(a) an untrue statement of material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made;

. . .

"material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;

. . .

Liability for secondary market disclosure

**Documents released by responsible issuer**

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

. . .

**Failure to make timely disclosure**

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

. . .

**Multiple roles**

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

**Multiple misrepresentations**

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes

concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

. . .

Damages

**Assessment of damages**

138.5 (1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.

2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,

i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and

ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

B. if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not

disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

i. if the issuer's securities trade on a published market, the trading price of the issuer securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

ii. if there is no published market, the amount that the court considers just.

**Same**

(2) Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

. . .

**Same**

(3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

00:00:21

# Tab 12

# COURT OF APPEAL FOR ONTARIO

CITATION: Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation, 2021 ONCA 104
DATE: 20210219
DOCKET: C67681

Hoy, Brown and Thorburn JJ.A.

BETWEEN

The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee

Plaintiffs (Appellants)

and

Barrick Gold Corporation, Aaron W. Regent, Jamie C. Sokalsky, Ammar Al-Joundi and Peter Kinver

Defendants (Respondents)

Joel P. Rochon, Peter R. Jervis and Golnaz Nayerahmadi, for the appellants

Kent E. Thomson, Luis Sarabia and Steven G. Frankel, for the respondents

Heard: November 9 and 10, 2020 by video conference, with further written submissions filed on November 23, 2020.

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated October 9, 2019, with reasons reported at 2019 ONSC 4160, 148 O.R. (3d) 755.

**Hoy J.A.:**

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## I. OVERVIEW

[1] This appeal arises out of secondary market misrepresentations allegedly made by Barrick Gold Corporation during the construction of Pascua-Lama, a multi-billion-dollar gold mining project in the high Andes of Chile and Argentina.

[2] The appellants – the proposed representative plaintiffs in a putative securities class action – appeal the order of the motion judge, granting them leave to proceed under s. 138.3 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 ("OSA") with one proposed misrepresentation claim against Barrick and the individual respondents, but denying them leave to proceed with all other claims they proposed to assert under Part XXIII.1 of the OSA.

[3] Under s. 138.3(1) of the OSA, a person or company who acquires or disposes of securities during the period between the time when a document containing a misrepresentation is released and the time when the misrepresentation is publicly corrected has a right of action for damages against the responsible issuer, each director of the responsible issuer at the time the document was released, and each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document, among others. However, pursuant to s. 138.8(1) of the OSA, an action may not be commenced without leave of the court, which must be satisfied that the action is being brought in good faith

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and that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[4] The motion judge denied leave to proceed with most of the alleged misrepresentations because, even if they were misrepresentations, they were not publicly corrected.

[5] The primary issues on appeal are whether the motion judge erred in principle (i) by effectively assuming the falsity of most of the alleged misrepresentations and determining whether leave to proceed should be granted by focusing on whether the misrepresentations had been publicly corrected or (ii) by taking an impermissibly narrow approach to determining whether the alleged misrepresentations were publicly corrected.

[6] A secondary issue is whether this court should interfere with his conclusion that four alleged environmental misrepresentations by omission were not even arguably misrepresentations.

[7] For the following reasons, I would allow the appeal in part and return the issue of whether leave should be granted in respect of the categories of alleged misrepresentations – described below as the capital expense (or, “capex”) and scheduling misrepresentations, and the accounting and financial reporting misrepresentations – to the court below.

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## II. BACKGROUND

[8] In brief, Pascua-Lama, straddling the border of Chile and Argentina at the headwaters of the Estrecho river system, was a complex and environmentally sensitive project. The motion judge described the Estrecho as “a life force for the thousands of people, including indigenous communities, that lived downstream from the mining site.” Barrick began work on the project in October 2009. The estimated cost of the project escalated, and environmental issues arose. In October 2013, Barrick concluded that the project was no longer financially viable and decided to shut it down. Barrick recorded a write-off of around $5 billion.

[9] Over the proposed two-year class period, there were five negative disclosures of information that resulted in significant declines in Barrick’s share price. In total, shareholders lost billions of dollars.

[10] The list of alleged misrepresentations and public corrections appended to the motion judge’s reasons is similarly appended to these reasons. The alleged misrepresentations were made in annual financial statements, interim financial statements, management’s discussion and analysis, or in an annual information form (“AIF”). Some of the alleged misrepresentations are alleged untrue statements of material fact. Others are alleged misrepresentations by omission; that is, alleged omissions to state a material fact that was required to be stated or

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that was necessary to make a statement not misleading in the light of the circumstances in which it was made.[1]

[11] The subject matter of these alleged misrepresentations, set out in full in the Appendix, essentially falls into three categories.

[12] First, misrepresentations by omission relating to when Barrick expected initial gold production to commence at Pascua-Lama and to the estimated capital expense budget for Pascua-Lama.

[13] Between October 27, 2011 and October 31, 2013, the date for first gold production moved from mid-2013, to mid-2014, and then to the second half of 2014. In the same period, Barrick increased its estimated capex budget for Pascua-Lama from $5.0 billion to $8.0 billion to $8.5 billion. Barrick argued that each of these changes reflected unanticipated increases in construction costs, including skyrocketing labour and commodity prices in the aftermath of an earthquake, unexpected currency fluctuations, government-imposed tariffs, and falling gold and silver prices.

[14] The appellants allege that Barrick knew that its scheduling and capex estimates were unreliable and misleading. The appellants argue that each of the statements Barrick issued about its scheduled date for initial gold production and

[1] See the definition of “misrepresentation” in s. 1(1) of the OSA.

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its estimated capex budget omitted to state a material fact that was either required to be stated or that was necessary to make a statement not misleading in the light of the circumstances in which it was made.

[15] Second, the appellants allege that Barrick made a series of misrepresentations relating to environmental compliance at the Pascua-Lama project.

[16] The motion judge granted the appellants leave to proceed with what he described as their core environmental claim, namely that on July 26, 2012 the respondents misrepresented that Barrick had completed the comprehensive water management system, required by the Resolución de Calificación Ambiental 024/2006 (“the RCA”), the primary Chilean environmental permit, and was therefore able to commence the mining activity described as “pre-stripping”. The appellants allege that this was an untrue statement of a material fact. The motion judge’s grant of leave to proceed with this core environmental claim is not at issue on this appeal.

[17] What is at issue are four alleged misrepresentations by omission with respect to environmental compliance set out in the Appendix and discussed later in these reasons. The motion judge denied leave in respect of those alleged misrepresentations on the basis that there was no reasonable possibility of success.

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[18] Third, the appellants allege that Barrick made misrepresentations by omission relating to accounting and financial reporting. Essentially, the appellants claim that Barrick's internal controls were ineffective, it should have written the project down more than a year before it did, and that it failed to record contingent liabilities.

[19] The materials on the leave motion were voluminous. The total body of evidence exceeds 50,000 pages of materials. The motion was argued over seven days.

## III. THE MOTION JUDGE'S REASONS ON PUBLIC CORRECTIONS

[20] Section 138.3(1) of the OSA provides that:

> Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against [the issuer and various related parties]. [Emphasis added.]

[21] The motion judge explained that the public correction serves as a time-post for the purposes of the proposed class period and any eventual damages calculation. He indicated that it is also a constituent element of the secondary market misrepresentation cause of action:

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> In the absence of a discrete and identifiable public correction (whether provided by the defendant company or a third party) there is no basis for a s. 138.3 misrepresentation action – the absence of a public correction is "dispositive" and there is no need to proceed further and consider whether leave should be granted under s. 138.8. [Citations omitted.]

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[22] The interpretation of 'public correction' under s. 138.3(1) has not received significant consideration at this court. However, a body of jurisprudence has developed in the courts below. The trial judge cited his prior decisions, and the decisions of other class action judges in the Toronto region, at para. 17 of his reasons.[2] He summarized the criteria for a proper public correction as follows:

(i) There must be some linkage or connection between the alleged misrepresentation and the alleged public correction;

(ii) The public correction must share the same subject matter and, in some way, relate back to the misrepresentation; and,

(iii) The public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact.

[23] Expanding on the third criterion, he wrote:

> If the alleged correction, <u>on a fair reading</u>, does not arguably reveal to the market the existence of the alleged

---

[2] See *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348; *Swiss Canto v. Blackberry*, 2015 ONSC 6434; *DALI Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784; *Cappelli v. Nobilis Health Corp.*, 2019 ONSC 2266; and *Kauf v. Colt Resources Inc.*, 2019 ONSC 2179.

> misrepresentation – that is, the existence of the allegedly untrue assertion or the alleged omission in the impugned representation – then there is no public correction and no basis for the proposed s. 138.3 action.
>
> For example, if the plaintiff alleges that Capex disclosure X was misleading because of omission Y, the alleged public correction Z must reasonably be capable of revealing the existence of Y. If all the plaintiff can do is point to X and allege even an arguable Y but cannot identify a Z that reveals the existence of Y, then there is no public correction. [Emphasis added.]

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[24] He stated that this makes sense in terms of public policy. If the assertion or the omission in the disclosure was never corrected, then the reason for the drop in the stock price will have to be found elsewhere. In his view, a meaningful public correction requirement provides an additional safeguard against unfair and unmeritorious misrepresentation claims.

[25] The motion judge addressed each of the three categories of alleged misrepresentations in turn.

***The alleged capex and scheduling misrepresentations***

[26] The motion judge concluded that he did not need to examine any of the extensive documentary and affidavit evidence, including expert reports filed by the appellants, explaining and supporting the alleged omissions, and by Barrick, explaining that the disclosures were timely and accurate. The motion judge stated that he could assume Barrick had made a misrepresentation, and focus his analysis on whether that assumed misrepresentation was publicly corrected:

> I do not have to examine any of this evidence or even explain its meaning or context. Even if the evidence filed by the plaintiff provides some support for the proposition that one or more of the alleged omissions were needed to make one or more of the alleged misrepresentations not misleading, any further analysis of this proposition is not required. I can decide the Capex and scheduling representations by focusing on the proposed public corrections and asking whether the requirements for a public correction have been satisfied.

[27] He concluded that the requirements for a public correction had not been satisfied:

> There is nothing in any of these alleged corrections that suggests that the earlier estimate was inaccurate or unreliable. There is nothing in any of these alleged corrections that reveals the existence of an alleged omission….
>
> … there is nothing in any of the four "partial corrections" that provides a linkage or connection to any of the alleged omissions. And there is certainly nothing that is reasonably capable of revealing the existence of any of the alleged omissions.

[28] He stated that, on the facts before him, the determination of what constitutes a proper public correction was not a matter that could be "improved" by further or better evidence at trial.

***The alleged environmental misrepresentations at issue on this appeal***

[29] As indicated above, the motion judge denied leave to proceed with four claims arising from the alleged environmental misrepresentations by omission on the basis that that the appellants had no reasonable possibility of establishing that

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they are misrepresentations. I review his reasons for so concluding later in these reasons.

[30] However, the motion judge went on to find that, even if wrong in that analysis, claims based on the alleged omissions would also fail for lack of any public correction. He wrote that, as with the alleged capex and scheduling misrepresentations, he did not have to weigh the evidence and assess every allegation of misrepresentation by omission. He could decide the "omission" allegations by assuming Barrick made a misrepresentation and asking whether the requirements for a public correction have been satisfied.

[31] He concluded that the requirements for a public correction had not been satisfied: there was nothing in the proposed corrections that could "fairly be said to reveal the existence of any of the 11 alleged environmental omissions." He observed that

> there is nothing in the four suggested "partial corrections" that provides a linkage or connection to any of the alleged omissions. There is nothing that reveals the existence of any of the alleged omissions.

***The alleged accounting and financial reporting misrepresentations***

[32] The motion judge wrote that there was, "nothing in any of the five supposed corrections about the ineffectiveness of any of [Barrick's] internal controls; nothing about any failure to take a timely impairment write-down; and nothing about any failure to record a contingent liability".

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[33] Again, he wrote, the determination of what constitutes a proper public correction, on the facts before him, was not a matter that could be affected by further or better evidence at trial. He could therefore conclude that there was no reasonable possibility that the plaintiff can show at trial that any of the suggested public corrections was connected to and revealed the existence of the alleged omission.

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## IV. AN OVERVIEW OF THE ISSUES REGARDING PUBLIC CORRECTIONS RAISED ON APPEAL

[34] The appellants make two main arguments.

[35] First, they argue that the motion judge erred in principle by determining the public correction issue without first examining all the evidence and determining whether there was a reasonable possibility that Barrick made a misrepresentation. They say that only after ascertaining the nature, subject matter and falsity of the alleged misrepresentation can the court appreciate and analyze the extent to which a pleaded public correction “relates to” and “corrects” the misrepresented facts. They argue that the motion judge’s failure to engage in this process tainted his analysis of whether there was a public correction.

[36] Second, while they do not take issue with the three criteria for a public correction summarized by the motion judge, they argue the motion judge erred in principle (i) by applying a narrow, purely textual, analysis of the alleged public

corrections and (ii) by failing to consider evidence, including expert economic evidence, about the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market.

[37] In response to the first argument, Barrick advises that it did not suggest to the motion judge that he determine the leave motion based on whether the requirement for a public correction was met. It fully argued the issue of whether there was reasonable possibility that the appellants' claim that it had made misrepresentations could succeed and candidly admits that it would have preferred that the motion judge decide the issue. However, it submits that that the motion judge was entitled to effectively assume that the alleged misrepresentations had been made out and proceed as he did.

[38] As to the appellants' second argument, Barrick submits that the motion judge, having heard seven days of argument, was fully alive to the context in which the alleged public corrections were made and to the appellants' expert evidence. For example, at the beginning of his reasons, he referred to the fact that, during the proposed class period, five negative disclosures resulted in significant declines in the share price. This, Barrick says, was in the report of the appellants' expert, Cynthia Jones. Barrick argues that the motion judge did not refer to the appellants' experts' evidence because it was not probative of whether there was a public correction. Rather, the motion judge properly considered the criteria for a proper public correction.

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[39] Barrick characterizes the appellants as seeking to interfere with a determination of mixed fact and law to which deference is owed.

## V. ANALYSIS OF THE ASSUMED MISREPRESENTATIONS ISSUE

[40] I reject the appellants' argument that a motion judge cannot assume that the alleged misrepresentations are made out and deny leave to proceed under s. 138.3 of the OSA on the basis there is no reasonable possibility that a trial court would find there has been a public correction of those misrepresentations.

[41] As Barrick argues, in several different contexts and different areas of the law, the court has assumed that one constituent element of a cause of action or legal test has been satisfied and disposed of the case on the basis that a different constituent element has not been established. For example, in the context of a claim in unjust enrichment, courts have assumed that there has been enrichment and determined the case on the issue of whether there is an absence of juristic reason for the enrichment: *Bank of Montreal v. i Trade Finance Inc.*, 2009 ONCA 615, 96 O.R. (3d) 561 at para. 36, aff'd on other grounds, 2011 SCC 26, [2011] 2 S.C.R. 360. Whether or not a public correction is properly characterized as an element of the statutory cause of action of secondary market misrepresentation, as I discuss below, it is a necessary part of the statutory scheme.

[42] I note that the motion judge in this case is not the only motion judge to have accepted that this approach is available. In *Drywall Acoustic Lathing and*

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*Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*, 2016 ONSC 5784 ("*SNC-Lavalin*"), at para. 48, Perell J. accepted, albeit in the context of a summary judgment motion, that it is possible to assume the falsity of the alleged misrepresentations for the purpose of determining whether a corrective disclosure or public correction exists.[3]

[43] The appellants offer no authority for their position. Contrary to their assertion, *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, aff'd 2016 ONCA 641 does not stand for the proposition that justices deciding motions for leave to proceed under s. 138.8 of the OSA are required to determine whether the plaintiff has a reasonable possibility of establishing that impugned disclosures were misrepresentations, and only then consider whether the plaintiff also has a reasonable possibility of demonstrating the alleged misrepresentations were publicly corrected. *Mask* – a decision of the motion judge in this case – simply sets out the pleading requirements applicable to claims brought under s. 138.3(1) of the OSA.

[44] The appellants also rely on *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106 and *Rahimi v. SouthGobi Resources Ltd.*, 2017

[3] A public correction has sometimes been referred to as a "corrective disclosure." Corrective disclosure is a term imported from the United States, not found in the OSA. As the motion judge remarked in *Swisscanto*, at para. 59, "[t]here is no harm in [referring to a public correction as a 'corrective disclosure'], provided that both court and counsel understand that 'corrective disclosure' as used in American case law carries additional (causation) baggage and for this reason this American usage should be handled with care."

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ONCA 719, 137 O.R. (3d) 241, leave to appeal refused, [2017] S.C.C.A. No. 443. As the appellants note, in *Theratechnologies*, at para 38, Abella J., for the Supreme Court, wrote that the leave requirement is more than a "speed bump" and that, at the leave stage, the court must undertake "a reasoned consideration of the evidence to ensure that the action has some merit". This, as Hourigan J.A. wrote for this court in *SouthGobi*, "must include some weighing of the evidence that both parties are required to proffer under ss. 138.8(2) and (3) [i.e. affidavit evidence setting forth the material facts on which the parties intend to rely] and scrutiny of the entire body of evidence, not just the evidence of the plaintiff viewed in isolation." Further, given the fact that at the leave stage full production has not been made, the motion judge must be cognizant of the fact that the defendant may have relevant evidence that has not been produced or tendered: *SouthGobi*, at para. 48.

[45] Through this reasoned consideration of the evidence, a motion judge discharges the competing duties of protecting issuers from unmeritorious claims and frivolous strike suits and ensuring that the secondary market remedy is not rendered illusory through the elimination of potentially meritorious claims: *SouthGobi*, at para. 45. However, in my view, read in context, *Theratechnolgies* and *SouthGobi* do not prevent a motion judge from taking a plaintiff's case at its highest by assuming the falsity of the impugned misrepresentation, and denying leave to advance that misrepresentation claim on the basis that there is no

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reasonable possibility that a trial court would find that there has been a public correction of the misrepresentation. In a proper case, a motion judge could discharge the "competing duties" in this manner.

[46] But it is an approach that should be used rarely. The existence of a misrepresentation is at the heart of the statutory cause of action. When an issuer's disclosures are impugned, both the issuer and the shareholders have an interest in a finding that restores confidence in the issuer's ongoing disclosure. Assuming a misrepresentation – that is, assuming a wrong – and then finding a second wrong – a failure to correct the misrepresentation – would generally do little to restore market confidence. As I discuss below, it is also an approach that should be used with great caution.

## VI. ANALYSIS OF THE APPROACH TO DETERMINING WHETHER THERE WAS A PUBLIC CORRECTION

[47] This leads to the appellants' second argument on the corrections issue.

[48] As I will explain, assuming the falsity of the alleged misrepresentation does not relieve a motion judge of the obligation to engage in a reasoned consideration of evidence of the context in which the alleged public correction was made and how the alleged public correction would be understood in the secondary market if the alleged public correction does not, on its face, reveal the existence of the alleged misrepresentation. In some cases, that may require the motion judge to

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consider evidence which also goes to the issue of whether there is a reasonable possibility that a trial court will find that there was a misrepresentation. Thus, caution is required. In some cases, assuming the falsity of the alleged misrepresentations – an approach driven by concerns of judicial economy – may prove a false economy. Judicial economy likely only outweighs the interests of an issuer and its shareholders in a finding as to whether there is a reasonable possibility that the trial court would find a misrepresentation and the risks entailed in assuming a misrepresentation when: the motion judge is faced with an overwhelming record; and the motion judge is confident that there is no material overlap between the evidence relevant to whether there is a misrepresentation, and the evidence of the context in which the alleged public correction was made and how the alleged public correction would be understood in the secondary market.

[49] Moreover, where the motion judge must engage in an analysis of the evidence of context, it cannot be said (as the motion judge did in this case) that there is no possibility that the matter could be "improved" by further and better evidence at trial.

[50] In *SNC-Lavalin*, Perell J. correctly rejected a purely semantic and mechanical approach to the determination of a public correction (referred to, here, as a corrective disclosure). He reasoned, at para. 45:

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> [T]he determination of whether a corrective disclosure is corrective depends not only on a semantic analysis of what the public correction means but also on an analysis of how the words would be understood in an efficient market and also a statistical analysis of the effect of those words on the market's evaluation of the value of the securities that had been misrepresented to the marketplace. Put somewhat differently, a semantic analysis of whether a corrective disclosure was made is necessary, but it is not sufficient to determine the existence or non-existence of a corrective disclosure. What is required is an analysis of the literal meaning of the words, which is in any event not a purely mechanical exercise but one that involves, evidence, opinion, and argument, and also an analysis of the perceived or effective meaning of the words in the secondary market, which once again is not a mechanical exercise, but rather one that involves evidence.

[51] Perell J. wrote this in reasons concluding that whether there had been a public correction could not be determined on a summary judgment. But the principle – that, where the alleged public correction does not, on its face, clearly reveal the existence of the alleged misrepresentation, the judge must engage in a reasoned consideration of evidence of the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market – applies equally on a leave motion.

[52] In a similar vein, in *Kauf v. Colt Resources Inc.*, 2019 ONSC 2179, 145 O.R. (3d) 100, at para. 121, Glustein J. wrote of the need for a "robust analysis of the evidence":

> If there is a reasonable possibility based on a robust analysis of the evidence that a trial court could find that

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> the purported public correction could serve as "time-post" for damages, leave ought to be granted.

[53] I turn to the determinative question: Did the motion judge in this case err in principle by determining that there was no reasonable possibility that the trial court would find that there has been a public correction of the misrepresentation based on a purely textual analysis, without the requisite reasoned consideration of the evidence?

[54] In my respectful view, the answer to that question is "yes". His reasons disclose that his analysis of the proposed public corrections was a purely textual one, limited to a "fair reading" of the proposed correction. As Perell J. wrote in *SNC-Lavalin*, this is a necessary step. But the analysis cannot end there.

[55] By way of example, the appellants allege that Barrick's representation that total construction capital for Pascua-Lama was estimated at $4.7-$5 billion, made in the third-quarter interim financial statement dated October 27, 2011, is a misrepresentation because, among other things, Barrick did not disclose that it had material information indicating that this estimate was neither reasonable nor accurate. They allege that Barrick's disclosure of a 50-60 percent increase in capital costs from this estimate, contained in its interim financial statements for the second quarter of 2012, dated July 26, 2012, constitutes a public correction.

[56] In his analysis, the motion judge effectively assumed that, as the appellants allege, Barrick had material information on October 27, 2011 indicating that its

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estimate was neither reasonable nor accurate. As stated above, the motion judge found that there was nothing in this (or any other) alleged public correction relating to capex that suggests that the earlier estimate was inaccurate or unreliable and reveals the existence of the omission. He did not consider whether, in the context in which the July 26, 2012 statement was made, there was a reasonable possibility that the trial court would find that the market would consider a budget increase of that magnitude, at that time, as casting doubt on the reasonableness or accuracy of the earlier budget. Nor did he consider the evidence of the appellants' economic expert, Cynthia Jones, that the alleged corrective disclosures "clearly informed the market that prior misstatements should no longer be relied upon".

[57] Barrick argues that no weight should be given to what it says is a bald assertion by Ms. Jones. It may be right. But that is an issue that remains to be determined, possibly only at trial.

[58] This court cannot engage in the necessary "reasoned consideration of the evidence": *Theratechnologies*, at para. 38. It is not clear that the 50,000 pages of evidence before the motion judge are before this court. Moreover, it is not the role of this court to engage in such a review. Regrettably, the question of whether leave should be granted in respect of those alleged misrepresentations must be remitted to the court below.

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[59] I will add this. The motion judge's narrow approach to determining whether a public correction was made out may have been driven by his view that the public correction is an "additional safeguard against unfair and unmeritorious misrepresentation claims". Respectfully, the legislative history of the statutory scheme does not support his view that the public correction serves as an "additional safeguard".

***The role of public corrections within the statutory scheme***

[60] Part XXIII.1 of the OSA was enacted in 2002, following careful consideration by committees of the Toronto Stock Exchange ("TSE") and the Canadian Securities Administrators ("CSA").[4]

[61] In the mid-1990s, the TSE established the Committee on Corporate Disclosure, chaired by Thomas I.A. Allen, Q.C., to address perceived problems in the quality of continuous disclosure from market participants ("the Allen Committee"). In 1995, the Committee published its interim report ("the Allen Report").[5] The CSA supported the recommendations made by the Allen Committee in its final report and established its own Civil Remedies Committee ("the CSA Committee") which, in 1998, adopted in large part – with one notable exception

[4] At the time, the CSA was composed of members of the securities commissions of Alberta, British Columbia, Ontario, and Quebec, all Canadian provinces and territories.
[5] See Committee on Corporate Disclosure, *Towards Improved Disclosure: A Search for Balance in Corporate Disclosure*, interim report (Toronto: Toronto Stock Exchange, 1995).

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discussed below – the recommendations of the Allen Committee.[6] Both the Allen Committee and the CSA Committee carefully considered the risk of unmeritorious or extortionate 'strike suits' in making their recommendations.

[62] As this court observed in *Kerr v. Danier Leather Inc.*, 77 OR (3d) 321, at paras. 119-120, aff'd 2007 SCC 44, the Allen Committee and the CSA Committee's reports may provide persuasive evidence as to the legislature's intent in enacting s. 138.3.

[63] The function of a public correction within the statutory scheme was not discussed by the Allen Committee in detail. It is referred to, obliquely, in the Allen Committee's discussion of the persons who ought to have a cause of action for secondary market misrepresentations or non-disclosure: Allen Report, at paras. 6.11-18. In summarizing its position, at para. 6.13, the Committee noted:

> [W]e recommend that a cause of action for damages resulting from misleading or untimely disclosure be available … to any person who acquires or disposes of a security of the issuer in question in a secondary market between the date when the misleading disclosure was made and the date when it was corrected, or in the case of untimely disclosure or non-disclosure, between the date when the disclosure ought to have been made and the date when it was in fact made. [Emphasis added; emphasis in original omitted.]

[6] The CSA Committee was comprised of staff from the securities commissions of Alberta, British Columbia, Ontario, Quebec, and Saskatchewan.

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[64] The function of a public correction was also discussed with reference to the scope and calculation of damages: Allen Report, at paras. 6.58, 6.63, fn. 12.

[65] I draw several observations from these limited comments, taken in the context of the entire Allen Report.

[66] First and foremost, the Committee appears to have viewed a public correction simply as part of the statutory scheme – a necessary time-post for the proposed class period and any eventual damages calculation. The public correction delimits who may bring a claim for secondary market misrepresentation and makes damage calculations for secondary market claims standardized and predictable.[7]

[67] Second, throughout, the Committee appears to have assumed the misrepresentation would be corrected or that the necessary disclosure would be made. If the Committee intended to limit the proposed statute's applicability only to those misrepresentations later explicitly corrected, it is surprising that it did not so indicate in its otherwise extensively canvassed report.

[68] Third, the Committee did not list a 'public corrections requirement' among the safeguards against "open[ing] the floodgates to U.S. type securities litigation":

[7] As enacted, the price following the public correction is integral to the statutory damages formula for secondary market misrepresentation in all situations except where there is no published market for the shares: OSA, s. 138.5. This is in contrast to damages in cases for prospectus misrepresentation or damages for insider trading, where there is either no formula or alternative modes of calculation outside a statutory formula are contemplated: see OSA, ss. 130 and 134(6).

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Allen Report, at para. 6.72; see also paras. 4.18-4.20. The Committee considered sufficient the significant differences in class action procedures, the limitations on liability recommended (including the limited class of plaintiff, several liability, and monetary limits on liability); and other differences between US and Canadian legal culture and courts (including the comparative rarity of civil jury trials and the "loser pays" rule).

[69] In addition to the safeguards against unmeritorious litigation considered or proposed by the Allen Committee, the CSA Committee proposed requirements for leave to proceed and court approval of settlements. The regime subsequently enacted by Ontario as Part XXIII.1 of the OSA – and other Canadian provinces' securities acts – closely followed the CSA's proposal.

[70] Not treating the public correction as an additional safeguard against unfair and unmeritorious misrepresentation claims makes sense.

[71] First, recall that, at the leave stage, a consideration of whether there has been a public correction of a misrepresentation follows a finding that there is a reasonable possibility that it will be found at trial that the defendant has released a document or made a public oral statement containing a misrepresentation (or, in rare cases, the making of an assumption that there was a misrepresentation). When that threshold has been cleared (or the misrepresentation assumed), the plaintiff's claim is potentially meritorious. Where there is a reasonable possibility of

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a misrepresentation, the plaintiff's claim can hardly be characterized as a strike suit. Furthermore, the clearing of the misrepresentation threshold, combined with the fact that the plaintiff brought an action, suggests that there was a public correction. The plaintiff must have learned of the misrepresentation somewhere.[8]

[72] Second, the supposed public policy rationale identified at para. 21 of the motion judge's reasons – that, in the absence of a strict public correction requirement, the cause of any decline in the market value of the security may be properly attributed to factors other than the correction of the alleged misrepresentation – is anticipated and addressed elsewhere in Part XXIII.1. Section 138.5(3) provides that "assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure." The motion judge properly averted to the role of s. 138.5(3) in his discussion of the core environmental misrepresentation claim for which he granted leave.

[8] See Adil Abdulla, "Correcting Corrections: Resolving Confusion over the Public Corrections Requirement in the Ontario *Securities Act*" (2019) 62:3 Can. Bus. L.J. 310, at p. 315, n. 16.

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***Public correction of a misrepresentation by omission***

[73] Finally, the fact the alleged misrepresentations are misrepresentations by omission does not change the need for reasoned consideration of the evidence in the context of a motion for leave.

[74] In expanding on the third of the criteria for a proper public correction, articulated at para. 19 of his reasons, the motion judge stated that the alleged public correction, on a fair reading, must arguably reveal to the market the alleged omission of the material fact that was necessary to make the statement at issue not misleading in light of the circumstances in which it was made.

[75] In my view, this sets the bar too high.

[76] The public correction need not specifically identify the omitted material fact or specifically relate the information in the correction to the omitted material fact. As stated earlier, if the alleged public correction does not, on its face, reveal the existence of the alleged misrepresentation, the motion judge must engage in a reasoned consideration of evidence concerning the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market. The critical question for the motion judge is whether the alleged public correction was reasonably capable of being understood

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in the secondary market as correcting what was misleading in the impugned statement.[9]

[77] What the motion judge outlined as the other criteria for a proper public correction were not at issue on this appeal. Whether they are better described as "characteristics" rather than "criteria", and their precise wording, are issues for another day.

[78] I turn now to the alleged environmental misrepresentations which the motion judge did not permit to proceed.

## VII. THE ALLEGED ENVIRONMENTAL MISREPRESENTATIONS WHICH THE MOTION JUDGE DID NOT PERMIT TO PROCEED

[79] The motion judge reviewed the evidence with respect to the allegations of environmental misrepresentations. He granted the appellants leave to proceed with their "core environmental claim". However, as indicated above, the motion judge concluded that leave to proceed with the four alleged environmental misrepresentations by omission should not be granted.

[80] The first three alleged environmental misrepresentations suffered from fatal "chronology issues". In short, he concluded that the material facts that the

[9] In his reasons, the motion judge suggested that a "partial correction" of a misrepresentation cannot constitute a public correction for the purposes of the statutory scheme. That issue was not argued on appeal and I should not be taken as endorsing his view. It remains an issue for another day.

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appellants allege should have been disclosed to make the three representations at issue not misleading arose after the representations were made. Since they arose after the representations were made, Barrick could not have been required to state them at the time it made the representations.

[81] The fourth alleged environmental misrepresentation by omission failed because the motion judge found that the material facts that Barrick allegedly omitted to disclose were not "even arguably required" to make the representation at issue not misleading.

[82] As I will explain, I would not interfere with the motion judge's decision to deny the appellants leave to proceed with the four alleged misrepresentations by omission with respect to environmental compliance.

[83] In their 50-page factum, the appellants concentrated solely on the motion judge's approach to determining whether the public correction was made out and made no reference to the motion judge having erred in concluding that their allegations of environmental misrepresentations by omission could not arguably constitute misrepresentations.

[84] In its responding factum, Barrick noted that the appellants did not take issue with the motion judge's conclusion that the alleged environmental misrepresentations by omission could not arguably constitute misrepresentations and concentrated solely on the public corrections issue. However, it argued that

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the motion judge's conclusion was amply supported by the evidence and was open to him.

[85] In oral submissions, in their outline of the errors they alleged that the motion judge had made, the appellants did not refer to his having erred in concluding that the alleged environmental misrepresentations by omission could arguably constitute misrepresentations. They again focused on the public corrections issue. However, in response to questions from the panel, the appellants indicated that they take issue with the motion judge's findings with respect to the alleged environmental representations by omission.

[86] In their Notice of Appeal, the appellants refer to only two of the four alleged environmental misrepresentations for which the motion judge denied leave: those made November 1, 2012 and March 28, 2013. With respect to those two alleged misrepresentations, the appellants state at para. 10(b) of their Notice of Appeal that the motion judge "failed to properly consider the applicable principles to determine the existence of misrepresentation by omission". Their other articulated grounds of appeal in relation to those alleged misrepresentations relate to the public correction issue.

[87] After the appeal was heard, the court asked the parties for written submissions, limited to five pages on this issue.

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[88] In their written submissions, the appellants argue that the motion judge erred in concluding that the alleged environmental misrepresentations by omission could not arguably constitute misrepresentations. Barrick submits that it would be unfair to permit the appellants to challenge those findings at this juncture. Among other reasons, Barrick has not had the opportunity to respond to what the appellants now argue are errors. In any event, Barrick argues, the motion judge's findings are not tainted by reversible legal error or palpable and overriding errors of fact.

***Some additional context***

[89] Unlike the portions of his reasons addressing the alleged capex and scheduling misrepresentations and the alleged accounting and financial reporting misrepresentations, in his reasons addressing the alleged environmental compliance misrepresentations the motion judge summarized what he characterized as the key points of evidence relating to those alleged misrepresentations. Some additional background, drawn from that summary, will help understand his reasons for denying leave to proceed with the four alleged environmental misrepresentations by omission and the parties' arguments.

[90] As noted above, Pascua-Lama, located at the headwaters of the Estrecho river system, was environmentally sensitive. In the motion judge's words, "[i]t was imperative that toxic by-products of the mining process, such as acid rain drainage, did not contaminate that river system." To this end, Chilean authorities required

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that Barrick construct a comprehensive water management system ("WMS") as part of the RCA.

[91] Barrick began pre-stripping at Pascua-Lama on May 4, 2012. Although the WMS was not fully constructed, Barrick considered itself entitled to do so as, in its view, the WMS was "operational" within the meaning of that term in the RCA.

[92] In September and October 2012, local indigenous groups filed two "constitutional rights" lawsuits in a Chilean court to stop the pre-stripping and other alleged environmental violations. The court refused to grant the requested preliminary injunction.

[93] Because of excessive road dust and other related problems, the pre-stripping operation was temporarily halted by government order in October 2012.

[94] Among other things, the WMS collected descending mountain water, using a system of horizontal channels and natural ravines, and carried that water around Pascua-Lama's waste dump and onward to the river system. The RCA required that the WMS be capable of receiving "water flows equivalent to a 1000-year flood." If the terrain carrying descending mountain water was not carved in rock, the RCA required that terrain to be lined with an appropriate material to prevent erosion and mudslides.

[95] Unlike the horizontal channels, one of the ravines – the Q-9 ravine – was not lined in concrete or other material. Several months following the pause of pre-

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stripping operations, in December 2012 and January 2013, two massive mudslides occurred after large volumes of descending water hit the loose rock, soil and silt present at the outlet work that directed the water into Q-9 and in Q-9 itself.

[96] Barrick's Chilean subsidiary filed a self-report with the primary environmental agency, referred to as the "SMA" in the motion judge's reasons, admitting that it had breached the RCA by not building the outlet work at the opening of Q-9 according to the RCA's specifications. The SMA rejected the self-report because it was incomplete and conducted its own investigation. It laid environmental charges against Barrick. In its charging document, released in March 2013, the SMA accused Barrick of 23 environmental violations. In a letter to the SMA in April 2013, Barrick acknowledged and "accepted" 13 of the 14 violations relating to the WMS. The SMA fined Barrick $16 million, which was reduced to $12 million for early payment.

[97] The two "constitutional lawsuits" made their way back to the Chilean court soon after the SMA released its charging document. On April 9, 2013, the Chilean court, *ex parte*, suspended all construction work on the Chilean side of the Pascua-Lama project.

[98] In June 2013, Barrick announced that it would try to rebuild the WMS "in compliance with permit conditions" and then resume pre-stripping. However, four months later, in October 2013, it decided to shut the project down.

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***The March 28, 2012 alleged misrepresentations by omission***

[99] The motion judge explained that two of the four representations at issue, dated March 28, 2012 (contained in Barrick's 2011 AIF and Annual Report and set out in the Appendix), "contain broad language intended to reassure the interested reader that Barrick takes environmental compliance seriously and that Barrick believes that it is in substantial compliance with all applicable environmental laws and regulations at its mining sites."

[100] He set out the seven material facts that the appellants allege Barrick was required to state to make those two March 28, 2012 representations not misleading:

1. Barrick's environmental permits required it to complete all elements of its WMS and have it fully operational prior to the commencement of pre-stripping;
2. Contrary to Barrick's misstatement that its WMS was complete, enabling pre-stripping to commence, Barrick was aware that its WMS was not complete and was not fully operational;
3. Barrick commenced pre-stripping in violation of its RCA permits in May 2012;
4. By committing this act, Barrick was in violation of Article 24 of Law 20,417 enacted on January 28, 2010 that required strict compliance with the RCA;

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5. Barrick's RCA violations would be considered serious under Chilean law, and Barrick knew that under the new strict compliance legal regime, it specifically risked suspension or permit revocation;
6. Barrick knew that a suspension of pre-stripping until the WMS was complete in accordance with the RCA could delay the project by at least an additional year or more beyond the one-year delay in completion until mid-2014 announced on July 26, 2012; and,
7. Barrick had decided to follow a highly risky strategy of commencing pre-stripping in violation of its permit to maintain its schedule and risk the consequent sanctions.

[101] He concluded that the alleged omissions are precluded by "obvious chronology problems":

> The alleged omissions that pertain to the two March 28, 2012 representations relate to a pre-stripping event that actually took place several weeks later in May 2012. Therefore, there is zero chance that any of these alleged omissions (in a March disclosure about an event that did not occur until May) can even arguably be described as omissions "that should have been disclosed to make the [March] representations not misleading."

[102] I agree with Barrick that there is no basis to interfere with this conclusion.

[103] First, to the extent that the appellants' Notice of Appeal could be argued as having opened the door to the appellants making arguments that the motion judge erred in concluding that some of the alleged environmental misrepresentations by

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omission did not arguably constitute misrepresentations, the Notice of Appeal makes no reference to these alleged environmental misrepresentations by omission. The appellants at no point sought leave to rely on an error in concluding that the alleged March 28, 2012 misrepresentations did not arguably constitute misrepresentations as a ground of appeal.

[104] Second, and in any event, I reject the appellants' argument that there is no "chronology problem" because, effectively, an issuer is deemed to make the impugned representation anew when related material facts requiring disclosure subsequently arise. This is contrary to s. 1(1) of the OSA, which defines a misrepresentation by omission as "an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made" (emphasis added). The definition is clear. The "circumstances in which it was made" do not include circumstances which arose after the statement was made. The appellants framed their claim as one based solely on misrepresentation. Their argument confounds liability for failure to make timely disclosure under s. 138.3(4) of the OSA with liability for misrepresentation under ss. 138.3(1) and (2) of the OSA.

[105] Finally, while alleged omission 1 – and possibly 2, 5, 6 and 7 – might appear to relate to Barrick's alleged intention prior to the May 2012 pre-stripping event to act in violation of environmental law by commencing pre-stripping in breach of the RCA, knowing of the risks of doing so, Barrick points to evidence that the decision

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to begin pre-stripping was not made until the day before pre-stripping began and the appellants do not point to any evidence to the contrary.

***The November 1, 2012 and March 28, 2013 misrepresentations by omission***

[106] The motion judge explained that the other two alleged misrepresentations are the disclosures of November 1, 2012 in Barrick's interim financial statements for the third quarter of 2012 and of March 28, 2013 in Barrick's 2012 AIF, set out in the Appendix and below. They report on the two "constitutional rights" lawsuits brought in Chile by indigenous communities affected by the Pascua-Lama project:

> November 1, 2012: "In September and October 2012, two constitutional rights protections actions were filed in Chile by representatives of an indigenous community and certain other individuals, seeking the suspension of the construction of the Chilean portion of the Pascua-Lama project due to alleged non-compliance with the requirements of the Project's Chilean environmental approval. The Court declined to issue an immediate injunction suspending pre-stripping activities, but both cases have been admitted for review by the Court. We intend to vigorously defend these actions."
>
> March 28, 2013: "In September and October 2012, two constitutional rights protections actions were filed in Chile by representatives of an indigenous community and certain other individuals, seeking the suspension of the construction of the Chilean portion of the Pascua-Lama project due to alleged non-compliance with the requirements of the Project's Chilean environmental approval. The Court declined to issue an immediate injunction suspending pre-stripping activities. The first action has been admitted for review by the court and the second action has been abandoned for lack of prosecution. We intend to vigorously defend these actions."

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[107] The motion judge set out the following four material facts that the appellants say should have been disclosed to make the above representations not misleading:

1. Barrick had commenced pre-stripping in violation of the RCA prior to the completion of the WMS;
2. Barrick admitted to the SMA in its self-report to serious RCA violations related to the WMS;
3. The self-report had been rejected for failing to provide "specific, truthful and demonstrable" information on January 31, 2013 after an SMA investigation uncovered other serious RCA violations beyond those admitted by Barrick; and,
4. Barrick had committed 13 of 14 of the RCA violations alleged by the SMA, which it admitted to on April 29, 2013.

[108] With respect to the November 1, 2012 statement, he concluded, again, that there were chronology issues:

> The alleged omissions that deal with a supposed violation of the RCA, Barrick's self-report about the WMS, the SMA's rejection of the self-report, and Barrick's April 29, 2013 letter of "acceptance" all post-date the November 1, 2012 statement and would not have been known to Barrick at that time.

[109] The alleged March 28, 2013 misrepresentation by omission failed for a different reason:

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> The alleged omissions that pre-date the March 28, 2013 AIF such as the self-report and its rejection by the SMA are not omissions that should have been disclosed to make the March 28, 2013 update about the "constitutional rights" litigation not misleading. There was nothing in this latter update that even arguably required information about the self-report or its rejection to make the "constitutional rights" update (that referred only to pre-stripping and not the WMS in any event) not misleading.

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[110] In their written submissions, the appellants argue that Barrick's statements on November 1, 2012 and March 28, 2013, in which it claimed that it would "vigorously defend" these actions, could only be interpreted by the market as a denial of the allegations in the constitutional litigation that it had violated the RCA, which Barrick, in fact, knew to be true. In addressing the motion judge's conclusion with respect to the November 1, 2012 statement, they say that the motion judge misapprehended the substance of the pleaded omissions, which was that in May 2012 Barrick violated the RCA – including by carrying out pre-stripping activities prior to full completion of the WMS, as alleged in the constitutional litigation – and knew it had violated the RCA, not that Barrick admitted to those violations a year later. This misapprehension, they argue, resulted because the motion judge failed to consider their omission claims through the lens of all the relevant evidence.

[111] I reject the appellants' argument that the motion judge failed to consider their allegations of environmental compliance misrepresentation by omission in the context of the relevant evidence. It is apparent from his reasons (including the

portion of his reasons granting the appellants leave to proceed with their "core" environmental claim) that he carefully considered the significant body of evidence relevant to the alleged environmental misrepresentations, including Barrick's belief about the completion of the WMS and the right to start pre-stripping. The appellants point to no evidence that Barrick did not, in fact, intend to "vigorously defend" the constitutional litigation. The impugned statements were made in documents which, elsewhere, cautioned that the outcome of the constitutional litigation was uncertain and that if Barrick were unable to resolve these disputes favourably, it may have a material adverse impact on its financial condition and results of operations. The argument that the appellants now advance about the "real" substance of the alleged omissions is inconsistent with their having plead alleged omissions 2 and 3 with respect to both the November 12, 2012 and March 28, 2013.

[112] I am not persuaded that there is any basis for this court to interfere with the motion judge's conclusions with respect to the November 1, 2012 and March 28, 2013 disclosures.

## VIII. DISPOSITION

[113] I would allow the appeal in part and return the issue of whether leave should be granted in respect of the categories of alleged misrepresentations described above as the capex and scheduling misrepresentations and the accounting and

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financial reporting misrepresentations to the court below, to be determined by a judge selected by the administrative judge of the class actions team in Toronto.

[114] I would order that if the parties are unable to agree on costs of the appeal and the motion below, the appellants shall make written submissions not exceeding five pages within 14 days of release of these reasons, and the respondent shall make written submissions not exceeding five pages within 10 days after the appellants make their submissions.

Released: “AH” FEB 19 2021

“Alexandra Hoy J.A.”
“I agree. David Brown J.A.”
“I agree. Thorburn J.A.”

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## APPENDIX

Plaintiff's Allegations of Misrepresentation (by Assertion or Omission)[10]

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**Part I: Capex and scheduling misrepresentations (by omission)**

**➔ The $4.7 to $5.0 billion Capex estimate and schedule**

> ***October 27, 2011 (Q3 2011)* –** "Pascua-Lama is... expected to achieve first production in mid-2013... Total mine construction capital is estimated at $4.7-$5.0 billion, with approximately 50% of the capital committed at the end of the third quarter." (p. 5)
>
> ***February 16, 2012 (Q4 2011)* –** "At the Pascua-Lama project, approximately 55% of the previously announced pre-production capital of $4.7- $5.0 billion has been committed and first production is expected in mid-2013." (p. 19)
>
> ***March 28, 2012 (2011 AIF)* –** "Approximately 55% of the previously announced pre- production capital of $4.7-$5.0 billion has been committed and first production is expected in mid-2013." (p. 88)
>
> ***May 2, 2012 (Q1 2012)* –** "At the Pascua-Lama project, about 70 percent of the previously announced mine construction capital of $4.7-$5.0 billion has been committed. First production is anticipated in mid-2013... [T]he company intends to complete a detailed capital cost and schedule review in the second quarter of 2012." (p. 14)

***representing*** as a matter of present fact in its "Cautionary Statements on Forward-Looking Information" that these estimates were "considered reasonable by management" or "the company" (Q3 2011, p. 112; Q4 2011 and 2011 Annual, pp. 10, 167; 2011 AIF, p. 88; 2012 Annual, pp. 30 and 175).

***omitting to disclose*** the following material facts necessary to make the above statements relating to the $4.7 to $5 billion Capex budget and first gold production by mid-2013 not misleading in light of the circumstances in which they were made:

---

[10] This appendix reproduces the appendix to the motion judge's reasons. The motion judge's appendix was based on the plaintiff's "Revised Schedule C" as amended August 15, 2019.

Barrick had material information that indicated that the $4.7 to $5 billion budget estimate was neither reasonable nor accurate;

The estimate was at best preliminary, subject to further review and would increase materially based on the assessment of known information;

Turner & Townsend (T&T) had advised that the June estimate, used as the basis for the $4.7 to $5 billion estimate, had been prepared using an incorrect “straight line” methodology (from the original 2009 estimate) and was not even reliable up to a Class III feasibility level estimate;

T&T was unable to determine if the estimate was reasonable due to the lack of critical “benchmark data”;

The $650 million contingency in the budget reflected a high level of unreliability in the base estimate;

T&T-led risk workshops concluded that the project estimate was high risk and required a very high contingency to reflect that risk;

*Internal information, which indicated that the Capex budget was unreasonable and unreliable:*

The estimate was dependent on estimates prepared by the projects EPC contractors and Barrick considered the estimates received from its largest contractor, Fluor-Techint (amounting to 40% of the Capex cost), to be highly unreliable throughout the period until July 26, 2012;

The cost escalation related significantly to ongoing problems with Barrick's first ever attempt at total EPC management of the project, which continued to be a very serious problem until the approach was abandoned in July 2012;

The estimate was based on a project schedule which called for 18 months of pre-stripping to commence in mid-2011 in order to permit completion of construction and first production by mid-2013, while Barrick knew of the risk of significant schedule delay in the commencing of pre-stripping because of the significant

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delays in completion of the Water Management System (WMS), which was still not complete by Q2, 2012;

Barrick knew of undisclosed internal estimate increases by no later than January 2012 to $6.4 billion (plus contingency) and then $7.5 billion (plus contingency) by Q1 2012 and knew that increasing inflation trends were likely to cause a material increase to the estimate.

➔ **The $7.5 to $8.0 billion Capex estimate and schedule**

***July 26, 2012 (Q2 2012)*** **–** "Preliminary results [of the review] currently indicate that initial gold production is now expected in mid-2014, with an approximate 50-60 percent increase in capital costs from the top end of the previously announced estimate of $4.7-$5.0 billion." (pp. 5 and 15).

***representing*** as a matter of present fact in its cautionary statements that these estimates were "considered reasonable by management";

***omitting*** to disclose material information necessary to be disclosed to make their representations relating to the Capex budget and expected schedule to first gold, specifically:

Barrick was abandoning its failed EPC approach and hiring the international construction engineering consulting firm Fluor (to take over full EPCM management) and the engineering firm Bechtel (to supplement its Chilean Project Team). Barrick did not disclose that the fees for these two firms being hired would likely be more than $400 million that had not been included in the $7.5 to $8 billion budget estimate;

Barrick knew that the project costs were likely to materially increase as a result of Fluor's analysis of the budget; and

Barrick had commenced pre-stripping in May 2012 in serious violation of the RCA permit, exposing the project to a serious risk of suspension and significant increase to the Capex costs in the event of such suspension.

➔ **The $8.0 to $8.5 billion Capex estimate and schedule**

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> ***November 1, 2012 (Q3 2012)*** **–** "As disclosed with Barrick's second quarter report, preliminary results of a review indicated an increase in capital costs to $7.5-$8.0 billion and a delay in first production to mid-2014. Since then, the company has been working with Fluor to carry out a more comprehensive top-to-bottom review. This review will be complete by our 2012 year-end results release; however, work to date suggests capital costs will be closer to $8.0 - $8.5 billion with first production in the second half of 2014." (pp. 5 and 14)
>
> ***March 28, 2013 (2012 Annual)*** **–** "During the fourth quarter, the cost estimate and schedule for the project was finalized. Expected total mine construction capital remains unchanged in the range of $8.0 to $8.5 billion and includes a contingency of 15- 20 percent of remaining capital. First gold production continues to be targeted for the second half of 2014. Incentives for both Fluor and Techint, our Engineering, Procurement, and Construction Management ("EPCM") partners, are based on the competition of the project in line with this estimate and schedule." (p. 37)

***representing*** as a matter of present fact in its cautionary statements that these estimates were "considered reasonable by management";

***omitting*** to disclose known material information that the publicly disclosed Capex estimate and schedule were unreliable and materially understated:

> Barrick had commenced pre-stripping in May 2012 in serious violation of the RCA permit and exposing the project to a serious risk of suspension, resulting delay and significant increase to the Capex costs in the event of such suspension;
>
> Barrick had decided in 2009 through 2012 to utilize EPC rather than "traditional" EPCM construction management in order to save costs, that it had no previous experience or expertise in doing so and that Pascua-Lama was beyond the expertise of its in-house EPC capabilities.

**Partial Corrections of Capex and Schedule Misrepresentations**

> ***July 26, 2012 (Q2 2012)*** **–** "[D]ue to lower than expected productivity and persistent inflationary and other cost pressures,

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> the company initiated a detailed review of Pascua-Lama's schedule and cost estimate in the second quarter. While the review is not yet complete, preliminary results currently indicate that initial gold production is now expected in mid-2014, with an approximate 50-60 percent increase in capital costs from the top end of the previously announced estimate of $4.7-$5.0 billion. Approximately $3 billion has been spent to date." (pp. *5* and 15)
>
> ***November 1, 2012 (Q3 2012) –*** "Pascua-Lama Project Update... [C]apital costs will be closer to $8.0-$8.5 billion with first production in the second half of 2014." (p. 1)
>
> ***June 28, 2013 (Press Release) –*** "Impairment Charges ... As a result of recent and continued significant declines in gold and silver prices, and the delay in first gold production, Barrick is conducting impairment testing. Preliminary analysis indicates an after-tax asset impairment charge in the range of approximately $4.5-$5.5 billion in the second quarter for the Pascua-Lama project."
>
> ***October 31, 2013 (Q3 2013 Press Release and MD&A) –*** "Barrick has decided to temporarily suspend construction activities at Pascua-Lama, except those required for environmental protection and regulatory compliance." (pp. 1 and 15)

**Part II: Environmental Compliance Misrepresentations**

> ***July 26, 2012 (Q2 2012) –*** "During the second quarter, the project achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities." (pp. 6 and 16)

***Omitting*** to disclose material facts necessary to be stated to make the following statements not untrue:

> ***March 28, 2012 (2011 AIF) –*** "The [Pascua-Lama] project has been designed to manage the handling of ore and rock to reduce the potential volume of acid rock drainage. Such considerations include diversion and containment systems for the collection, storage and treatment of drainage and closure

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and reclamation plans designed to minimize water infiltration." (p. 91)

"Barrick has a policy of conducting environmental audits of its business activities, on a regular and scheduled basis, in order to evaluate compliance with: applicable laws and regulations; permit and license requirements; company policies and management standards including guidelines and procedures; and adopted codes of practice." (p. 97)

"The Company's operating facilities have been designed to mitigate environmental impacts. The operations have processes, procedures or facilities in place to manage substances that have the potential to be harmful to the environment. In order to prevent and control spills and protect water quality, Barrick utilizes multiple levels of spill containment procedures and routine inspection and monitoring of its facilities." (p. 98)

"The Company believes that it is in substantial compliance with all current government controls and regulations at each of its material properties." (p. 105)

***March 28, 2012 (2011 Annual Report) –*** "License to Operate ... Our license to operate is a critical asset and contributes directly to the achievement of our strategic objectives and value creation for our shareholders.

Risk Factor: In order to main our license to operate, it is essential that we: Protect the environment [and] Comply with all regulatory standards" (p. 51)

"In order to mitigate risks associated with our license to operate, Barrick places a strong focus on CSR and safety and environmental performance...

Responsible environmental management is central to our success as a leading gold mining company. Environmental Management Systems have been fully implemented at twenty of our mines with full implementation at the remaining six mines to be completed in 2012." (p. 52)

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In particular, ***omitting to disclose*** the following material facts necessary to be stated to make the above statements not untrue:

> Barrick's environmental permits required it to complete all elements of its WMS and have it fully operational prior to the commencement of pre-stripping;
>
> Contrary to Barrick's misstatement that its WMS was complete, enabling pre-stripping to commence, Barrick was aware that its WMS was not complete and was not fully operational;
>
> Barrick commenced pre-stripping in violation of its RCA permits in May 2012;
>
> By committing this act, Barrick was in violation of Article 24 of Law 20,417 enacted on January 28, 2010 that required strict compliance with RCA compliance;
>
> Barrick's RCA violations would be considered serious under Chilean law, and Barrick knew that under the new strict compliance legal regime, it specifically risked suspension or permit revocation;
>
> Barrick knew that a suspension of pre-stripping until the WMS was complete in accordance with the RCA could delay the project by at least an additional year or more beyond the one-year delay in completion until mid- 2014 announced on July 26, 2012; and
>
> Barrick decided to follow a highly risky strategy of commencing pre-stripping in violation of its permit in order to maintain its schedule and risk the consequent sanctions.

***Omitting to disclose*** the following material facts necessary to be stated in order to make its statements in its Q3 2012 and 2012 AIF relating to the two constitutional rights actions commenced in September and October 2012 not inaccurate or misleading:

> ***November 1, 2012 (Q3 2012) –*** "In September and October 2012, two constitutional rights protection actions were filed in Chile by representatives of an indigenous community and certain other individuals, seeking the suspension of construction of the Chilean portion of the Pascua-Lama project due to alleged non-

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> compliance with the requirements of the Project's Chilean environmental approval. The Court declined to issue an immediate injunction suspending pre- stripping activities, but both cases have been admitted for review by the Court. We intend to vigorously defend these actions." (pp. 14 and 15)
>
> ***2012 Annual Information Form (March 28, 2013) –*** "In September and October 2012, two constitutional rights protection actions were filed in Chile by representatives of an indigenous community and certain other individuals, seeking the suspension of construction of the Chilean portion of the project due to alleged non-compliance with the requirements of the project's Chilean environmental approval. The court declined to issue an immediate injunction suspending pre- stripping activities. The first action has been admitted for review by the court and the second action has been abandoned for lack of prosecution. Barrick intends to vigorously defend these actions." (p. 82)

In particular, ***omitting to disclose*** the following material facts required to be disclosed to make the above statements not misleading:

> Barrick had commenced pre-stripping in violation of Pascua Lama's RCA prior to the completion of the WMS;
>
> Barrick admitted to the SMA in its Self-Report to serious RCA violations related to the WMS;
>
> Barrick's Self-Report had been rejected for failing to provide "specific, truthful, and demonstrable" information on January 31, 2013 after an SMA investigation uncovered other serious RCA violations beyond those admitted to by Barrick; and
>
> Barrick had committed 13 of 14 of the RCA violations alleged by the SMA, which it admitted to on April 29, 2013.

**Partial Correction of Environmental Misrepresentation**

> ***April 10, 2013 Barrick First Press Release –*** "Pascua-Lama preliminary injunction in Chile; major construction of works in Argentina unaffected ... Barrick Gold Corporation (NYSE:ABX) (TSX:ABX) (Barrick or the "company") is aware of media reports indicating that a Chilean court has issued a preliminary injunction

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pending a full hearing halting construction activities on the Chilean side of the Pascua-Lama project. The company has not yet been formally notified of the court order and will assess the potential implications once it has received official notification. Construction activities in Argentina, where the majority of Pascua-Lama's critical infrastructure is located, including the process plant and tailings storage facility, are not affected."

***April 10, 2013 Barrick Second Press Release –*** "Barrick to suspend construction on Chilean side of Pascua-Lama ... Barrick Gold Corporation (NYSE:ABX) (TSX:ABX) (Barrick or the "company") today announced that the company is suspending construction work on the Chilean side of the Pascua-Lama project while working to address environmental and other regulatory requirements to the satisfaction of Chilean authorities. In the interim, activities deemed necessary for environmental protection will continue as authorized.

Construction activities in Argentina, where the majority of Pascua-Lama's critical infrastructure is located, including the process plant and tailings storage facility, are not affected. It is too early to assess the impact, if any, on the overall capital budget and schedule of the project." (p. 1)

***April 10, 2013 Dow Jones Newswire –*** "The complaint against the project launched in 2009 by Canadian mining company Barrick Gold Corp., the world's largest gold producer, cited concerns over possible damage to a river, according to the ruling by the Santiago Appeals Court, which was seen by AFP and issued Tuesday night.

The unfinished Pascua Lama gold mine straddles the Chilean-Argentine border. The project has seen stiff resistance from environmental groups and local communities. Barrick had expected production to begin in the first six months of 2014. The order suspends construction of the open-pit mine while the court studies the broader environmental issues. The complaint was filed by the Diaguita Indians, a small community based in northern Chile. It said that the construction work "has generated a situation of imminent environmental danger" for the Estrecho River.

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> ***June 28, 2013 Barrick Press Release –*** "Schedule Re-sequencing and Reduction of 2013-2014 Capital Spending ... The company has submitted a plan, subject to review by Chilean regulatory authorities, to construct the project's water management system in compliance with permit conditions for completion by the end of 2014, after which Barrick expects to complete remaining construction works in Chile, including pre-stripping. Under this scenario, ore from Chile is expected to be available for processing by mid-2016.
>
> In line with this timeframe and in light of challenging market conditions and materially lower metal prices, the company intends to re-sequence construction of the process plant and other facilities in Argentina in order to target first production by mid-2016 (compared to the previous schedule of the second half of 2014)."
>
> ***October 31, 2013 (Q3 2013) –*** "Barrick has decided to temporarily suspend construction activities at Pascua-Lama, except those required for environmental protection and regulatory compliance. This decision will postpone and reduce near term cash outlays and allows the company to proceed with development at the appropriate time under a more effective, phased approach. The decision to re-start will depend on improved project economics such as go-forward costs, the outlook for metal prices, and reduced uncertainty associated with legal and other regulatory requirements." (pp. 1 and 15)

**Part III: Accounting Misrepresentations**

Plaintiff alleges that in all disclosures during the class period, Barrick misrepresented that its financial reporting complied with applicable accounting standards and fairly and accurately represented the financial situation of the company. The annual financial reports released during the class period contained the following statements:

> "Management's Responsibility for Financial Statements ... The consolidated financial statements have been prepared in accordance with International Financial Reporting Standards and reflect Management's best estimates and judgments based on currently available information. The company has developed and maintains a system for internal controls in order to ensure, on a

> reasonable cost-effective basis, the reliability of its financial information."(p. 81)

Barrick and its CEO and CFO certified in each financial report that the company's ICFR and DC&P were "effective"

Barrick ***omitted to disclose*** material facts necessary to be disclosed to make these statements not misleading. Specifically, Barrick omitted to disclose:

> That its ICFR and DC&P were ineffective with respect to the Pascua-Lama project;
>
> That it had failed to take necessary and timely impairment writedowns no later than Q2 2012 on the carrying value of its Pascua-Lama asset in its financial statements;
>
> That it failed to record contingent liabilities relating to the risk of serious regulatory sanctions against Pascua-Lama which could include lengthy suspension, permit revocation and closure and the associated cost implications from Q2 2012 through to Q2 2013.

**Partial Correction of Accounting Misrepresentations**

> ***July 26, (2012 Q2 2012) –*** "While the review was not yet complete, preliminary results currently indicate that initial gold production is now expected in mid-2014, with an approximate 50-60 percent increase in capital costs from the top end of the previously announced estimate of $4.7-$5.0 billion." (pp. 5 and 15);
>
> ***April 10, 2013 (Press Releases and Dow Jones Newswire) –*** [See above in the Environmental misrepresentations section.]
>
> ***June 28, 2013 (Press Release) –*** [See above in the Capex misrepresentations section.]

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# Tab 13

**CITATION:** Dyck v. Tahoe Resources Inc., 2021 ONSC 5712
**COURT FILE NO.:** CV-18-00606411-00CP
**DATE:** 20210826

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ABRAM B. DYCK, Plaintiff

**AND:**

TAHOE RESOURCES INC. and RONALD WAYNE CLAYTON, Defendants

**BEFORE:** Glustein J.

**COUNSEL:** *Michael Robb, Anthony O'Brien, and Sana Ebrahimi*, for the Plaintiff

*Lara Jackson, Derek Ronde, and Jessica Lewis*, for the Defendants

**HEARD:** July 21 and 22, 2021

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## REASONS FOR DECISION

## 1. OVERVIEW

### *1.1 Nature of the motion*

[1] The plaintiff, Abram B. Dyck (Dyck), and the proposed class acquired shares of the defendant, Tahoe Resources Inc. (Tahoe), in the period following a May 24, 2017 Tahoe news release (the May 24 News Release) until the end of the trading day on July 5, 2017.

[2] Dyck and the proposed class seek damages for alleged misrepresentations by omission by Tahoe and the defendant Ron Clayton (Clayton), the President and Chief Executive Officer of Tahoe as of the May 24 News Release. The claim is based on (i) the statutory cause of action in Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S. 5 (*Securities Act*) and (ii) negligent misrepresentation.

[3] Under s. 138.8(1) of the *Securities Act*, Dyck must seek leave from this court to assert the statutory cause of action. In the present motion, Dyck seeks an order from the court (i) granting such leave, and (ii) certifying the class action under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*CPA*).

### *1.2 Background*

[4] The present action arises out of amparo litigation that was brought before the Guatemala Supreme Court in May 2017 by a Guatemalan non-profit organization, CALAS.[1]

[5] A petition for amparo is a remedy available under Guatemalan law that protects citizens against violations of their rights and against abuses of authority by the government. The petition sought the suspension of Tahoe's exploitation license (the License) for the Escobal mine, which was described by Tahoe as its "flagship" asset and was critical to its business. The Escobal mine was operated through Tahoe's wholly-owned Guatemalan subsidiary, Minera San Rafael, S.A. (MSR).

[6] The License was required for Tahoe to continue its extractive activities at the Escobal mine. CALAS asserted that prior to granting the License, the Guatemalan Ministry of Energy and Mines (MEM) failed to consult with the local Xinka indigenous people as required under International Labour Organization Convention 169 on Indigenous and Tribal Peoples (ILO 169), which forms part of Guatemalan law.

[1] In Spanish, the organization is Centro de Acción Legal, Ambiental y Social de Guatemala, which translates as the Center for Legal-Environmental and Social Action of Guatemala.

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[7] In the petition for amparo, CALAS requested both a "provisional" amparo and a "definitive" amparo.

[8] The provisional amparo sought the suspension of the License until the courts could determine the merits of CALAS' request for the definitive amparo.

[9] In the definitive amparo, CALAS sought an order (i) requiring that the MEM consult with the Xinka people and (ii) suspending the License pending such court-ordered consultations.

[10] A provisional amparo is similar to an interlocutory injunction. In Guatemala, because amparo litigation generally takes a long time to be finally determined, even a provisional suspension of a license can have severe consequences for a company holding the license.

[11] In response to the CALAS petition, the defendants issued the May 24 News Release, in which they represented that CALAS had filed a claim alleging that the granting of the License "violated the Xinca indigenous people's right of consultation in advance of granting the Escobal mining license to … Minera San Rafael".

[12] In the May 24 News Release, the defendants made the following representations:

(i) There was a "lack of indigenous communities in or around the mine";

(ii) "[B]oth MEM and [MSR] participated in and documented hundreds of public and private meetings and open consultations in and around the mine dating back to 2010";

(iii) "[MSR] consulted with a number of indigenous people during its many meetings";

(iv) The MEM and MSR had engaged in an "extensive consultation and socialization process … leading to issuance of the Escobal license";

(v) Tahoe was "confident that the current claim is without merit";

(vi) The litigation was "an attempt by an anti-mining NGO [non-governmental organization] to oppose mining and other development in Guatemala"; and

(vii) Tahoe stated that it "believes that the claim by CALAS is without merit".

[13] On July 5, 2017, the Supreme Court of Guatemala granted the provisional amparo requested by CALAS and suspended the License until the definitive amparo could be determined. The effect of the decision was to shut down operations at the Escobal mine during the suspension.

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[14] By news release dated July 5, 2017 (the July 5 News Release), Tahoe disclosed the provisional suspension of its License. It also disclosed the risks that (i) it would be unsuccessful in challenging the provisional suspension; (ii) ILO 169 consultations would be ordered with the Xinka; and (iii) the suspension of the License would continue while the consultations were held. Tahoe also disclosed that suspension of the License could be very lengthy (up to 30 months) based on the various litigation results.

[15] Tahoe's share price declined by $3.50 per share after the July 5 News Release. This was 32.5% of its value, representing a loss of approximately $1.1 billion in market capitalization in one trading day.

*1.3 Positions of the parties*

[16] Dyck asserts that the defendants failed to disclose the following facts (which he asserts are material) in the May 24 News Release (collectively defined by Dyck as the "Omissions"):

(i) the relief sought: a provisional suspension of the License while the merits of the definitive amparo request were determined and the continued suspension of the License while ILO 169 consultations were held,

(ii) the risk that the License would be provisionally suspended pending the final determination of the definitive amparo request, which would likely last between eight and eighteen months, and

(iii) the risk that, on the definitive amparo request, ILO 169 consultation would be ordered to take place and the License would remain suspended during this period of consultation, which would likely take another six months to a year.

[17] Dyck submits that leave under Part XXIII.1 should be granted since there is a reasonable possibility, based on credible evidence and a plausible interpretation of the *Securities Act*, that:

(i) The defendants failed to disclose material facts in the May 24 News Release; and

(ii) Under s. 138.4(1) of the *Securities Act*, the defendants either (a) knew that the May 24 News Release contained a misrepresentation by omission, (b) deliberately avoided acquiring such knowledge, or (c) were "guilty of gross misconduct in connection with the release" of the May 24 News Release.[2]

[2] Since the May 24 News Release is a "non-core" document under s. 138.4(1) of the *Securities Act*, the plaintiff must, on the leave motion, demonstrate a reasonable possibility of success (based on credible evidence and a plausible interpretation of the legislation) that at least one of the s. 138.4(1) requirements will be established at trial.

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[18] Dyck further submits that the proposed class action should be certified under s. 5 of the *CPA*.

[19] The defendants oppose both leave and certification.

[20] With respect to Dyck's motion for leave to proceed under Part XXIII.1, the defendants submit that there is no reasonable possibility that the secondary statutory market misrepresentation claim will be successful. They raise 12 objections to the leave motion (quoted *verbatim* from the defendants' factum):

(i) CALAS did not have proper standing to bring the amparo;

(ii) Tahoe's contemporaneous disclosure explains all relevant risks;

(iii) The May 24 News Release was sufficient disclosure;

(iv) The July 5 News Release was not corrective disclosure;

(v) In any event, the risk of provisional suspension from the amparo was not material;

(vi) Tahoe properly handled all necessary forward-looking information;

(vii) The Guatemalan Supreme Court confirmed that Tahoe's initial position on the amparo was correct;

(viii) Tahoe had a reasonably held view that there were no Xinka at Escobal;

(ix) The plaintiff's expert[3] cannot establish the materiality of the alleged misrepresentations;

(x) Dr. Escobar's[4] evidence should not be admitted;

(xi) Dr. Escobar's opinion evidence is inconsistent and unsupportable; and

[3] Dyck proffered the expert evidence of Dr. Michael Hartzmark who opined that it is reasonable to conclude that the Omissions were material to investors from an economic perspective.

[4] Dyck proffered the expert evidence of a former Guatemalan jurist, Dr. Claudia Escobar. Dr. Escobar's opinion is that based on Guatemalan law, as of May 24, 2017, (i) it was highly likely that there would be a provisional suspension of the License; (ii) it was highly likely that the CALAS claim would succeed on the merits; and (iii) there was a risk of a continued suspension while consultations with the Xinka people under ILO 169 occurred.

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(xii) The plaintiff mischaracterizes the June 19, 2020 ruling of the District Court in Las Vegas.

[21] With respect to the certification motion, the defendants raise two objections[5] (quoted *verbatim* from the defendants' factum):

(i) The proposed class definition is overbroad and inappropriate: U.S. shareholders should not be certified as members of the proposed class; and

(ii) Dyck is not an appropriate representative plaintiff.

*1.4 Summary of conclusions*

[22] For the reasons that follow, I reject the objections raised by the defendants.

[23] The only issue before the court on a leave motion under s. 138.8(1) is whether the plaintiff has established a reasonable possibility of success at trial, based on credible evidence and a plausible interpretation of the legislation.

[24] By way of a brief summary addressing the objections for leave to proceed under Part XXIII.1, I find:

(i) There is credible expert evidence from Dr. Escobar that establishes a reasonable possibility that a trial court could find that there was precedent under Guatemalan law for CALAS to be granted standing to bring the petition;

(ii) There is credible evidence that establishes a reasonable possibility that a trial court could find that Tahoe's contemporaneous disclosure explained only general risks of conducting mining business in Guatemala, without disclosing (a) the nature of the relief sought in the amparo petition (*i.e.* a suspension of the License), (b) the specific risk that the relief might be granted, and (c) the potential length of such suspensions;

[5] The defendants also raised a third certification objection that "certain proposed common issues are inappropriate and insufficient". However, at the hearing, the defendants advised the court that they do not challenge the drafting of any of the proposed common issues (which are attached as Schedule A to these reasons), nor their suitability as common issues, other than relying on *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901 for the proposition that the court should not certify negligent misrepresentation claims if leave is not granted to proceed under Part XXIII.1.

Dyck does not challenge that proposition, but relies on the counter-proposition set out at para. 94 of *Bayens* (not challenged by the defendants) that if leave is granted to proceed under Part XXIII.1, the common law negligent misrepresentation claims should also be certified. Consequently, this certification issue is not in dispute between the parties.

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(iii) There is credible evidence from the May 24 News Release that establishes a reasonable possibility that a trial court could find that the defendants did not disclose sufficient information for readers to understand that (a) amparo relief was being sought against MSR, (b) the risk of the suspension of the License, and (c) the potentially significant length of any such suspension;

(iv) There is credible evidence from the July 5 News Release, as well as support in the case law, to establish a reasonable possibility that a trial court could find that the July 5 News Release was a public correction, even though such a finding is not a requirement of the statutory cause of action;

(v) There is credible expert evidence from Dr. Escobar based on Guatemalan law that establishes a reasonable possibility that a trial court could find that the risk of provisional suspension of the License from the amparo petition was material;

(vi) There is credible evidence from the May 24 News Release that establishes a reasonable possibility that a trial court could find that the defendants did not comply with the statutory requirements to disclose forward-looking information;

(vii) There is credible evidence from Dr. Escobar that establishes a reasonable possibility that a trial court could find that the Supreme Court did not confirm that Tahoe's initial position on the amparo was correct. By the time the Supreme Court ruled on the definitive amparo, it had already provisionally suspended the License and confirmed the provisional suspension on an application for reconsideration of its decision. Further, in its decision on the definitive amparo, the Supreme Court (a) did not overturn its prior decisions granting the provisional amparo, and (b) found that (1) there were Xinka near the Escobal mine that were required to be consulted; and (2) no previous consultation had occurred. The Supreme Court ordered those consultations to take place;

(viii) There is credible evidence from (a) Tahoe's admission in a February 13, 2018 news release (the February 13 News Release), (b) the amparo petition, and (c) additional evidence reviewed by Dr. Escobar, to establish a reasonable possibility that a trial court could find that the defendants' statement in the May 24 News Release that there were no Xinka near the Escobal mine could not be reasonably supported;

(ix) There is credible evidence from Dr. Hartzmark that establishes a reasonable possibility that a trial court could find that the Omissions were material. Dr. Hartzmark concludes that more than $0.55 (the threshold for a material change to the Tahoe share price) of the $3.50 drop in share price after the July 5 News Release can be attributed to the failure to disclose the Omissions;

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(x) Dr. Escobar's evidence is admissible on the motion under the test set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182;

(xi) There is a reasonable possibility that a trial judge could find Dr. Escobar's opinion evidence to be consistent and supportable; and

(xii) The results of the U.S. litigation, while not determinative on this motion, are consistent with Dyck's position.

[25] By way of a brief summary addressing the objections for certification, I find:

(i) The proposed class definition is not overbroad or inappropriate. U.S. shareholders should be certified as members of the proposed class, with any modifications to class membership to be subsequently addressed if required. I adopt the approach of the court in *Silver v. Imax Corp.*, 2009 CanLII 72334 (Ont. S.C.), at paras. 134 and 164, leave to appeal refused 2011 ONSC 1035 (Div. Ct.); and

(ii) Dyck is an appropriate representative plaintiff. The uncontested affidavit evidence is that he is a member of the class who purchased Tahoe shares between the May 24 and July 5 News Releases. The defendants' other concerns as to Dyck's suitability as a representative plaintiff are ill-founded.

## 2. ISSUES

[26] There are two overarching issues raised on this motion:

(i) Pursuant to s. 138.8(1) of the *Securities Act*, is there a reasonable possibility of the plaintiff succeeding at trial against the defendants with respect to the claim under Part XXIII.1 of the *Securities Act*? This involves analyzing the 12 objections raised by the defendants at para. 20 above.

(ii) Pursuant to s. 5 of the *CPA*, should the class action be certified? This involves analyzing the two objections raised by the defendants at para. 21 above.

## 3. BACKGROUND FACTS

[27] In this section, I review the background facts relevant to this motion. In my analysis of each of the individual objections, I address any further evidence (whether expert or otherwise) required to determine whether the "credible evidence" threshold has been established.

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*3.1 The parties*

[28] During the period from May 24, 2017 to July 5, 2017 inclusive (the Class Period), Tahoe was a publicly traded company listed on the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE). The company's head office was situated in Reno, Nevada.

[29] The Escobal mine was operated through Tahoe's wholly-owned Guatemalan subsidiary, MSR.

[30] On February 22, 2019, Pan American Silver Corp. (Pan American) acquired all of Tahoe's shares under a plan of arrangement. Tahoe merged with 0799714 B.C. Ltd., a wholly-owned subsidiary of Pan American.

[31] Clayton was CEO and President of Tahoe during the relevant time period and also sat on the company's board of directors. Clayton was a member of Tahoe's founding executive team and led the construction of the Escobal mine. Tahoe announced that Clayton was retiring from all his positions with the company in June 2018.

[32] Dyck is a retail investor who lives in Winkler, Manitoba. Dyck acquired shares during the Class Period. He subsequently sold his shares at a substantial loss on December 4, 2018. Dyck seeks to represent a class comprised of all investors who acquired shares of Tahoe during the Class Period.

*3.2 Mining rights in Guatemala and ILO 169*

[33] Guatemala has a mining law that governs the administration process for the MEM to consider applications for (i) exploitation licenses, such as the one needed to operate the Escobal mine, and (ii) exploration licenses. The difference between these two license types can be summarized as follows:

(i) An exploration license grants the holder the right to identify and sample potential mineral rights in a defined area; and

(ii) An exploitation license is typically granted for 25 years, covers a smaller area of approximately 20 km², and allows the holder the exclusive right to extract identified deposits within the license area. In order to obtain an exploitation license from the MEM, an applicant must prepare an environmental impact study for review and approval by the Ministry of the Environment and Natural Resources.

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[34] As explained by the defendants' expert on Guatemalan law, Mr. Francisco Chávez Bosque[6], the law governing license applications states that the MEM must conduct consultations under ILO 169 when a project "may affect communities residing near the project area, or communities in whose lands the project will be developed". Both Mr. Chávez and the plaintiff's expert on Guatemalan law, Dr. Escobar, agree that "land" is defined broadly in ILO 169 and is not confined to areas of exclusive ownership. It includes lands that indigenous peoples use, such as for traditional and subsistence activities.

[35] ILO 169 was adopted into Guatemalan law on March 5, 1996.

[36] Guatemala has failed to enact domestic legislation that specifies when or how indigenous peoples should be consulted pursuant to ILO 169. Mr. Chávez acknowledged on cross-examination that the absence of such domestic legislation creates uncertainty about whether the requirements of ILO 169 have been properly considered by the Guatemalan government.

*3.3 The Escobal mine*

[37] Tahoe was formed to acquire the assets that became the Escobal mine and the "Juan Bosco" exploration license[7] from Goldcorp Inc., which it did in 2010. The MEM issued (i) the exploration license for Escobal in 2012, (ii) the Juan Bosco exploration license in April 2012, and (iii) the exploitation license for Escobal (previously defined as the License) in April 2013.

[38] The License covers 20km². The Juan Bosco exploration license covers 59.9 km².

[39] The Escobal mine is located in the department of Santa Rosa in southeast Guatemala, which is one of 22 departments into which the country is divided. Counsel advised at the hearing that a department is similar to a province which is then divided into various municipalities.

[40] The Escobal mine is located approximately three kilometres from the municipality of San Rafael Las Flores, which is also within the department of Santa Rosa.

[41] Tahoe's application for the License included an environmental impact study (EIS). The EIS indicated that the Escobal mining project covers 262.13 hectares (approximately 2.6 km²) in which no community resides. The EIS also refers to a broader "area of influence" of approximately 45 km² around the area where mining operations would take place.

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[6] (referred to by the parties, and in these reasons, as Mr. Chávez)

[7] There is no issue before this court related to the Juan Bosco exploration license. However, since the CALAS amparo petition referred to the Juan Bosco exploration license, I also refer to background facts relevant to the Juan Bosco exploration license.

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[42] When in production, the Escobal mine ranked as one of the best silver mines in the world and was indispensable to the success of Tahoe's business, driving revenues and funding expansion activities. Tahoe described the Escobal mine as a "flagship" asset and emphasized the importance of the Escobal mine in its public statements. Analysts covering Tahoe also recognized the importance of Escobal to Tahoe's business. Most analysts attributed over 50% of Tahoe's net asset value to the Escobal mine.

[43] The Escobal mine has been controversial. There were ongoing protests, consultation demands, activism, and violence against the Escobal mine from the outset. By a news release issued on July 30, 2019 announcing the settlement of a civil proceeding in British Columbia brought by individuals injured in an April 27, 2013 protest, Pan American, on behalf of Tahoe, apologized and acknowledged that the protesters had been engaged in protests "regarding the issue of prior community consultation."

[44] Escobal faced ongoing challenges from certain community, religious and environmental groups and NGOs (such as CALAS) including protests, roadblocks, and lawsuits contesting the validity of the License and the mine's compliance with environmental laws.

[45] During the initial Tahoe licensing process, CALAS filed 240 objections, 14 motions for reconsideration, seven administrative litigation proceedings and one petition for amparo, most of which were rejected, and none of which resulted in the suspension of the License.

*3.4 The Royalty Agreement*

[46] Under a royalty agreement signed by MSR with the MEM on April 16, 2013 (the Royalty Agreement), MSR agreed to pay royalties to the municipalities set out in the Royalty Agreement as San Rafael Las Flores, San Carlos Alzatate, Mataquescuintla, Jalapa, Santa Rosa de Lima, Barberena, Casillas, Nueva Santa Rosa, Santa Cruz el Naranjo and Cuilapa.

*3.5 The Xinka*

[47] The Xinka are indigenous people of southeastern Guatemala with their own organization, sociopolitical structure, and cultural characteristics dating to pre-colonial times. Their ancestral and present-day homelands are in the departments of Santa Rosa, Jutiapa, and Jalapa. The Xinka have their own representative institution, the Xinka Parliament.

[48] The Xinka have long faced discrimination in Guatemala and have, at times, struggled to obtain recognition from the Guatemalan government. It was not until after the Guatemalan Peace Accords were signed in 1996, which ended years of internal conflict, that the Xinka were officially recognized as a distinct ethnic group.

*3.6 The Guatemalan judicial system*

[49] The Guatemalan judicial system is comprised of the Constitutional Court, the Supreme Court, the Court of Appeals, the Court of first instance or jurisdiction, and the Courts of the

justice of the peace or for minors. The Constitutional Court is the highest court in Guatemala for constitutional matters.

*3.7 CALAS' petition for amparo*

*3.7.1 A review of the amparo petition process*

[50] A petition for amparo is a constitutional tool used to prevent the violation of rights or to restore rights when the violation has already occurred. A petition for amparo can be filed against the MEM to rectify the breach of ILO 169 consultation obligations. Such a petition for amparo must be filed with the Supreme Court of Guatemala.

[51] A petition for amparo functions much like a request for injunctive relief. In the first stage of the proceeding, the Supreme Court of Guatemala can grant preliminary relief, called a provisional amparo, analogous to an interlocutory injunction, until the court determines the merits of the petition. A provisional amparo can be granted when the court considers it appropriate and is mandatory where, among other reasons, there is a continuing serious or irreparable harm or illegality.

[52] The Supreme Court's decision on the provisional amparo can be appealed to the Constitutional Court. If the Constitutional Court upholds the provisional amparo, it remains in effect until the merits of the proceeding are determined on the definitive amparo and appeals are exhausted.

[53] The second stage of the proceeding, the definitive amparo, is akin to a permanent injunction. The Supreme Court determines the merits of the petition for amparo and the appropriate relief. As with the provisional amparo, appeals from the definitive amparo decision are brought to the Constitutional Court.

*3.7.2 The CALAS amparo petition*

[54] On May 17, 2017, CALAS filed a petition for amparo in the Supreme Court asserting that the MEM failed to consult with the Xinka in the departments of Santa Rosa and Jalapa as required by ILO 169 prior to granting the License and the Juan Bosco exploration license.

[55] The petition for amparo requested the following two specific heads of relief, both of which sought suspension of the continued operations of the Escobal mine:

(i) a request for a provisional amparo suspending the License and the Juan Bosco exploration license while the merits of the petition for a definitive amparo were determined, and

(ii) a request for a definitive amparo suspending the License and the Juan Bosco exploration license while ILO 169 consultations were held with the Xinka.

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[56] The petition for amparo described the evidentiary and legal basis for the relief sought and attached evidence as schedules. This included:

(i) the MEM's acknowledgement in correspondence with CALAS that it had not consulted with the Xinka under ILO 169 prior to granting the licenses,

(ii) evidence from a 2016 assessment prepared for the Guatemalan Ministry of Culture and Sport titled "Situation of the Xinka Culture", which "reveals how the Xinka peoples have organized themselves and remained in the departments of Santa Rosa, Jalapa and Jutiapa, fully describing their location, distribution, customs and lifestyles",

(iii) a legal argument that the Constitutional Court previously found CALAS had standing to act to protect the collective rights of indigenous peoples, and

(iv) a legal argument that (a) the MEM's misconduct, such as the continued denial of the presence of Xinka in the area, justified the provisional amparo, and (b) the amparo was necessary to safeguard and protect against the ongoing violation of the Xinka's rights.

[57] MSR was named as a third party in the petition for amparo.

[58] On May 17, 2017, the Supreme Court decided to admit the petition for amparo indicating that it would hear the request for a provisional amparo and definitive amparo made by CALAS.

[59] MSR filed an appearance in the case on May 22, 2017 and requested a copy of the complete court file.

*3.8 The May 24 News Release*

[60] I set out the relevant statements by the defendants from the May 24 News Release at paras. 11-12 above.

[61] In the May 24 News Release, the defendants further advised that it contained "forward-looking statements related to the timing of MEM's response, the timing of the Supreme Court's ruling, as well as the Company's expectation that the CALAS claim has no merit and that the Company's position will prevail". Investors were advised that the purported forward-looking statements were based on management's "reasonable assumptions" but "may prove to be incorrect", and that, as such, "readers should not place undue reliance on forward-looking statements".

[62] There was no statistically significant change in the Tahoe share price following the May 24 News Release.

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[63] As of the date of the May 24 News Release, Tahoe was in takeover negotiations with Pan American.

*3.9 Public information that CALAS was seeking to suspend the License*

[64] CALAS' petition was not publicly available when Tahoe issued the May 24 News Release.

[65] The lawyer for CALAS that filed the amparo, Rafael Maldonado, tweeted a picture of the last page of the amparo petition on May 17, 2017, which stated that CALAS sought the suspension of the resolution that granted the licenses. He also tweeted on May 23, 2017 that CALAS hoped to close "San Rafael", referring to the Escobal mine.

[66] CALAS subsequently issued a news release on or about May 25, 2017 in which it stated that it was challenging the issuance of the license by the MEM.

*3.10 The July 5, 2017 Supreme Court decision*

[67] On July 5, 2017, the Supreme Court of Guatemala issued a provisional amparo ordering a temporary suspension of operations at the Escobal mine.

*3.11 The July 5 News Release*

[68] After the close of trading on July 5, 2017, Tahoe disclosed that the Guatemalan Supreme Court granted CALAS' request to provisionally suspend the License. Tahoe disclosed other facts including the relief sought in CALAS' petition for amparo and the risks inherent in the amparo proceedings.

[69] In the July 5 News Release, Tahoe stated that:

(i) It did not know whether it would be successful in challenging the Supreme Court's decision granting the provisional amparo and if unsuccessful, the License could remain suspended for twelve to eighteen months while the definitive amparo was considered; and

(ii) It did not know whether it would be successful on the definitive amparo and, if unsuccessful, the definitive amparo could result in court-ordered consultations under ILO 169 and the continued suspension of the Escobal exploitation license while consultations occurred, which could last another six to 12 months

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[70] Consequently, Tahoe disclosed the risk of a suspension of the License for up to 30 months.

[71] Tahoe's share price declined by $3.50,[8] representing a 32.5% or $1.1 billion decline in Tahoe's market capitalization.

*3.12 Subsequent developments after the July 5, 2017 provisional amparo*

[72] On July 28, 2017, the Supreme Court denied MSR's request to reconsider its provisional suspension of the License.

[73] On August 24, 2017, Tahoe announced that the Constitutional Court upheld the Supreme Court's decision provisionally suspending the License until the final ruling by the Constitutional Court on the definitive amparo.

[74] The Supreme Court issued its decision on the merits of the petition for definitive amparo on September 8, 2017. The Supreme Court ruled that the MEM had to consult with the Xinka pursuant to the requirements of ILO 169. The Supreme Court confirmed that there were Xinka in the area of the mine and that previous consultations had not taken place. The Supreme Court did not order the continued suspension of the License while consultations were undertaken. However, under Guatemalan law, the Constitutional Court's provisional suspension of the License remained in force until the Constitutional Court's decision on the definitive amparo.

[75] The Constitutional Court issued its decision on the definitive amparo on September 8, 2018. It held that there were Xinka in the communities near Escobal who had not been previously consulted under ILO 169. The Constitutional Court ordered the continued suspension of the License until ILO 169 consultations were held.

[76] Tahoe suffered significant financial consequences as a result of the suspension, including deferring capital expenditures and exploration efforts, cancelling a longstanding dividend, and incurring a significant loss of $8.4 million in the first quarter the Escobal mine was not operating (compared to a $33.5 million profit for the previous quarter).

[77] At present, the ILO 169 consultations with the Xinka have not been completed and the License remains suspended.

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[8] There is a minor discrepancy in Dr. Hartzmark's first report (in which he states that the share price declined by $3.57) and in his reply report (in which he states that the share price declined by $3.50). For the purposes of these reasons, I consider the lower amount of $3.50 per share.

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*3.13 The February 13 News Release acknowledging Xinka presence near the Escobal mine*

[78] In the February 13 News Release, Clayton stated that "Tahoe wishes to clarify and specifically acknowledge the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka."

[79] This acknowledgement of Xinka presence in the communities near Escobal was made while the CALAS amparo proceeding remained ongoing.

*3.14 U.S. litigation*

[80] Concurrent to the present action, there is ongoing securities litigation in the U.S. under Rule 10b-5 against Tahoe, Clayton, and other defendants. One of the central allegations in the U.S. litigation is that the defendants misrepresented the presence of the Xinka in the area of the Escobal mine and failed to disclose that consultations had not been undertaken, resulting in the risks to Escobal being understated.

[81] On June 19, 2020, Boulware J. of the Nevada District Court denied a motion by the defendants to dismiss the plaintiff's claim. Leave to certify an appeal of that decision was refused. One of the key issues on the motion to dismiss was whether the plaintiff had pled sufficient facts to establish *scienter*. In Rule 10b-5 litigation, *scienter* is the requirement that the plaintiff prove the defendants' intention to deceive, manipulate, or defraud. It can be established by proof of the defendants' knowledge or recklessness.

[82] Boulware J. found, on the pleadings, that *scienter* had been adequately alleged for the following reasons: (i) public information referred to by the defendants indicated that there was an indigenous population near the Escobal mine, (ii) indigenous activism against the Escobal mine, including protests that Tahoe attempted to stop, (iii) the importance of the Escobal mine, in conjunction with the small size of Tahoe, suggests that the defendants would have been involved in daily operations and would have known about activities and circumstances pertinent to the mine's operations, (iv) Tahoe management's prior experience mining in Guatemala, (v) the acknowledgement that NGOs had criticized Tahoe for lack of consultation, and (vi) the defendants had a financial motive to make the misrepresentations.

[83] Boulware J. also found, on the pleadings, that the defendants could not credibly rely on information from a 2002 Guatemalan census, given its public criticism and the information the defendants said was public about the presence of the Xinka in the area of the mine and indigenous activism.

[84] On the pleadings, Boulware J. concluded that "it would be illogical and unreasonable for Tahoe not to be aware of the indigenous population in the Escobal area, the consultation requirements under the ethical guidelines and Guatemalan law, and the opposition to the project by indigenous people".

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[85] When deciding a motion to dismiss in the U.S., similar to a motion to strike a claim in Ontario, Boulware J. stated that the "courts must … accept all factual allegations in the complaint as true." The ruling did not make any conclusions about the merits of the claim.

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## 4. ANALYSIS

[86] I first review the issues arising out of the leave motion, and then consider the certification issues.

### *4.1 The issues arising out of the leave motion*

[87] I first consider the applicable test to grant leave to assert the statutory cause of action under Part XXIII.1. I then address each of the 12 objections raised by the defendants, with reference to additional evidence and law if applicable.

#### *4.1.1 The test to grant leave to bring the Part XXIII.1 claim*[9]

[88] Leave shall be granted under s. 138.8(1) of the *Securities Act* if the court is satisfied that (i) the action is brought in good faith; and (ii) there is a reasonable possibility that the action will be resolved in the plaintiff's favour at trial.

[89] Dyck commenced this action to recover losses he suffered on his investment in Tahoe, for reasons that are consistent with the purpose of the statutory right of action and not a collateral purpose. The defendants do not challenge Dyck's good faith.

[90] Consequently, the only issue for leave in the present case is whether Dyck has a reasonable possibility of success at trial.

##### *4.1.1.1 The applicable law*

[91] Under settled law in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, the court is required to engage in a "robust screening mechanism" to ensure that "cases without merit are prevented from proceeding". The threshold is "more than a 'speed bump'": at para. 38.

[92] However, the screening mechanism is not intended to become a "mini-trial". The plaintiff must only establish a "reasonable or realistic chance that the action will succeed": *Theratechnologies*, at para. 38. Consequently, the requirement for a reasonable possibility of success is satisfied if the plaintiff can establish "both a plausible analysis of the applicable

[9] The parties agree that for the purposes of determining the present motion, the court can treat the proposed Fresh as Amended Statement of Claim as the operative pleading without a further motion required for leave to amend.

legislative provisions, and some credible evidence in support of the claim". In *Theratechnologies*, the Court held, at para. 39:

> A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success - and the time and expense they impose - are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour. [Italics in original.]

[93] Consequently, in assessing the evidentiary record, the court should not engage in a finely calibrated weighing process, and it should keep in mind the relatively low threshold and limits of the record: *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179, 145 O.R. (3d) 100, at para. 69.

[94] The leave motion is also not the forum in which to resolve conflicts in the expert evidence, unless it can be established that there is no reasonable possibility that an expert's opinion would be accepted by a trial judge: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, at para. 315; *Swisscanto Fondsleitung AG v. Blackberry Ltd.*, 2015 ONSC 6434, at para. 48.

[95] Morgan J. summarized the applicable test in the recent decision of *Gowanlock v. Auxly Cannabis Group Inc.*, 2021 ONSC 4205 by stating that the leave test is "very much stacked in the moving party's favour". Even if the motion judge believes that the defendant has a strong chance of success at trial, the court can conclude that the plaintiff has a reasonable possibility of success at trial if the plaintiff meets such lower threshold: *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, 148 O.R. (3d) 755, at paras. 32-35, rev'd on other grounds 2021 ONCA 104.

[96] I do not accept the defendants' submission that a plaintiff requires a "seriously arguable claim" in order to grant leave. That statement of the leave test was from case law prior to the decision of the Supreme Court in *Theratechnologies*. The *Theratechnologies* test was reaffirmed in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 118-22.

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*4.1.1.2 Application of the law to the present case*

[97] The defendants tendered no evidence on this motion upon which they can rely to establish the affirmative defences afforded to them under Part XXIII.1. Those defences include a "reasonable investigation" defence under s. 138.4(6)(a) of the *Securities Act*.

[98] In particular, the defendants do not assert that they conducted a reasonable investigation before advising investors of any of the statements in the May 24 News Release. The failure to tender such evidence is determinative of the defence for the purposes of this motion, although it does not foreclose the defence as the action proceeds on its merits.

[99] Further, while the defendants stated in the May 24 News Release that (i) "both MEM and Minera San Rafael participated in and documented hundreds of public and private meetings and open consultations in and around the mine area dating back to 2010"; (ii) there was an "extensive consultation and socialization process followed by both MEM and Minera San Rafael leading to issuance of the Escobal license"; and (iii) MSR "consulted with a number of indigenous people during its many meetings", the defendants led no evidence of the truth of any of those statements.

[100] Mr. Chávez did not opine that ILO 169 consultations occurred. The MEM's records indicate that ILO 169 consultations did not occur and the MEM acknowledged in communication with CALAS (attached to the petition) that that no such consultations occurred. No evidence was led to the contrary.

[101] Consequently, for the purposes of this motion, it is not contested that there is a reasonable possibility a trial court could conclude that the MEM and MSR did not consult with the Xinka people before the License was issued.

[102] For the above reasons, the *Theratechnologies* test is to be applied only to those objections raised by the defendants. Those objections, if accepted by the court, would establish no reasonable possibility of success even if MSR failed to consult with the Xinka people.

[103] I now address each of the objections raised by the defendants to oppose leave to bring a Part XXIII.1 claim under s. s. 138.8(1) of the *Securities Act*.

*4.1.2 Objection 1: CALAS had no standing to bring the petition*

[104] The defendants submit that the decision of the Supreme Court and Constitutional Court to grant CALAS standing to bring the petition was a "black swan" (*i.e.* a result so contrary to precedent that it could not have been reasonably foreseen), and as such, there is no reasonable possibility that the defendants could have anticipated that the CALAS amparo petition would have been granted. I do not agree.

[105] The standing issue was not raised in the May 24 News Release as a basis for the defendants' view that the CALAS claim was "without merit", nor is there any evidence that the

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defendants relied on standing as a basis to represent that the CALAS amparo petition was without merit.

[106] Nevertheless, if the court on this motion accepted the defendants' submission that there is no reasonable possibility that a trial court could find (based on Guatemalan law) that the defendants could have anticipated that the Guatemalan courts would have granted standing to CALAS to bring the amparo petition, then there would be no basis for the defendants to have disclosed the information in the Omissions, and leave could not be granted.

[107] On my review of the evidence of Dr. Escobar and Mr. Chávez, I find there is a reasonable possibility, based on the credible expert evidence on Guatemalan law, that a trial court could find that there is precedent supporting CALAS' standing to bring the amparo petition.

[108] Mr. Chávez concludes in his report that standing to file an amparo is generally restricted to affected parties or to the General Prosecutor and the Human Rights Prosecutor. Mr. Chávez relies on article 25 of the *Ley de Amparo*, Exhibición Personal y de Constitucionalidad, Decree 1-86 (*Ley de Amparo*), which grants standing to the General Prosecutor and the Human Rights Prosecutor to file an amparo petition.

[109] However, article 10 of *Ley de Amparo* provides that any person has the right to ask for an amparo in the following circumstances: (i) to maintain or be restored of his rights or guarantees established by the Constitution or other laws, (ii) in specific cases, to obtain a ruling declaring that a law, bylaw, decision or act of any authority does not affect the petitioner because it contravenes or restricts any of the rights guaranteed by the Constitution or any other law, or (iii) when an authority of any jurisdiction issues a bylaw or decision of any nature which is considered an abuse of power or to exceed its legal powers or to exercise its legal powers in such a way that the harm caused or that may be caused cannot be repaired by any other legal means of defense (*i.e.* irreparable harm).

[110] While Mr. Chávez took the position in his reports that the lack of standing was "obvious", he acknowledged on cross-examination that the Constitutional Court had "leeway" with respect to standing and did not have to follow the strict precepts of the standing requirements he referenced. Mr. Chávez's acknowledgement of "leeway" was consistent with the evidence of Dr. Escobar.

[111] Dr. Escobar interpreted the amparo law as "a guarantee against arbitrariness; its objective is to protect anyone from violations of their constitutional rights". Consequently, Dr. Escobar did not agree that article 25 of the *Ley de Amparo* restricted standing to bring an amparo petition to those representatives, or to persons directly affected by an authority's acts.

[112] In particular, Dr. Escobar relied on the decisions of both the Supreme Court and Constitutional Court in an earlier matter (known as the *La Puya* or "El Tambor" matter), in which the courts granted CALAS standing to bring an amparo petition to suspend a mining exploitation license.

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[113] In *La Puya*, as in the present case, CALAS filed a petition for amparo with the Supreme Court asserting that the MEM failed to consult with indigenous people under ILO 169 prior to granting a mining exploitation license in relation to the El Tambor gold mine.

[114] On November 3, 2015, the Constitutional Court in *La Puya* ordered the Supreme Court to admit the amparo petition presented by CALAS.

[115] On November 11, 2015, the Supreme Court in *La Puya* granted a provisional amparo suspending the El Tambor mine's exploitation license while the court determined the definitive amparo.

[116] On May 5, 2016, the Constitutional Court in *La Puya* upheld the provisional suspension of the exploitation license.

[117] On June 28, 2016, the Supreme Court in *La Puya* granted the definitive amparo to CALAS and ordered the continued suspension of the exploitation license while ILO 169 consultations were undertaken. The Supreme Court found that CALAS had standing to defend homogeneous collective and individual rights. The Supreme Court indicated that under certain circumstances, such as where CALAS acted on behalf of indigenous people affected by the mining project, the requirement that the person presenting the amparo be the aggrieved person can be dispensed with, in view of the primacy of the fundamental rights that are denounced as infringed.

[118] Consequently, standing for CALAS was accepted by the courts in the *La Puya* matter.

[119] Mr. Chávez acknowledged that CALAS obtained standing in *La Puya*. However, he sought to distinguish the granting of standing in *La Puya* because the Supreme Court accepted that CALAS had standing "based on fact it is an environmental NGO and that one of the rights to be preserved through consultation is the right to protect the environment".

[120] Mr. Chávez took the position that because CALAS focuses on environmental issues, the Constitutional Court "ought to have prevented CALAS from obtaining standing in respect of a matter like Escobal that focused on the indigenous consultative process rather than environmental issues".

[121] However, Dr. Escobar's evidence is that Mr. Chávez's purported distinction is not valid. In her reply report, Dr. Escobar refers to the right of indigenous peoples under article 7 of ILO 169 to "decide their own priorities for the process of development, especially in matters that affect their lives". In particular, she refers to article 7(3) of ILO 169, which provides:

> Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

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[122] Dr. Escobar further refers to article 15(2) of ILO 169, which requires the government to engage in consultation in order to establish if the interests of indigenous people could be affected by projects that could have environmental consequences.

[123] Consequently, Dr. Escobar concludes from the above that Mr. Chávez's attempt to distinguish *La Puya* is not well-founded, as CALAS could be given standing based on a failure to consult under ILO 169 since the lack of consultation would result in the failure of the MEM to consider the environmental impact of the Escobal mine.

[124] Dr. Escobar's evidence is further supported by the CALAS mandate, which is to provide "leadership and influence in sociopolitical environmental activism, the defence of environmental human rights and the rights of indigenous peoples with respect to the environment".

[125] Similarly, Mr. Chávez agreed in his cross-examination that (i) under Guatemalan law, consultation is a collective right of indigenous people; (ii) environmental impact could affect indigenous peoples' use or enjoyment of the land in the area where the mining project is being undertaken; and (iii) the impact on the use or enjoyment of land is a reason why consultation with indigenous peoples is required. All of these factors could support the application of the *La Puya* decision to the CALAS petition.

[126] On the above evidence, I find that there is a reasonable possibility that a trial court could find, based on credible expert evidence of Dr. Escobar, that there was precedent under Guatemalan law supporting CALAS' standing to bring the amparo petition.

[127] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.3 Objection 2: Tahoe's contemporaneous disclosure explains all relevant risks*

[128] Tahoe submits that its disclosure to investors prior to the May 24 News Release was sufficient, on its own, to explain "all relevant risks" of "operating Escobal and the fundamentally tenuous nature of the licensing process".

[129] For the reasons I discuss below, Dyck has established a reasonable possibility that a trial court could find that Tahoe's contemporaneous disclosure did not explain "all relevant risks", and in particular, did not explain the information Dyck alleges should have been disclosed in the Omissions.

##### *4.1.3.1 Tahoe's contemporaneous disclosure*

[130] Tahoe's 2016 Annual Information Form, dated March 9, 2017 (AIF), stated certain risks regarding operations in Guatemala. Under the heading "Operations in Guatemala, Peru and Canada", Tahoe advised that company activities may be affected by judicial activity and that there was ongoing opposition from NGOs. Tahoe also stated that "[t]he status of Guatemala as a

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developing country may make it more difficult for the Company to retain licenses and obtain required financing for projects."

[131] Under the AIF heading titled "Licenses and Title to Assets", Tahoe stated that (i) "the validity of the licenses related to our operations may be contested"; and (ii) adverse court rulings could materially and adversely impact its rights to exploitation licenses.

[132] In the AIF section titled "Governmental Laws and Regulation", Tahoe further set out the risks associated in respect of changing laws and law enforcement in Guatemala and warned that "more stringent enforcement of current laws and regulations by governmental authorities, could cause … suspension of our operations." Tahoe also warned of laws and regulations permitting private parties to bring lawsuits.

[133] Under the AIF section titled "Community Action", Tahoe set out the specific threats to the company's operations from community action from NGOs, warning that NGOs have taken actions like initiating lawsuits and that such activities could have a material adverse effect on Tahoe's operations, financial position, cash flow and results.

[134] Under the AIF section titled "Claims and Legal Proceedings," Tahoe provided a general warning that legal proceedings against the company may "give rise to legal uncertainties or have unfavourable results." Tahoe further noted that the company's disputes could "materially adversely impact" the company's financial position, cash flow, and results of operations.

[135] The March 2017 Management Discussion and Analysis (MD&A) advised that mining activities "may be affected in varying degrees by government regulations relating to the mining industry, judicial activity or political change or instability." Tahoe noted that "[t]he status of Guatemala as a developing country may make it more difficult for the Company to retain licenses and obtain required financing for projects."

[136] The 2016 MD&A also provided details of previous unsuccessful NGO litigation against Tahoe.

#### *4.1.3.2 Analysis of the contemporaneous disclosure*

[137] For the reasons I discuss below, there is a reasonable possibility that a trial court would find that the contemporaneous disclosure did not disclose "all relevant risks" related to the suspension of the License, and in particular, did not disclose the specific risks set out in the Omissions of (i) the nature of the amparo relief sought, (ii) the risk of suspension of operations, and (iii) the potential duration of suspended operations.

[138] It is reasonably possible that a trial court could find that the contemporaneous disclosure only sets out general risks, relating to judicial activity, opposition from NGOs, and the general threat to Tahoe's operations from the possibility that licenses could be contested or laws and law enforcement could be changed. It is reasonably possible that a trial judge could find that the

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contemporaneous disclosure did not advise shareholders of the specific risk of a lengthy suspension of operations at Escobal arising from the CALAS petition.

[139] Such an interpretation would be consistent with the absence of a statistically significant price reaction following the May 24 News Release.

[140] Tahoe's general risk disclosure also represented that "there are no indigenous populations currently living in the immediate area of the Escobal" site. That representation is consistent with the same assertion in the May 24 News Release. Accordingly, even if the May 24 News Release was read in the context of Tahoe's general risk disclosure, a reasonable reader of the disclosures might conclude that there was no risk to the License from the CALAS litigation.

[141] There is a reasonable possibility that a trial judge might find that the potential consequences of the CALAS amparo litigation went beyond the general risk levels discussed in the contemporaneous disclosure. Dyck's claim is that CALAS' petition for amparo increased the risk of an Escobal mine suspension relative to the general risks the market already understood. That position is supported by credible evidence, both from the contemporaneous disclosure itself and by expert evidence.

[142] For the above reasons, Dyck has established a reasonable possibility that the contemporaneous disclosure did not disclose the specific risks arising from the CALAS litigation. Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.4 Objection 3: The May 24 News Release was sufficient disclosure*

[143] Tahoe submits that the May 24 News Release was sufficient disclosure since it "fairly convey[ed] the Amparo and any inherent risks to Tahoe shareholders".

[144] I find that Dyck has established a reasonable possibility that sufficient disclosure was not made in the May 24 News Release based on the language contained in the news release.

[145] Tahoe's statement in the May 24 News Release was that a claim had been made against the MEM, with CALAS "alleging that MEM had violated the Xinca indigenous people's right of consultation in advance of granting the Escobal mining license to Tahoe's Guatemalan subsidiary, Minera San Rafael".

[146] There was no reference in the May 24 News Release to the fact that CALAS sought amparo relief against MSR, or that as part of such relief, CALAS sought both a suspension of the License on the provisional amparo (pending the hearing of the definitive amparo) and a suspension of the License on the definitive amparo (pending consultation with the Xinka people). There was no reference to the length of time that the License might reasonably be suspended if either the provisional or definitive amparos were obtained.

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[147] The defendants also made a categorical declaration that they were "confident" that the CALAS litigation was "without merit". It is reasonably possible that such language could be read as advising investors that Tahoe had little or no doubt as to the result of the litigation.

[148] In submitting that there was sufficient disclosure from the May 24 News Release, the defendants rely on a single report from an analyst from Desjardins Capital Markets (Desjardins). The defendants submit that based on the May 24 News Release (which the defendants submit was reflected in the comments of the Desjardins analyst), "the market understood that CALAS was seeking to shut down the mine".

[149] The Desjardins analyst described the "takeaway" from the CALAS litigation as "negative". However, the analyst did not change his price forecast for Tahoe, consistent with an understanding that there was little or no risk from the CALAS litigation. Consequently, the analyst's view is consistent with the defendants' "confidence" that the claim was "without merit" based on the representations in the May 24 News Release.

[150] Further, the Desjardins analyst described the claim as being "against [the MEM] alleging that the MEM failed to consult with a local indigenous group prior to granting the mining license for Escobal", which tracked the language in the May 24 News Release and did not reflect an understanding that a suspension of mining operations was being sought for both the provisional and definitive amparos.

[151] The Desjardins analyst referred to a 2013 court decision which held (as the analyst described) that the "MEM should have conducted a hearing in connection with a written opposition to the Escobal mining license, but did not go so far as to invalidate the mining license". Again, there is a reasonable possibility that a reference to 2013 litigation, which did not "invalidate the licence", does not establish that the Desjardins analyst (let alone the market) understood that "CALAS was seeking to shut down the mine", as submitted by the defendants.

[152] In any event, the defendants led no evidence of any other analyst who even discussed the May 24 News Release, let alone understood that "CALAS was seeking to shut down the mine".

[153] Even if the Desjardins analyst had somehow determined from the May 24 News Release that the operation of the Escobal mine was at stake, the comments of a single analyst do not constitute notice to investors.

[154] For the above reasons, I find Dyck has established a reasonable possibility that the trial court will find that the May 24 News Release was not sufficient disclosure of the nature, scope, and risks of the CALAS litigation.

[155] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

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*4.1.5 Objection 4: The July 5 News Release was not corrective disclosure*

[156] The defendants submit that (i) a s. 138.3(1) claim requires a public correction; and (ii) the July 5 News Release is not a public correction.

[157] For the reasons below, I find that (i) the law does not require a public correction as a constituent element of a s. 138.3(1) claim; and (ii) in any event, there is a reasonable possibility that the July 5 News Release was a public correction.

[158] I first address the applicable law and then consider the disclosure in the July 5 News Release.

*4.1.5.1 The applicable law*

[159] In the recent decision of *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, the motion judge held that a public correction was a constituent element of the secondary market misrepresentation claim (at para. 21). The Court of Appeal disagreed, holding that it was not a requirement a plaintiff must prove to succeed on the claim. Instead, the public correction serves as a "time-post for the proposed class period and any eventual damages calculation": at para. 66.

[160] A public correction is not one of the safeguards to protect against unmeritorious claims on a leave motion, since "[w]here there is a reasonable possibility of a misrepresentation, the plaintiff's claim can hardly be characterized as a strike suit": *Barrick Gold*, at paras. 68 and 70.

[161] Consequently, while a plaintiff must have transacted the relevant securities prior to the public correction of the misrepresentation, the lack of a public correction does not prevent a plaintiff from asserting the cause of action provided by Part XXIII.1 where there is a reasonable possibility of establishing a misrepresentation. As Hoy J. comments in *Barrick Gold*, "the clearing of the misrepresentation threshold, combined with the fact that the plaintiff brought an action, suggests that there was a public correction. The plaintiff must have learned of the misrepresentation somewhere": at para. 71.

[162] For the above reasons, the defendants cannot rely on an alleged lack of a public correction as a basis to dismiss the claim.

*4.1.5.2 The July 5 News Release can be a public correction*

[163] As the court held in *Barrick Gold*, a public correction must be "reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": at para. 76.

[164] The defendants submit that the disclosure in the July 5 News Release that the Supreme Court *granted* the provisional amparo and suspended the License does not correct their alleged failure to disclose the *risks* of that event occurring. Under the defendants' approach, only the

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mirror-image of the misrepresentation—an explicit statement that their previous assessment of the risk was incorrect—could serve as a public correction. I disagree.

[165] In *Barrick Gold*, Hoy J. held that a public correction was not designed to limit investor claims "only to those misrepresentations later explicitly corrected": at para. 67. A public correction "need not specifically identify the omitted material fact or specifically relate the information in the correction to the omitted material fact": at para. 76. Instead, it is enough if the alleged correction casts doubt on the reasonableness or accuracy of the earlier disclosure: at paras. 56 and 76. Consequently, it is reasonably possible that a trial court could conclude that the materialization of the risk that the defendants said did not exist meets the *Barrick Gold* test.

[166] A review of the contents of the July 5 News Release demonstrates that there is a reasonable possibility that a trial court could find that it was a public correction. In particular, while the defendants had asserted in the May 24 News Release that (i) there were no indigenous communities near the Escobal mine; (ii) indigenous peoples had been consulted; and (iii) the CALAS claim was without merit, it is reasonably possible that a court could conclude that a reader of the July 5 News Release would reasonably understand that the earlier statements had been corrected.

[167] Further, Dyck alleges that the Omissions include the failure to disclose the relief sought in CALAS' petition for amparo, the risk of a suspension on the definitive amparo while consultations were undertaken, and the likely length of the potential suspensions. All of these Omissions were corrected and disclosed to the public in the July 5 News Release.

[168] For the above reasons, Dyck has established a reasonable possibility that the July 5 News Release was a public correction. Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.6 Objection 5: In any event, the risk of provisional suspension from the amparo was not material*

[169] The defendants submit that the risk that the Supreme Court would suspend the License on the petition for a provisional amparo was so unlikely that there would have been no reasonable basis for the defendants to disclose any of the Omissions, even if (i) there had been Xinka present near the Escobal site; and (ii) the Xinka people had not been consulted under ILO 169 before the License was issued.

[170] The defendants describe the July 5, 2017 Supreme Court decision suspending the License on the provisional amparo as another example of a "black swan" event.

[171] Consequently, the issue before the court on the leave motion is whether Dyck has established a reasonable possibility that, based on Guatemalan law, a provisional suspension of the License could reasonably have been foreseen on the basis of the CALAS petition. For the reasons that follow, I find that Dyck has met this threshold.

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[172] Dr. Escobar relies primarily on the *La Puya* decision as well as decisions by both the Supreme Court and Constitutional Court in litigation referred to by the parties as the *Oxec* matter.

[173] As I discuss at para. 115 above, the Supreme Court in *La Puya* granted CALAS' petition for a provisional amparo and suspended the El Tambor mine's exploitation license while the court determined the definitive amparo. That decision was upheld by the Constitutional Court (see para. 116 above).

[174] On June 28, 2016, the Supreme Court granted the definitive amparo to CALAS and ordered the continued suspension of the El Tambor exploitation license while ILO 169 consultations were undertaken (see para. 117 above).

[175] Similarly, Dr. Escobar relies on the *Oxec* decisions which were decided prior to the CALAS amparo petition. In the *Oxec* matter, (i) the Supreme Court provisionally suspended the license for a hydroelectric project license; (ii) the Constitutional Court also held that the license for the hydroelectric projects should be provisionally suspended while the litigation was adjudicated; and (iii) the Supreme Court also ordered the continued suspension of the license on the definitive amparo while consultations were undertaken.

[176] The Constitutional Court in the *Oxec* matter later lifted the suspension while consultations were undertaken, but this occurred after May 24, 2017.

[177] The defendants submit that Dr. Escobar (i) "admitted" that there was no Constitutional Court precedent for a suspension of the License and (ii) agreed that it was "unprecedented". However, this submission is not supported by the evidence.

[178] Dr. Escobar stated in her report and on cross-examination that as of May 24, 2017, the Constitutional Court had not previously upheld the suspension of a license on a *definitive* amparo. However, Dr. Escobar opined (and there is no dispute on the issue) that the Constitutional Court had previously granted *provisional* amparos suspending licenses under ILO 169 in both the *Oxec* and *La Puya* cases.

[179] The defendants' submissions ignore the above evidence, as well as the evidence of the Supreme Court granting suspensions of operations on definitive amparo applications.

[180] Consequently, there was Constitutional Court precedent for a suspension of the License on a provisional amparo based on ILO 169, and Supreme Court precedent for a suspension of the License both for a provisional and definitive amparo.

[181] Mr. Chávez seeks to distinguish the *La Puya* decisions on the basis that (i) they involved numerous amparos and there were different bases of complaints, including concerns about the absence of an ILO 169 consultation; (ii) there was a history of company misconduct alleged in respect of the mining project; and (iii) the El Tambor mine operated in an area that had an uncontroverted indigenous population.

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[182] Mr. Chávez seeks to distinguish the *Oxec* decisions on the basis that they involved a hydroelectric project and there was no dispute as to whether an indigenous population was impacted by the project.

[183] However, Mr. Chávez did not file any evidence to establish that the factual distinctions upon which he relied were the basis for the suspension of operations in either *La Puya* or *Oxec*. The Constitutional and Supreme Courts in those cases granted a suspension of operations on a provisional amparo until determination on the merits of whether there was a breach of the ILO 169 consultation obligations, just as was alleged by CALAS in the petition relating to the Escobal mine.

[184] In any event, in the present case, CALAS not only alleged that the "MEM violated the Xinka indigenous peoples' right of consultation under ILO 169 in advance of granting the License" but also alleged that the MEM "*otherwise discriminated against the Xinka*", raising additional issues such as in *La Puya*, even if the license suspension on the provisional application required such additional claims (which Mr. Chávez did not establish).

[185] Further, Mr. Chávez's attempts to distinguish the *La Puya* and *Oxec* decisions on the basis that there was no dispute in those decisions as to whether an indigenous population was impacted by the project fails to address the evidence before the Guatemalan courts which could have established the presence of Xinka people in the Escobal area. As I note at para. 78 above, Tahoe admitted in the February 13 News Release that "Tahoe wishes to clarify and specifically acknowledge the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka."

[186] Finally, Mr. Chávez acknowledged that CALAS had an "arguable case" and that he would not have described the litigation as "without merit". While Mr. Chávez concluded that the action had "so many flaws that it should have been dismissed", the issue for the trial court will be to determine the likelihood of such a result in the face of Dr. Escobar's evidence that the suspension of the License on the provisional amparo was highly likely.

[187] For the above reasons, Dyck has established that it is reasonably possible that a trial court would find that there was Constitutional Court and Supreme Court precedent granting provisional amparos suspending operating licenses under ILO 169, and Supreme Court precedent suspending operating licenses on a definitive amparo application.

[188] Consequently, it is reasonably possible that a trial court could find that (i) the risk of a suspension of the License on the provisional amparo application (or the definitive amparo application) was significant; and, as such (ii) the Omissions (which addressed the nature of the relief sought, the risks of such an order being granted, and the length of any possible suspension) were material and ought to have been disclosed.

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*4.1.7 Objection 6: Tahoe properly handled all necessary forward-looking information*

[189] The defendants submit that they were not required to disclose "forward-looking information" about the length of time of any potential suspension of the License that would result if CALAS succeeded on their petition.

[190] The defendants submit that "[t]his allegation borders on the absurd and essentially would punish Tahoe for not making forward-looking guesses about the consequences of events that had not occurred", "would constitute guess work", and "would be entirely inappropriate in the context of Ontario's securities regime". The defendants submit that as of the May 24 News Release, "there was no reasonable basis to provide forward-looking information on future events whose risk of materialization remained broadly uncertain" and that as such, it was not appropriate to "speculate on hypothetical events".

[191] However, the defendants' submission is circular. Part 4A.2 of National Instrument 51-02 addresses forward-looking information. It provides that "[a] reporting issuer must not disclose forward-looking information unless the issuer has a reasonable basis for the forward-looking information."

[192] Consequently, if the defendants' objections as to standing and materiality of the risk are not accepted at trial, a court could find that the defendants had a reasonable basis to conclude that (i) it was highly likely that the provisional amparo might be granted suspending the License, and (ii) there was a risk that the definitive amparo could be granted suspending the License. If the court held as such, it is reasonably possible that a court could find that the defendants were required to disclose the forward-looking information as to the length of time the License could be suspended upon either provisional or definitive amparo relief being granted.

[193] Further, the defendants are not absolved from disclosure of material facts simply because the risk had not yet arisen. They are required to disclose the risk in the May 24 News Release if material at the time. Laws governing the disclosure of forward-looking information are not intended to operate as a license for reporting issuers to withhold disclosure of material information relating to risks affecting a business' operations.

[194] In subsection 4.1.2 above, I held that there is a reasonable possibility that a trial court could find, based on credible expert evidence of Dr. Escobar, that there was precedent supporting CALAS' standing to bring the amparo petition.

[195] In subsection 4.1.6 above, I found that there is a reasonably possibility that a trial court could find that the risk of suspensions from the CALAS petition was material.

[196] In subsection 4.1.9 below, I find that Dyck has also established a reasonable possibility that a trial court could find that the defendants had no reasonable basis for their assertion in the May 24 News Release that there was a lack of Xinka presence in the area.

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[197] As I discuss at paras. 99-101 above, there is no evidence to support any reasonable basis for the defendants' assertion in the May 24 News Release that they had "consulted with a number of indigenous peoples [let alone the Xinka people] during its many meetings".

[198] Consequently, it is reasonably possible that a trial court could find that the Omissions (which addressed the nature of the relief sought, the risks of such an order being granted, and the length of any possible suspension) were material and ought to have been disclosed.

[199] In fact, the defendants made the forward-looking disclosure sought in the Omissions in the July 5 News Release, which disclosed that (i) the License could remain suspended for 12 to 18 months while the definitive amparo was considered; and (ii) the continued suspension while consultations with the Xinka were undertaken could last another six to 12 months.

[200] Consequently, there is credible evidence that as of the May 24 News Release, (i) Tahoe had a reasonable basis to make the forward-looking statements as to the risk and duration of any License suspension; and (ii) as such, the forward-looking information in the Omissions ought to have been disclosed in the May 24 News Release.

[201] For the above reasons, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.8 Objection 7: The Guatemalan Supreme Court confirmed that Tahoe's initial position on the amparo was correct*

[202] The defendants submit that "[t]he view expressed by Tahoe in the May 24 News Release, that the Amparo Application brought before the Supreme Court would not result in a suspension of the License, was ultimately supported by the Supreme Court on September 8, 2017, when the Court overturned the provisional Amparo and held that the license should not be suspended".

[203] The defendants rely on the decision of the Court of Appeal in *Kerr v. Danier Leather Inc.*, 2005 CanLII 46630 (Ont. C.A.), in which the court held that the fact that the Q4 projections in the forecast of results were attained was relevant to whether management's assessment of the projections was reasonable. The court in *Kerr* noted that "it is a contradiction in terms to say that a Forecast which accurately predicts what will occur is not, at the very least, one of the alternatives management could reasonably select": *Kerr*, at para. 153.

[204] However, there is credible evidence from Dr. Escobar that supports the conclusion that the Guatemalan Supreme Court did not confirm that Tahoe's initial position on the amparo was correct. In particular:

(i) On July 5, 2017, the Supreme Court provisionally suspended the License, which was contrary to Tahoe's position;

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(ii) On July 28, 2017, the Supreme Court confirmed the provisional suspension on an application for reconsideration of its decision, which was again contrary to Tahoe's position; and

(iii) On August 24, 2017, the Constitutional Court confirmed the provisional suspension on appeal, also contrary to Tahoe's position.

[205] Further, the Supreme Court's September 8, 2017 decision on the definitive amparo did not overturn the provisional suspension, which remained in place until the Constitutional Court's decision on the definitive amparo.

[206] The Supreme Court's September 8, 2017 decision on the definitive amparo also found that (i) there were Xinka near the Escobal mine who were required to be consulted; and (ii) no previous consultations had occurred, again contrary to Tahoe's initial position. The Supreme Court ordered those consultations to be held, which Tahoe opposed.

[207] Consequently, the Supreme Court's September 8, 2017 decision rejected both bases for Tahoe's statement in the May 24 News Release that the petition for amparo was "without merit".

[208] Finally, the Constitutional Court, in its September 8, 2018 decision, ordered the continued suspension of the License while consultations were held.

[209] For the above reasons, it is reasonably possible that a court could find that the Supreme Court in September 8, 2017 did not confirm Tahoe's initial position on the amparo (*i.e.* that the claim was without merit).

[210] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.9 Objection 8: Tahoe had a reasonably held view that there were no Xinka at Escobal*

[211] As I discuss above, the defendants filed no evidence as to what information they relied upon to assert in the May 24 News Release that there was a "lack of indigenous communities in or around the mine". The only basis for that statement set out in the news release is that "[t]he last official census shows the San Rafael community to be overwhelmingly non-indigenous".

[212] The defendants ask the court to find that it is not reasonably possible for Dyck to establish that the defendants either (i) knew of the presence of Xinka at Escobal, (ii) deliberately avoided acquiring such knowledge, or (iii) engaged in gross misconduct by failing to learn of the Xinka presence (as those requirements are set out for a non-core document under s. 138.4(1) of the *Securities Act*). For the reasons that follow, I find that it is reasonably possible for Dyck to succeed at trial on this requirement.

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[213] I first consider the Tahoe admission in its February 13 News Release that there were Xinka near the Escobal mine. I then consider the information available in the petition for amparo. Finally, I consider the other information that could have been available as of the May 24 News Release, since the defendants filed no evidence as to what information they had in their possession to assert that there was "a lack of indigenous communities in or around the mine".

*4.1.9.1 The February 13 News Release*

[214] In the February 13 News Release, Clayton stated that "Tahoe wishes to clarify and specifically acknowledge the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka".

[215] The acknowledgement of Xinka presence in the communities near Escobal was made while the CALAS amparo proceeding remained ongoing. It can reasonably be inferred that Tahoe would not have made this admission against interest unless there was no credible argument to the contrary.

[216] Mr. Chávez acknowledged on cross-examination that he was not aware of any evidence that the Xinka moved into the communities near Escobal after the License was approved in 2013.

[217] The defendants filed no evidence on the motion to explain why they knew about the presence of the Xinka people in February 2018, less than nine months after the May 24 News Release yet advised investors otherwise in May 2017. Consequently, there is no basis on the record for the defendants to suggest that they did not have the same knowledge of Xinka presence at the May 24 News Release.

[218] As the court held in *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241, at para. 48, the court on a leave motion should consider the evidence that a defendant has chosen *not* to provide.

[219] The defendants did not refer to the February 13 News Release in any capacity, even though the issue was raised prominently by Dyck in his motion record, factum and in his submissions at the hearing. In particular, I note the following:

(i) The defendants provided no evidence from a Tahoe representative. The reports prepared by Mr. Chávez did not address any evidence about changes to Xinka presence near Escobal since 2013;

(ii) The lengthy factum filed by the defendants for this hearing made no reference to the February 13 News Release, despite repeated references to it in the Dyck factum; and

(iii) The defendants made no submissions to the court on the issue, even after Dyck relied on the February 13 News Release in his submission.

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[220] The defendants are sophisticated parties represented by experienced counsel, who can be taken to understand the consequences of not providing the court with any evidence on this issue.

[221] For these reasons, the admission in the February 13 News Release is sufficient to establish a reasonable possibility that a court could find that (i) the defendants had no basis for their assertion in the May 24 News Release of the lack of indigenous presence in the area; and (ii) the s. 138.4(1) requirements for liability for misrepresentation in a non-core document were met.

*4.1.9.2 Evidence set out in the CALAS petition for amparo*

[222] As I set out at para. 34 above, (i) Mr. Chávez acknowledged that the MEM is required to conduct consultations under ILO 169 when a project "may affect communities residing near the project area, or communities in whose lands the project will be developed"; and (ii) both experts agree that "land" is defined broadly in ILO 169 and is not confined to areas of exclusive ownership. It includes lands that indigenous peoples use, such as for traditional and subsistence activities.

[223] In its petition, CALAS relied on a 2016 report prepared by Claudia Dary Fuentes for the Ministry of Culture and Sports titled "Situation of Xinka Culture", in order to establish the presence of Xinka in the communities near Escobal and their use of the land.

[224] The 2016 report states that the community of San Carlos Alzatate was formally registered as indigenous, peasant or agrarian in the 20th century and that the name Xinka was added after the 1996 Peace Accords.

[225] MSR had entered into the Royalty Agreement with the MEM that recognized San Carlos Alzatate as one of ten municipalities in the area of direct influence of the Escobal mine and the community was a municipal party to the Royalty Agreement.

[226] The defendants submit that the 2002 census data relied upon by CALAS in its petition did not establish the existence of the Xinka people in the area near Escobal. However, even if the census data is accurate (which is contested), that census data shows that there were two Xinka people living in San Rafael Las Flores, and more in the surrounding areas. Mr. Chávez acknowledged that there is no minimum number of indigenous people required to trigger the consultation obligations under ILO 169. The defendants have not adduced any evidence to suggest that they received legal advice to the contrary.

[227] Consequently, given the 2016 report and the absence of any evidence of a minimum population requirement for consultation, it is reasonably possible that a court could find that based on the evidence in the petition, (i) the defendants had no basis for their assertion in the May 24 News Release of the lack of indigenous presence in the area; and (ii) the s. 138.4(1) requirements for liability for misrepresentation in a non-core document were met.

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*4.1.9.3 Other evidence of Xinka presence available as of May 24, 2017*

[228] Prior to May 24, 2017, there was evidence of both ongoing Xinka activism in opposition to the Escobal mine and protests at the mine. The Xinka had demanded that they be consulted in accordance with ILO 169, including through their representative institution the Xinka Parliament. Tahoe was aware of the Xinka activism and consultation demands.

[229] A report on Tahoe prepared by the Council on Ethics for the Norwegian Government Pension Fund Global in 2014 (the Norwegian Report) noted that "[t]he Xinka Parliament and other Xinka organizations have engaged actively in opposing the [Escobal] mine and what they consider the imposition of a development model based on major interventions in nature." The Norwegian Report notes that the Xinka consider themselves to be directly impacted by Tahoe and its mining licenses. The Norwegian Report further documented the Xinka demand for prior consultation. It also linked ongoing conflict and violence at the Escobal mine to a lack of adequate consultations, including with the Xinka.

[230] Tahoe provided a response to the allegations in the Norwegian Report. The response was found by the Norwegian pension fund to be lacking, leading to a divesture recommendation.

[231] Similarly, a complaint filed to the Inter-American Commission on Human Rights (IACHR) by the Mayan and Xinka peoples of Guatemala describes a protest at the Escobal mine where protesters demanded that consultations be held. The report also describes the arrest of protesters, including the President of the Xinka Parliament. In its Annual Information Form for 2014, Tahoe disclosed receiving the IACHR complaint.

[232] The defendants' economic expert, Dr. Gompers, confirmed that since the Escobal exploitation license was granted in 2013, the Xinka had asserted that they had a presence near the mine. Dr. Gompers also confirmed that in 2013 the Xinka Parliament made public statements denouncing the MEM's decision to grant the Escobal exploitation license.

[233] Based on this available evidence, and without the defendants leading any evidence of reasonable investigation, it is reasonably possible that a trial court could find (i) the defendants had no reasonable basis for their assertion in the May 24 News Release of the lack of indigenous presence in the area; and (ii) the s. 138.4(1) requirements for liability for misrepresentation in a non-core document were met.

[234] For the above reasons, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

*4.1.10 Objection 9: The plaintiff's expert cannot establish the materiality of the alleged misrepresentations*

[235] The materiality requirement raises two issues.

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[236] The court must first consider the evidence from the experts on Guatemalan law to determine whether it is reasonably possible for Dyck to establish at trial that the Omissions ought to have been disclosed, given the nature of the CALAS petition. That is matter of dispute between the parties with (i) Dr. Escobar concluding that (a) it was highly likely that the Supreme Court would suspend the License on the provisional amparo application while the definitive amparo was decided on its merits; and (b) there was a risk that the License would be suspended on the definitive amparo application; and (ii) Mr. Chávez concluding that the most likely outcome was that the amparo application would be dismissed.

[237] If the first requirement is met, the court must then consider the evidence from the economic experts on materiality to determine whether it is reasonably possible for a trial court to determine that the disclosure of the Omissions would have had a material effect on the Tahoe share price.

[238] I first address the applicable law on the issues of misrepresentation and materiality. I then consider the expert evidence on each of these issues below.

*4.1.10.1 The applicable law*

[239] Under s. 1(1) of the *Securities Act*, a "misrepresentation" occurs in one of three ways: (i) an untrue statement of material fact, (ii) an omission to state a material fact that is required to be stated, or (iii) an omission to state a material fact that is necessary to make a statement not misleading in the light of the circumstances in which it was made (which captures "half-truths"): *Kerr* at paras. 61 and 112.

[240] A "material fact" is defined under s. 1(1) of the *Securities Act* as any fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[241] In *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, the Supreme Court established the following principles with respect to the materiality of a fact, at paras. 51, 54, and 61:

(i) A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price;

(ii) "[T]he subjective views of the issuer do not come into play when assessing materiality" and the business judgment rule does not apply; and

(iii) In assessing materiality, the court must first look at the disclosed information and the omitted information. A court may also consider contextual information, such as concurrent or subsequent events.

[242] This concept of materiality from the Supreme Court in *Sharbern Holdings* has been applied to the *Securities Act*: *Wong v. Prettium Resources*, 2017 ONSC 3361, 139 O.R. (3d) 353, at para. 30; *Kauf*, at para. 60.

[243] "[R]isks are facts within the meaning of the [*Securities Act*]" that "must be disclosed if they are material": *Re YBM Magnex International Inc*, 2003 LNONOSC 337, (2003), 26 OSCB 5285, at para. 87; *Dugal v. Manulife Financial Corp*, 2013 ONSC 4083, at para. 54.

[244] As stated in *YBM Magnex*, at para. 87, "not only should the risk be disclosed, if material, but also the underlying facts."

[245] The probability/magnitude test balances the probability that the event will occur against the anticipated magnitude of the event in light of the total activity of the company: *YBM Magnex*, at para. 92; *Dugal*, at para. 54.

*4.1.10.2 A review of the evidence on Guatemalan law as to the likelihood of a suspension of Escobal operations*

[246] The conflicting expert opinions as to the strength of the CALAS petition is strong evidence, in itself, that there is a reasonable possibility Dyck could establish that the Omissions ought to have been disclosed.

[247] Dr. Escobar is a former trial lawyer from Guatemala with extensive experience, including litigating petitions for amparo. Dr. Escobar was appointed as a trial judge to the First Instance Court of the parish of Mixco. A few years later, she was designated as a judge at the Court of Appeals of the Civil Commercial Branch of Guatemala. The Court of Appeals is the court of first instance for amparos filed against lower ranking governmental authorities. At the Court of Appeals, Dr. Escobar heard petitions for amparo presented against governmental authorities. Dr. Escobar resigned as a judge and moved to the United States after she denounced an attempt in 2014 by senior officials to bribe her, which lead to threats against her and her family.

[248] Mr. Chávez has been a lawyer in private practice in Guatemala for over 45 years, specializing in civil and commercial litigation. In 1975, Mr. Chávez graduated from the School of Law at Universidad Rafael Landívar, in Guatemala City, Guatemala, and later obtained a Specialization Degree in Procedural Law from that same school. He has taught civil procedure at that law school.

[249] Dr. Escobar's opinion on the likely consequences of the petition for amparo is that, as at May 24, 2017:

(i) It was highly likely that the Supreme Court would issue a provisional amparo suspending the Escobal exploitation license while the definitive amparo was decided on its merits. If appealed, it was highly likely that the Constitutional Court would uphold the Supreme Court's decision on the provisional amparo;

(ii) The definitive amparo would take between eight and 18 months to be determined;

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(iii) It was highly likely that, on the definitive amparo, the Supreme Court and Constitutional Court would force the MEM to consult with the Xinka pursuant to the requirements of ILO 169; and

(iv) There was a risk that on the definitive amparo the License would be suspended while ILO 169 consultations were held with the Xinka.

[250] The defendants submit that the suspension of the License was a "black swan" legal decision, without legal precedent. It is on that basis that the defendants submit that they were not required to disclose the Omissions.

[251] Mr. Chávez's opinion on the result of the petition for amparo is that, as at May 24, 2017:

(i) The most likely outcome of the amparo was that the court would dismiss it because: (a) CALAS obviously lacked standing to pursue claims on behalf of indigenous communities; (b) the MEM granted the License based on official data showing that consultation of indigenous groups under ILO 169 was not applicable; and (c) prior court decisions from the Constitutional Court refused to suspend mining exploitation licenses in similar situations;

(ii) Even if these flaws in the amparo were ignored, prior jurisprudence suggested that the appropriate relief that could be granted, if any, was an amparo ordering the MEM to consult with affected indigenous groups, not an order suspending the License. In this regard, prior decisions emphasized that the rights of private parties were not subject to suspension based on allegations that a government body did not satisfy legal obligations; and

(iii) Further, given the lack of any Guatemalan laws or regulations governing the ILO 169 consultation process and inconsistencies in the Guatemalan courts' decisions interpreting ILO 169's requirements, it is not credible to suggest that on May 24, 2017, suspension of the License was a likely outcome of the amparo.

[252] Mr. Chávez acknowledged on cross-examination that CALAS had an "arguable case" and that he would not have described the amparo application as being "without merit". He maintained his opinion from his reports that suspension was not a likely outcome and that the application "had so many flaws that it should have been dismissed".

[253] For the purposes of the leave application, it is not appropriate to determine which expert's evidence will be accepted at trial. As long as Dyck can establish that there is a reasonable possibility of success at trial based on credible evidence from Dr. Escobar and a plausible interpretation of the *Securities Act*, the issue as to the specific level of risk posed by the CALAS amparo petition is not to be resolved on this leave motion.

[254] In addressing the other objections discussed above, I have found that Dyck can establish a reasonable possibility of success, based on credible evidence, that:

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(i) CALAS had standing to bring the amparo petition;

(ii) There were Xinka in the communities near the Escobal mine to whom a consultation obligation was owed;

(iii) No previous consultations had been undertaken with the Xinka; and

(iv) There was precedent in analogous cases before the Supreme Court and Constitutional Court to suspend the License on a provisional amparo, as well as before the Supreme Court to suspend the License on a definitive amparo.

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[255] Given the above findings, it is reasonably possible that a court could accept Dr. Escobar's opinion.

[256] Consequently, it is reasonably possible that a court could find that the Omissions constituted a misrepresentation, particularly given the assurances given by the defendants (twice in the May 24 News Release) that the claim was without merit, and that the defendants were "confident" of that conclusion because of (i) "the lack of indigenous communities in or around the mine", (ii) "the fact that both MEM and Minera San Rafael participated in and documented hundreds of public and private meetings and open consultations in or around the mine area dating back to 2010" and "Minera San Rafael consulted with a number of indigenous people during its many meetings", and (iii) the "extensive consultation and socialization process followed by both MEM and Minera San Rafael leading to issuance of the Escobal license".

*4.1.10.3 A review of the expert evidence on materiality*

[257] Expert economic evidence as to the materiality of the Omissions was provided by Dr. Michael Hartzmark on behalf of Dyck, and by Dr. Paul Gompers on behalf of the defendants.

[258] Dr. Hartzmark opined that it is reasonable to conclude that the Omissions were material from an economic perspective based on the event study he conducted and from other analysis. According to Dr. Hartzmark, the concealment in the May 24 News Release of even a small degree of risk of a suspension at the Escobal mine would be material to investors, given the significance of the Escobal mine to Tahoe's operations.

[259] On July 6, 2017, the share price decline was $3.50 per Tahoe share, representing a $1.1 billion decline in Tahoe's market capitalization. Dr. Hartzmark concluded that an economically material decline in Tahoe's share price on July 6, 2017 was $0.55 per Tahoe common share, which is only 15.7% of the total $3.50 decline.

[260] Consequently, under Dr. Hartzmark's approach, as long as the risk of the suspension of Escobal's operations was greater than 15.7% (if the market had no perceived risk of the information concealed by the Omissions), then the failure to disclose the Omissions was economically material.

[261] Dr. Hartzmark found that it was reasonable to conclude that the Omissions met the threshold for materiality based on: (i) the above described calculation, (ii) Dr. Escobar's opinion on the high likelihood of a provisional amparo being granted, (iii) analysts expressing their surprise at the adverse outcome, which suggests that the risk was not previously disclosed, (iv) analysts reducing their estimates of Tahoe's future earnings per share after the adverse event, (v) Tahoe's high trading volume on July 6, 2017, and (vi) the material change report filed by Tahoe.

[262] Dr. Gompers concluded that Dr. Hartzmark had not established that the Omissions were material.

[263] Again, the conflicting expert evidence sends a strong signal that there is a reasonable possibility that Dyck can establish the economic materiality of the Omissions.

[264] The defendants submit that Dr. Hartzmark led no evidence of economic materiality because he did not disaggregate the decline following the public correction versus other information. However, it is reasonably possible that a trial court would accept Dyck's submission that the defendants and their expert confuse materiality with loss causation.

[265] Dr. Hartzmark concluded that the Omissions accounted for more than $0.55 of the July 6, 2017 share price decline, which he concluded is the threshold for materiality. Loss causation requires the quantum of the decline to be disaggregated between the share decline which would have resulted from disclosure of the information in the Omissions from the additional July 5 News Release, which included information that a provisional amparo had been granted, and that the License would be suspended, possibly for a lengthy period of time (as opposed to the risk that would happen, which would have been disclosed under the Omissions).

[266] The disaggregation of those amounts (and thus the loss causation) was not the subject of Dr. Hartzmark's report as it was not a relevant issue for the motion.

[267] Consequently, it is reasonably possible that a trial court could conclude that Dr. Hartzmark properly considered the materiality issue, since if the trial court accepts that there was more than a very small risk concealed, then there is a reasonable possibility the trial judge could accept that Dr. Hartzmark's model establishes the economic materiality of that risk.

[268] Under Dyck's approach, it was proper for Dr. Hartzmark to consider Dr. Escobar's reports in opining that there is a reasonable likelihood that the misrepresentations were material. Dr. Escobar's opinion considers the significance of the risks facing Escobal and provides credible evidence that such a risk will be found at trial.

[269] Finally, Dyck relies on the probability/magnitude test for materiality, under which the materiality of the defendants' misrepresentations is not solely dependent on Dr. Hartzmark's evidence of economic materiality. It is reasonably possible, based on credible evidence, that the misrepresentations will be proven to be material on that test given the significant risk facing Escobal's operations and the importance of the Escobal mine to Tahoe.

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[270] Further, Dyck raises the following concerns about the approach taken by Dr. Gompers:

(i) Dr. Gompers concludes that there is reason to believe the Omissions are immaterial because those risks were already incorporated into Tahoe's share price based on inferences that could purportedly be made from external sources. However, Dr. Gompers provides no evidence that any investors actually found these sources, speculated about the risk posed to the Escobal mine by the petition for amparo based on them, or used that information to inform their investment decisions. Dyck relies on the decision in *Weiner v. Tivity Health, Inc.*, 334 F.R.D. 123 (M.D. Tenn. 2020), at 135, in which the court rejected similar arguments made by Dr. Gompers in a securities case and commented that the sources relied on "are not the types one would commonly expect investors to consult";

(ii) Dr. Gompers' approach is inconsistent with the commentary from the Desjardins analyst who relied on Tahoe management's representation that there was no merit to the CALAS claim, since the analyst maintained his valuation of the company with no apparent independent inquiry;

(iii) Even where contrary information may exist in the public domain, an issuer's statements can obscure that information and undermine its credibility and thereby prevent the information from being incorporated into a company's share price. Dr. Gompers acknowledged that the May 24 News Release is the only information that he knows was publicly available about the petition at the time; and

(iv) Dyck criticizes the reliance by Dr. Gompers on sources such as Spanish language tweets, blog posts, Spanish language news articles from local Guatemalan newspapers, and articles blocked by paywalls, which are not easily accessible by sophisticated institutional investors, let alone retail investors such as the plaintiff. By way of example, Dr. Gompers acknowledged on cross-examination that he did not know if the Twitter account of Mr. Maldonado (see para. 65 above) was locked on May 24, 2017 or how many followers he had and, thus, whether the tweets had any real possibility of being read by investors.

[271] Further, Dyck criticizes the approach taken by Dr. Gompers as being inconsistent with settled law that a defendant cannot escape their disclosure obligations because some institutional investors might have speculated about undisclosed risks if they happened to locate obscure information.

[272] There is a reasonable possibility that Dyck could establish at trial that Dr. Gompers' analysis is at odds with the purpose of Canadian securities regulation, which "is designed to create a 'level playing field' where all investors have access to the same information and all pricing and investment decisions are made from the same starting point." A policy of ensuring

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the level playing field is "the most fundamental principle of securities regulation": *Theratechnologies*, at para. 25.

[273] It is reasonably possible that a trial judge could find that the defendants' position would favour sophisticated institutional investors with significant resources who might search for this type of information and trade on it to the detriment of retail investors without similar means.

[274] Dyck further submits that such an approach is contrary to the caution raised by the court in *SouthGobi Resources* that "[c]ontinuous disclosure obligations are not a shell game where investors are left to guess where the truth lies. Investors have a right to know a corporation's true state of affairs.": at para. 81.

[275] It is not the role of the court on a leave motion under s. 138.8(1) to determine which expert evidence will be accepted at trial. I review the expert evidence above in some detail only to conclude that Dyck has led credible evidence to establish a reasonable possibility, based on a plausible interpretation of the legislation, that Dr. Hartzmark's evidence on materiality would be accepted at trial.

[276] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.11 Objection 10: Dr. Escobar's evidence should not be admitted*

[277] With respect to the objection raised by the defendants that Dr. Escobar's evidence ought to be ruled inadmissible, I first consider the law as set out in *White Burgess* and then apply the law to the case at bar.

##### *4.1.11.1 The applicable law*

[278] The court in *White Burgess* adopted a two-stage test for determining the admissibility of expert evidence: at paras. 23-24. The first stage involves a threshold requirement where the expert must be properly qualified by being willing and able to fulfil the duty to the court to provide evidence that is unbiased: at paras. 26, 32.

[279] The court in *White Burgess* stated that as a "matter of fact and degree" an expert is "clearly unwilling and/or unable to carry out the primary duty to the court" if the expert, "in his or her proposed evidence or otherwise, assumes the role of an advocate for a party": at paras. 49-50. If this is proven, then "the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded": at para. 48.

[280] Exclusion of an expert's evidence at this stage is "quite rare" and would occur "only in very clear cases": at para. 49. There is a high bar for exclusion.

[281] The second "gatekeeper" stage permits the court to balance the benefits of admitting evidence against its potential risks, considering such factors as bias: at para. 54.

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*4.1.11.2 Application of the law to the present motion*

[282] The defendants submit that Dr. Escobar's evidence should be excluded under either threshold test. I do not agree. I first address the independence of Dr. Escobar under the first *White Burgess* threshold and then consider her alleged bias under the second (gatekeeper) stage.

*4.1.11.2.1 Independence*

[283] With respect to the first threshold requirement of being independent and providing unbiased evidence, the defendants raise the examples which I address below.

[284] The defendants submit that Dr. Escobar "put forward and evaluated evidence outside of her own expertise in order to support the plaintiff's claim", by considering "archeological evidence that did not necessarily show evidence of a Xinka population in the area around the Escobal mine".

[285] However, Dr. Escobar was not acting as an advocate. She referred to evidence that was considered by the Constitutional Court in the CALAS claim, as to the existence of an archaeological site in San Rafael Las Flores, and its use by Xinka groups. Consequently, while the defendants dispute that the Xinka used the archaeological site, Dr. Escobar is not acting as an advocate by relying on evidence which was considered by the Guatemalan court.

[286] By way of similar example, Mr. Chávez relies on the 2002 census data to support his opinions when the plaintiff disputes the accuracy of that data and Mr. Chávez's reliance on it.

[287] The defendants submit that Dr. Escobar's purported advocacy is demonstrated by internet searches she conducted for third-party information concerning the presence of the Xinka near the Escobal mine "to bolster the argument that that [*sic*] Tahoe ought to have known that there was a Xinka population affected by the Escobal mine".

[288] However, Dr. Escobar was responding to Mr. Chávez's assertion in his report that it was reasonable, as of the May 24 News Release, for the defendants to believe that there were no Xinka in the area. By searching for articles that demonstrate the ease of locating facts establishing the existence of Xinka in the area, Dr. Escobar was properly responding to the issue of whether the defendants either knew of the presence of the Xinka in the area, deliberately avoided acquiring such knowledge, or engaged in gross misconduct by failing to acquire that knowledge.

[289] Further, given that the defendants filed no evidence as to any information on which they relied in asserting that there were no Xinka in the area, Dr. Escobar was entitled to locate any evidence which existed, so that the basis for the defendants' assertion could be challenged through easily located publicly-available information from the internet.

[290] The defendants criticize Dr. Escobar for redacting a single sentence from a passage she relied upon from the Norwegian Report.

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[291] Dr. Escobar cited a passage that included statements by the authors that (i) "[t]he Xinka Parliament and other Xinka organizations have engaged actively in opposing the [Escobal] mine and what they consider the imposition of a development model based on major interventions in nature"; (ii) "[a]ccordingly, they oppose the mining operation and demand that they be consulted before licenses are granted in the areas in which they live"; (iii) "the Xinka people consider themselves to be directly impacted by the company and the mining licenses in the region"; and (iv) the Xinka "regard El Escobal as the first of several mining projects that will affect them directly, which they do not want and which they feel unable to stop".

[292] The excluded portion from the above passage stated that "San Rafael Las Flores is not considered a traditional Xinka village, and the majority of the population (99.6 per cent) are ladinos, i.e. descendants of the indigenous population who speak Spanish and wear Western clothing".

[293] I do not agree that the impugned redaction demonstrates a lack of independence which would exclude Dr. Escobar's evidence. Dr. Escobar was not relying on any census information as to the population in the particular town – the Norwegian Report was relevant to Tahoe's knowledge that the Xinka people were demanding consultation. I cannot find that the redaction of a portion of the sentence was an attempt to mislead the court or otherwise impugns Dr. Escobar's independence.

[294] For the above reasons, I do not take the "rare" step of excluding Dr. Escobar's evidence on the basis of lack of independence. She acknowledged her duty as an independent expert under Rule 4.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and that duty prevails over any obligation to the plaintiff. The defendants have not established a realistic concern that her evidence should not be received because she is unable and/or unwilling to comply with the duty.

*4.1.11.2.2 Bias*

[295] The defendants ask the court to not admit Dr. Escobar's evidence based on alleged bias and prejudice. The defendants submit that her "background as an activist … puts her in a position of being unable to properly exercise her duty of confidentiality". The defendants rely on the Saskatchewan case of *R. v. Heimbecker*, 2019 SKQB 204, in which the court held that expert evidence was inadmissible from a criminal justice activist for indigenous women, for a case involving charges against an indigenous woman for cocaine possession for the purposes of trafficking: at paras. 44, 48.

[296] The "activist" role alleged by the defendants arises from Dr. Escobar's rejection by the government in 2018 of her application to be the Attorney General of Guatemala. The defendants describe Dr. Escobar as a "critic of the Guatemalan government". Dr. Escobar's view was that the rejection was reflective of corruption in Guatemala.

[297] Dr. Escobar's anti-corruption activism arose again when she was pressured by the government to provide a favourable ruling for the Vice-President.

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[298] Finally, the defendants rely on an article she purportedly wrote "in support of indigenous rights".

[299] However, the defendants leap from Dr. Escobar's anti-corruption views to a conclusion that Dr. Escobar is a "critic of the Guatemalan government" at large, and then attempt a further leap to submit that Dr. Escobar is pre-disposed to finding that the MEM erred in relation to the License.

[300] There is no suggestion in Dr. Escobar's reports or in the evidence that the MEM or any other Guatemalan governmental actor engaged in corruption in connection with the granting of the License. The defendants also provide no explanation as to how the opinion that the MEM failed to consult with the Xinka pursuant to ILO 169 prior to the granting of the License would further Dr. Escobar's desire to end corruption within Guatemala. There is no connection between the matters on which she opined in this litigation and her anti-corruption work.

[301] The defendants also portray Dr. Escobar as an activist for indigenous rights and submit that she wishes to "punish" Tahoe because she views it as being at odds with indigenous rights. This argument is based on a single newspaper article listed in Dr. Escobar's lengthy *curriculum vitae*. In that newspaper article, she was reporting on constitutional reform that was under discussion in Guatemala in 2016 that included the right for the indigenous population to resolve conflicts in accordance with their own methods. In the context of that proposed constitutional reform, she expressed a view that a pluralistic legal system or indigenous law needed to be recognized. She noted in the article that she is not an expert on indigenous legal systems. Consequently, the evidence does not establish that she is an activist for indigenous rights as suggested by the defendants.

[302] Finally, even if there was a connection, that would not necessarily mean that her evidence is inadmissible. Ontario courts have admitted expert evidence even where the matter on which the expert is opining is directly related to the area in which the expert has previously engaged in advocacy and/or activism: *Wise v. Abbott Laboratories, Ltd*, 2016 ONSC 7275 at paras. 34–83; *Black et al. v. City of Toronto*, 2020 ONSC 6398, 152 O.R. (3d) 529, at paras. 25–38; *Affleck v. The Attorney General of Ontario*, 2021 ONSC 1108 at paras. 18–37.

[303] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.12 Objection 11: Dr. Escobar's opinion evidence is inconsistent and unsupportable*

[304] The defendants submit that Dr. Escobar's evidence should not be accepted as credible because it is "inconsistent" and "unsupportable". By way of example, the defendants rely on Dr. Escobar's conclusion that it was more likely that the Supreme Court would suspend the License upon the provisional amparo application than on the definitive amparo application.

[305] However, as discussed above, it is reasonably possible that a court could find that it was more likely that the Supreme Court would suspend the License on a provisional amparo

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application because there was precedent to do so from both the Constitutional Court and Supreme Court in both the *La Puya* and *Oxec* matters, whereas the Constitutional Court had not suspended a license on a definitive amparo application. Consequently, it is reasonably possible that a trial court would find Dr. Escobar's analysis to be consistent and supportable.

[306] The defendants submit, as another example of an "illogical" conclusion by Dr. Escobal, that she concluded "that external political events" such as violent protests "may have influenced the Supreme Court's decision concerning the Amparo".

[307] However, a review of the transcript relied upon by the defendants shows that Dr. Escobal commented that (i) the bringing of the petition could have been a consequence of the protests because the Xinka were asserting a lack of prior consultation; and (ii) a suspension of operations pending the hearing of the definitive amparo was "the most highly likely conclusion because [the court] had to determine what was happening there", given the lack of consultation which was at the core of the protests. Consequently, the transcript evidence does not necessarily support the defendants' submission.

[308] In any event, even if the trial court did not accept that this single comment (in the course of three reports and lengthy cross-examination) could be supported, it would not be a basis to find that all of Dr. Escobal's evidence should be held to be unsupportable, for the reasons I discuss above.

[309] Consequently, it is reasonably possible that a court will find Dr. Escobal's evidence to be credible and supportable. I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

#### *4.1.13 Objection 12: The Plaintiff mischaracterizes the June 19, 2020 ruling of the District Court in Las Vegas*

[310] I do not rely on the U.S. litigation as a basis for finding that Dyck has established a reasonable possibility of success at trial. It is not evidence before the court, and the decision is based solely on the pleadings being accepted as true.

[311] Nevertheless, I do not agree that Dyck has mischaracterized the U.S. litigation. Dyck does not ask the court on the present motion to follow the U.S. approach, but only submits that the analysis in the U.S. litigation is consistent with the analysis Dyck proposes in this action.

[312] The evidence before the court in the present case addresses many of the similar allegations made before the U.S. court with respect to the *scienter* knowledge requirement (as similar to ss. 138.(4)(1)(a)-(b) of the *Securities Act*). Consequently, while I find that the parallel U.S. class action is not directly relevant to whether Dyck has established a reasonable possibility of success at trial, the U.S. decision is consistent with the basis for leave sought in the present case.

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*4.1.14 Summary on the leave motion*

[313] It is not the role of the court on a leave motion to conduct a mini-trial, or to make findings of fact or law that should be made by a trial judge. Instead, the role of the court is to determine only whether the plaintiff has acted in good faith (which is not at issue in this case) and led credible evidence, based on a plausible interpretation of the legislation, to establish a reasonable possibility of success.

[314] For the reasons discussed above, Dyck has established a reasonable possibility of success at trial, based on credible evidence and a plausible interpretation of the legislation.

[315] First, Dyck has established a reasonable possibility of success at trial that a court would find that the Omissions were material. In summary:

(i) Dr. Escobar's expert evidence that a suspension of the License was "highly likely" on the provisional amparo is credible;

(ii) Given the magnitude of the consequences of a shutdown of the Escobal mine, and Dr. Escobar's credible evidence of the probability of that occurrence, Dyck has established a reasonable possibility that the Omissions were material, as the May 24 News Release did not disclose that (a) CALAS sought a suspension of the License both on the provisional and definitive amparo; (b) there was any risk to such relief being granted; or (c) the anticipated length of the shutdown if the suspensions were granted;

(iii) Dr. Hartzmark reaches a credible conclusion that disclosure would be required as long as the risk of the suspension of Escobal's operations was greater than 15.7% (if the market had no perceived risk of the information concealed by the Omissions). Given Dr. Escobar's opinion that the suspension on the provisional amparo was "highly likely", there is a reasonable possibility that Dr. Hartzmark's evidence on materiality would be accepted at trial; and

(iv) Dr. Escobar's evidence is admissible under the *White Burgess* test.

[316] Second, Dyck has established a reasonable possibility of success at trial that a court would find that at least one of the requirements under s. 138.4(1)(a)-(c) of the *Securities Act* has been met for the May 24 News Release as a non-core document (*i.e.* that the defendants were aware of the material facts that are the subject of the Omissions, deliberately avoided acquiring knowledge of those facts, or engaged in gross misconduct by issuing the May 24 News Release with a marked departure from the standard of conduct expected given the risk). In summary:

(i) Given (a) Tahoe's acknowledgment in the February 13 News Release of "the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka", (b) no evidence explaining any change in knowledge between the May 24 and February 13 News Releases, and (c) no

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evidence of any change to the Xinka presence after the License was granted, there is credible evidence that the defendants either knew of the Xinka presence, deliberately avoided acquiring knowledge of those facts, or engaged in gross misconduct by issuing the May 24 News Release and representing that the CALAS claim had no merit "[b]ased on the lack of indigenous communities in or around the mine" and based on "extensive consultation" with indigenous peoples;

(ii) There is credible evidence that the 2016 report relied upon in the petition established a reasonable possibility that the Guatemala court could find that the Xinka people had a presence in the community of San Carlos Alzatate, which was a party to the Royalty Agreement; and

(iii) The only evidence before the court on the motion is that the Xinka were not consulted prior to the issuance of the License, as was acknowledged by the MEM in the correspondence attached to the CALAS petition. Consequently, there is credible evidence that the defendants either knew of the lack of consultation, deliberately avoided acquiring knowledge of those facts, or engaged in gross misconduct by issuing the May 24 News Release and advising investors that the CALAS claim had no merit, based on Tahoe's representations that "Minera San Rafael consulted with a number of indigenous people during its many meetings", "participated in and documented hundreds of public and private meetings and open consultations in and around the mine area dating back to 2010", and that there was "extensive consultation and socialization process followed by both the MEM and Minera San Rafael leading to issuance of the Escobal license".

[317] With respect to the defendants' statements in the May 24 News Release that CALAS' claim was "without merit", there is credible evidence that there was precedent under Guatemalan law to suspend mining operations as a result of a provisional amparo. Further, the defendants filed no evidence as to whether they obtained legal advice prior to making the representations as to the merit of the claim. Consequently, Dyck has established a reasonable possibility of success at trial that the facts known or readily available to the defendants as of May 24, 2017 contradicted the bases asserted by them for their "without merit" position.

[318] For the above reasons, Dyck has established a reasonable possibility that (i) the defendants either knew that the CALAS claim had merit, deliberately avoided acquiring knowledge of that fact, or engaged in gross misconduct by issuing the May 24 News Release and advising that the CALAS claim had no merit; and (ii) the defendants' failure to disclose the information in the Omissions was a breach of their obligations to disclose material facts in a non-core document under the conditions of s. 138.4 of the *Securities Act*.

[319] Consequently, I grant the motion for leave.

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*4.2 The issues arising out of the certification motion*

[320] It is not contested that (i) the pleading discloses a cause of action under Part XXIII.1 and for negligent misrepresentation; (ii) the proposed common issues properly set out those issues to be determined on a common basis;[10] and (iii) a class proceeding is the preferable procedure since pursuing the claims on an individual basis would be uneconomical and the resolution of the common claims is highly significant in relation to the other issues raised in the action. Consequently, it is uncontested that the requirements under ss. 5(1)(a), (c), and (d) of the *CPA* have been met.

[321] As I set out at para. 21 above, I address the following two objections raised by the defendants to oppose certification (or limit the size of the proposed class):

(i) The proposed class definition is overbroad and inappropriate: U.S. shareholders should not be certified as members of the proposed class (s. 5(1)(b)); and

(ii) Dyck is not an appropriate representative plaintiff (s. 5(1)(e)).

*4.2.1 Objection 1: The proposed class definition is overbroad and inappropriate: U.S. shareholders should not be certified as members of the proposed class*

[322] Dyck proposes a global class of shareholders who purchased shares on either the TSX or the NYSE, regardless of where they reside.

[323] In the parallel U.S. class action, the proposed class includes only those persons who acquired Tahoe shares in the U.S. or on the NYSE (the U.S. Shareholders).

[324] The defendants submit that the court should exclude the U.S. Shareholders from the proposed class in the present action. I do not agree.

[325] In *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, at para. 107, the Court of Appeal held that certification of a global class is appropriate where: (i) there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and defendants; (ii) there are common issues between the claims of the representative plaintiff and the absent foreign claimants; and (iii) procedural safeguards of adequacy of representation and notice, as well as the right to opt out, are provided.

[326] The defendants do not dispute that the court has jurisdiction to certify a global class on the basis of the above case law.

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[10] The defendants' third certification objection that "certain common issues are inappropriate and insufficient" was addressed at the hearing and is not at issue between the parties, as set out at footnote 5 above.

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[327] However, the defendants assert that this court should follow the approach in *Kaynes v. BP, PLC*, 2014 ONCA 580, 122 O.R. (3d) 162, in which the court applied the doctrine of *forum non conveniens* to exclude purchasers of the defendant company (BP) who had purchased their shares on the NYSE. The court relied on evidence of a parallel proceeding in the U.S.: at paras. 35 and 54. The court held that "when the issue of avoiding a multiplicity of proceedings is considered in the light of the entire context of the jurisdictional standards prevailing elsewhere, it weighs heavily in favour of declining jurisdiction": at para. 52.

[328] However, the decision in *Kaynes* does not stand for the proposition that any global securities class action must exclude shareholders who are part of a class or proposed class in another jurisdiction.

[329] In *Kaynes*, the court applied the doctrine of *forum non conveniens* in circumstances where BP, the foreign corporation, had ceased to be a reporting issuer in Canada: at paras. 7-9. In the present case, Dyck asserts claims under Ontario law against the defendants who, during the Class Period, were residents, domiciled and/or carried on business in Canada. Tahoe was a reporting issuer in Ontario at all material times.

[330] In 2016, the Court of Appeal in *Kaynes v. BP*, 2016 ONCA 601, 133 O.R. (3d) 29, lifted the stay due to a change in circumstances in the U.S. litigation. While BP had argued before the Court of Appeal at the initial hearing that U.S. law governed the Canadian shareholders' claims for trades under the NYSE, BP then successfully argued before the U.S. District Court that the Canadian plaintiffs' "pre-explosion" claims were governed by Ontario law: at para. 15. The Court of Appeal, in lifting the stay, noted that "the claim of exclusive jurisdiction was a significant factor in our assessment of comity and *forum non conveniens*": at paras. 13-14, and 17.

[331] Consequently, the 2016 decision in *Kaynes* demonstrates that the court should not narrow the class at an early juncture when the defendants are opposing certification. The doctrine of *forum non conveniens* is only available if the defendant can meet the high threshold required to displace the forum chosen by the plaintiff: *Paniccia v. MDC Partners Inc.*, 2017 ONSC 7298, at para. 40. However, in the present case, the evidence is that Ontario law applies against defendants who were residents, domiciled, and/or carried on business in Canada during the Class Period. The evidence before the court on the present motion does not establish the factors relied upon in the initial *Kaynes* decision.

[332] I adopt the approach of van Rensburg J. (as she then was) in *Silver*. The court in the 2009 decision certified a global class action because there was a real and substantial connection to Ontario. The scope of the class was later narrowed in a 2013 decision, but only after a settlement of the U.S. action where class members were provided with the opportunity to opt out: *Silver v. IMAX Corp.*, 2013 ONSC 1667, at para. 18.

[333] As in *Silver*, it would be premature in the present case to dismiss the claims of certain class members on the basis of ongoing U.S. litigation that may not secure access to justice for the

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foreign class members. The U.S. class action could fail for reasons unrelated to the cause of action provided by Part XXIII.1.

[334] For the above reasons, I certify the global class of shareholders as proposed by Dyck.

*4.2.2 Objection 2: Dyck is not an appropriate representative plaintiff*

[335] The defendants submit that Dyck is not an appropriate representative plaintiff because:

(i) "[H]e has not produced any tangible evidence that he even purchased shares in Tahoe, either before or during the class period";

(ii) His evidence was that he was "concerned" when he read the May 24 News Release and "went through it very carefully" and understood that there was "always a risk" of negative events when dealing with investments in developing countries;

(iii) He "indicated that he had 'been involved in a class action before' but refused to provide any further details"; and

(iv) "[H]e did not know who Mr. Hartzmark … was [and] was unaware that [Dr. Escobar] had filed three, not one, expert reports for this motion".

[336] For the reasons that follow, I find that Dyck is an adequate representative plaintiff.

[337] Dyck provided uncontested affidavit evidence (i) that he acquired 620 Tahoe shares on July 4, 2017 and (ii) about the purchase price and the trading platform through which he executed the trade. Dyck was cross-examined on his affidavit, with no request for trading records and no challenge to his evidence on the purchase. Further, the defendants acknowledge that Dyck brought this action in good faith.

[338] Consequently, there is no evidence from the defendants to challenge the uncontested evidence of Dyck that he is a class member through his acquisition of Tahoe shares.

[339] With respect to Dyck's expressed "concern" about the contents of the May 24 News Release and his subsequent "careful" review of it, such evidence is irrelevant to a Part XXIII.1 claim, given the deemed reliance of any shareholder as provided in s. 138.3(1) of the *Securities Act*, which engages liability for misrepresentations "without regard to whether the person or company relied on the misrepresentation".

[340] Further, Dyck's evidence could support his position that the specific risks associated with the Omissions were not disclosed ether prior to or in the May 24 News Release, since even upon a "careful" review, he noted that he "checked the Tahoe web page", which said "the same" (*i.e.* that the claim was without merit).

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[341] With respect to Dyck's prior involvement in a class action, the defendants offered no authority for the proposition that a representative plaintiff could not act in that capacity in more than one action, and I would not adopt such a principle. In any event, Dyck's evidence was that he was not a "lead plaintiff" in the prior class action, and his counsel advised by subsequent letter that Dyck was a class member in that class action which related to employment benefits and was settled approximately 19 years ago.

[342] Consequently, there is no support for the defendants' submission.

[343] Finally, the criticisms of Dyck's lack of detailed knowledge are not valid. He is not required to know all of the names of experts giving evidence, nor the number of reports filed by one of his experts. These matters have no bearing on Dyck's ability to carry out his function as a representative plaintiff.

[344] A representative plaintiff's role is to vigorously and capably prosecute the interests of the class: *1176560 Ontario Ltd v. Great Atlantic & Pacific Co of Canada Ltd* (2004), 70 O.R. (3d) 182 (Div. Ct.), at paras. 19-29. A representative plaintiff is not expected to have a detailed knowledge of the civil litigation process or the issues involved in the action: *Maxwell v. MLG Ventures Ltd*, [1995] O.J. No. 1136 (Gen. Div.), at para. 10.

[345] Dyck is capable of representing and protecting the interests of the class. He is a member of the class and his evidence (both from his affidavit and on cross-examination) shows that he understands the allegations in the action and the major steps to be taken, he has already taken steps to represent the proposed class, and he is prepared to continue to represent the interests of the Class Members.

[346] Finally, the defendants do not challenge that Dyck has a workable litigation plan to advance the proceeding through to completion, which provides a reasonable framework for the issues that are reasonably expected to arise as the case proceeds: *McKenna v. Gammon Gold Inc.*, 2011 ONSC 6630, at para. 45.

[347] For the above reasons, I find that Dyck is an adequate representative plaintiff.

[348] Consequently, I grant the certification motion.

## 5. ORDER AND COSTS

[349] I grant leave to bring the Part XXIII.1 action and certify the proceeding as a class action.

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[350] If the parties are unable to agree on costs, Dyck shall deliver a costs submission of no more than five pages (not including the costs outline) by September 9, 2021. The defendants shall deliver responding costs submissions of no more than five pages (not including the costs outline) by September 23, 2021. Dyck may deliver a reply costs submission of no more than three pages by September 30, 2021.

GLUSTEIN J.

**Date:** 20210826

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**SCHEDULE A**
**PROPOSED COMMON ISSUES**

**Part XXIII.1 of the *OSA***

1. Did the May 24, 2017 News Release contain a misrepresentation within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation)?

2. If the answer to issue 1 is yes, are the Defendants, or either of them, liable under section 138.3 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?

3. If the answer to issue 2 is yes, how should damages be calculated under section 138.5 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?

4. If the answer to issue 2 is yes:

> a. what is the proportionate liability of each of the Defendants pursuant to section 138.6(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?
>
> b. regardless of the answer to issue 4(a), may the whole amount of the damages assessed in the action pursuant to Part XXIII.1 of the *OSA* be recovered from Clayton, pursuant to section 138.6(2) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?

5. If the answer to issue 2 is yes, do the liability limits set out in section 138.7(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation) limit the liability of either or both of the Defendants? If so, what are the limits of each such Defendant's liability?

**Negligent Misrepresentation**

6. Did the May 24, 2017 News Release contain a misrepresentation at common law?

7. If the answer to issue 6 is yes, did the Defendants, or either of them, owe the Class Members a duty of care to ensure that the May 24, 2017 News Release did not contain a misrepresentation? If so, which Defendants owed that duty?

8. If the answer to issue 7 is yes, did the Defendants, or either of them, breach their duty of care? If so, which Defendants and how?

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**Aggregate Damages**

9. Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

**Other Issues**

10. Is Tahoe vicariously liable or otherwise responsible for the acts and omissions of Clayton and/or its other officers, directors and employees?

11. Should the Defendants, or either of them, pay the costs of administering and distributing the recovery? If so, what amount should the Defendants pay?

12. If the Court determines that the Defendants are liable to the Class Members, and if the Court considers that the participation of the Class Members is required to determine individual issues, what directions, procedural steps, and/or rulings with respect to the admission of evidence are required?

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**CITATION:** Dyck v. Tahoe Resources Inc., 2021 ONSC 5712
**COURT FILE NO.:** CV-18-00606411-00CP
**DATE:** 20210826

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

ABRAM B. DYCK

Plaintiff

**AND:**

TAHOE RESOURCES INC. and RONALD WAYNE CLAYTON

Defendants

## REASONS FOR DECISION

Glustein J.

**Released:** August 26, 2021

# Tab 14

# COURT OF APPEAL FOR ONTARIO

CITATION: Fantl v. Transamerica Life Canada, 2016 ONCA 633
DATE:.20160822
DOCKET: C61284

2016 ONCA 633 (CanLII)

Strathy C.J.O., Blair and Lauwers JJ.A.

BETWEEN

Joseph Fantl

Plaintiff/Respondent

and

Transamerica Life Canada

Defendant/Appellant

Mary Jane Stitt and Doug McLeod, for the appellant

David F. O'Connor and J. Adam Dewar, for the respondent

Heard: May 11, 2016

On appeal from the order of the Divisional Court (H. Sachs, D.L. Corbett and Gilmore JJ.), dated March 9, 2015, with reasons reported at 2015 ONSC 1367, setting aside in part the certification order of Justice P. Perell of the Superior Court of Justice, dated April 18, 2013, with reasons reported at 2013 ONSC 2298.

Strathy C.J.O.:

## A. INTRODUCTION

[1] The issue on this appeal is whether a class action for negligent misrepresentation is the preferable procedure for the resolution of the class members' claims.

[2] The certification judge held that it was not, because the individual issues of reliance, causation and damages would "overwhelm or subsume" the common issues. The Divisional Court allowed the appeal, noting that the certification judge did not have the benefit of the Supreme Court of Canada's decision in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949.

[3] For the reasons that follow, I would dismiss the appeal.

**B. THE FACTS**

[4] The proposed class is composed of investors in Transamerica's Can-Am Fund, an investment vehicle offered under insurance contracts sold by Transamerica between October 1992 and March 2001. It was a "synthetic" fund, similar to a mutual fund and designed to replicate the performance of the S&P 500.

[5] The respondent's class action encompasses 53 different insurance contracts. Five of these contained an express statement that the fund would "on a best efforts basis replicate the performance of the S&P 500 Total Return Index."

[6] The other 48 contracts did not contain this express statement. However, beginning in 1994, every investor in the Can-Am Fund received an information folder containing a statement that the goal of the fund was to replicate, on a "best efforts" basis, the performance of the S&P 500 Total Return Index.

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[7] The information folder was provided pursuant to regulations under the Ontario *Insurance Act,* R.S.O. 1990, c. I.8, which required that investors receive a disclosure document before investing in a segregated fund like the Can-Am Fund. That document, referred to as an "information folder," is required to disclose the fund's investment policy and objectives. Investors are required to acknowledge receipt of the information folder.

[8] The respondent's negligent misrepresentation claim arises from the "best efforts" statement in the information folder. He says this representation was untrue.

## C. DECISIONS BELOW

[9] I will give a brief overview of the reasons in the courts below. Further detail will be added in the Analysis section.

### (1) The certification judge

[10] The certification judge certified the plaintiff's action for breach of contract based on the five insurance contracts that contained an express "best efforts" clause. He did not certify the negligent misrepresentation claim in relation to the statements in the information folders provided to investors in the other 48 contracts.

[11] He found that two, or possibly three, of the five constituent elements of the tort of misrepresentation could be common issues: (a) the existence of a duty of

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care; (b) whether the representation was untrue, inaccurate or misleading; and (c) whether the misrepresentation was made negligently. This left issues of reliance and damages to be decided at individual trials – issues that he regarded as "critical, difficult, and contentious."

[12] He concluded that these individual issues "overwhelmed or subsumed" the common issues, and that resolving the common issues would "mark just the beginning of the process leading to a final disposition of the claims of class members". For this reason, he said, a class action was not the preferable procedure for the negligent misrepresentation claims. Moreover, this was not a case in which the policyholders' claims were "so small that access to justice would not be available absent a class action."

**(2) The Divisional Court**

[13] The Divisional Court noted that although a certification judge's decision on preferable procedure is normally entitled to deference, the judge here did not have the benefit of the approach to the preferability analysis set out by the Supreme Court in *Fischer*.

[14] Applying that analysis, the Divisional Court held that a class proceeding was a fair, efficient and manageable method of advancing the claim and the only reasonable way to remove the economic barriers to access to justice. It also found that the certification judge had overstated the value of the plaintiff's claim

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in coming to his conclusion that it was economically viable as a stand-alone claim. It was not viable and there was no reasonable alternative.

[15] The Divisional Court recognized that *Fischer* does not displace or eliminate the requirement that the proposed class proceeding must be a fair, efficient and manageable method of resolving the claims. However, as the certification judge noted, two, and perhaps even three, of the five elements of the tort of negligent misrepresentation could be dealt with at a common issues trial.

[16] Moreover, contrary to the certification judge's finding that the common issues to be tried in the certified breach of contract claim would not assist the prosecution of the tort claim, the evidence on the breach of contract common issue would likely overlap with the evidence in the tort claim. That evidence would examine how the Can-Am Fund was invested and managed and how it ought to have been managed to replicate the performance of the S&P 500.

[17] While the duty of care issue might not be particularly contentious, determining whether the representation was false and whether Transamerica was negligent would require expensive and complex expert evidence and it would be efficient to address these issues in a class action.

[18] The remaining elements of the tort of misrepresentation – reliance and damages – were individual issues. The Divisional Court noted that there have been cases in which such reliance-based claims have not been certified due to

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the unmanageability of individual issues: see *e.g.*: *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corporation*, 2014 ONCA 901, 61 C.P.C. (7th) 1; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, [2012] O.J. No. 3072, rev'd on other grounds, 2014 ONCA 90, aff'd, 2015 SCC 60.

[19] On the other hand, it noted, claims involving a single representation, a uniform set of representations, or even separate representations having a common import have been certified, notwithstanding individual issues of reliance and damages, citing: *Ottawa Police Association v. Ottawa Police Services Board*, 2014 ONSC 1584 (Div. Ct.), at para. 59; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, at paras. 340, 350-351, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Div. Ct.); *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019, 93 C.P.C. (6th) 106, at para. 103; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.), at paras. 48-49; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Div. Ct.), at para. 35; *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (S.C.), at para. 20; *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy v. BDO Dunwoody*,

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[2006] O.J. No. 2729 (S.C.); and *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 (S.C.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Div. Ct.)[1].

[20] Here, there was a single uniform representation, contained in a statutorily-mandated disclosure document, which was given to each class member and which each acknowledged receiving.

[21] The Divisional Court considered, at para. 46, that the individual issues of reliance and damages might be capable of resolution through "fairly straightforward mechanisms." While reliance would be an individual issue, a class member would not need to prove that the representation was the only factor that induced the investment, but simply that they relied on the representation (para. 44, referring to *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (C.A.) at para. 78, leave to appeal to SCC refused, [2000] S.C.C.A. No. 96).

## D. SUBMISSIONS OF THE PARTIES

[22] The appellant submits that *Fischer* does not eliminate *Hollick's* requirement that the proposed class action be a fair, efficient and manageable method of resolving class members' claims. It says that this court's decision in *Kinross* illustrates that a class proceeding based on common law

[1] In *Silver*, van Rensburg J. (as she then was) rendered a separate decision concerning leave to pursue a claim for secondary market misrepresentation against the defendant. This decision was appealed to the Court of Appeal and thereafter to the Supreme Court of Canada: *Silver v. IMAX Corp.*, 2012 ONSC 4881, aff'd, 2014 ONCA 90, aff'd, 2015 SCC 60.

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misrepresentation is unsuitable for certification because individual issues of reliance, causation, mitigation and damages make it unmanageable. As a result, it simply cannot promote judicial economy and efficiency.

[23] The respondent argues, as he did in the Divisional Court, that deference is not owed to the decision of the certification judge as he did not have the benefit of *Fischer*, which refocused the preferable procedure analysis on access to justice. He says that the presence of individual issues does not preclude certification, for the reasons set out by the Divisional Court.

## E. ANALYSIS

[24] I would dismiss the appeal, substantially for the reasons given by the Divisional Court.

[25] The Divisional Court noted that a certification judge's decision on preferable procedure attracts deference and a reviewing court should intervene only where the judge has made a palpable and overriding error of fact or has erred in principle: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A). Here, the effect of *Fischer*, released subsequent to the certification judge's decision, was to reduce the deference that would normally be given to the certification analysis. This is consistent with *Kinross*, at para. 107, where this court considered that the failure of the certification analysis to comport with *Fischer* was a factor that

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reduced the deference owned to the certification judge and permitted the court to conduct its own analysis.

[26] In *Fischer*, Cromwell J. emphasized that the preferability analysis is a comparative one that considers whether the proposed class action will achieve the goals of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as compared to other means of resolving the claim. This requires a consideration of whether the process is fair and will provide claimants with a just and effective remedy. The remedy will not be just and effective if, at the end of the day, claimants remain faced with the same economic and practical hurdles they faced at the outset of the proceeding.

[27] *Fischer* requires us to consider (a) the barriers to access to justice; (b) the potential of a class action to address those barriers; and (c) the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare.

[28] As Cromwell J. noted, the most common barrier to access to justice is an economic one. That is the case here.

[29] The motion judge concluded that the amount of damages claimed at the individual issues trial could be substantial. He suggested that Mr. Fantl had the alternative of commencing an action in the Superior Court and that efficiencies

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might be obtained by joinder of plaintiffs. He made reference to the fact that Mr. Fantl had made a total investment of around $100,000.

[30] As the Divisional Court pointed out, however, Mr. Fantl invested only a part of this amount in the Can-Am Fund. His investments in the Can-Am Fund during the material time ranged in value between approximately $27,000 and $52,000. His monetary damages, calculated on the difference between what he earned on those investments and what he would have earned had the representation not been made, would have been a fraction of his investment.

[31] I agree with the Divisional Court's conclusion, at para. 32, that Mr. Fantl's claim could not reasonably be viewed as economically viable to litigate in the Superior Court. The cost of expert evidence to establish that the representation was untrue or misleading, and that the misrepresentation was made negligently, would be out of all proportion to the amount at issue. That cost would be a significant barrier to access to justice. That barrier would not be addressed by joinder, which is not a practical means of bringing access to justice to a class of thousands. A class proceeding, on the other hand, has the potential to address this economic barrier by distributing the costs over thousands of class members, rather than one or even a few.

[32] The real issue on this appeal was not at issue in *Fischer*, but was in *Kinross* – whether a class action would be a fair, efficient and manageable

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proceeding, having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.

[33] The appellant submits that the Divisional Court's decision is in direct conflict with this court's decision in *Kinross*. According to the appellant, *Kinross* establishes that common law negligent misrepresentation claims in investor class actions are inherently unsuitable for certification because the need for numerous individual inquiries undercuts the goal of judicial economy and overwhelms the resolution of the common issues, producing an inefficient and unmanageable class proceeding.

[34] *Kinross* involved claims under the *Securities Act*, R.S.O. 1990, c. S.5, for secondary market misrepresentation and common law claims for negligent misrepresentation. The motion judge denied leave to proceed with the statutory claims and declined to certify both the statutory and common law claims.

[35] This court found that the motion judge had erred in refusing to certify the common law claims solely on the basis of the denial of leave for the statutory claims. While this court found that the motion judge's preferability analysis did not comport with *Fischer*, it found that the proposed class action did not meet the preferable procedure criterion because the individual issues of reliance, causation and damages rendered the common law claims unsuitable for

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certification. It held, at para. 127, that "a class proceeding would not represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the common law claims."

[36] *Kinross* is distinguishable for several reasons. *First*, as I have noted, the action was for both the statutory remedy for misrepresentation in the secondary securities market and for common law misrepresentation. It has often been noted that securities cases frequently present difficulties in class actions, hence the statutory remedy, which obviates the need to prove reliance: see *Green v. CIBC* at paras. 595, 610-611. This court noted in *Kinross* that proof of reliance, causation and damages would pose particular difficulties, making it necessary to answer numerous investor-specific questions related to multiple representations, investors' sophistication and investment advice, dates of acquisition and prices. This court considered that the host of individual inquiries would make the common law claims unsuitable for certification.

[37] Here, in contrast, there was a single common written representation made in the English language materials. Moreover, every class member acknowledged receiving it. This substantially obviates the need for individual inquiries into whether the alleged misstatement was received by class members.

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[38] *Second*, in *Kinross* there had been a judicial determination that the statutory misrepresentation claims, which rested on the same foundation as the common law claims, had no reasonable prospect of success at trial. This favoured the conclusion that a class action was not the preferable procedure for advancing the common law claims. That circumstance does not apply here.

[39] *Third*, in this case some of the necessary heavy lifting on the misrepresentation common issues will be shared with the certified breach of contract common issues. This will promote judicial economy and will avoid a multiplicity of proceedings. As the Divisional Court observed, at para. 41, referring to this court's decision in *Carom v. Bre-Ex Minerals Ltd.*, "where there is substantial overlap between two legal claims advanced in the same proceeding and each claim raises common issues, a decision to certify one of the claims weighs heavily in favour of certifying the other."

[40] *Fourth*, the resolution of the common issues of duty of care, truth or falsity of the representation and negligence would go a long way towards the determination of the appellant's liability and would significantly advance the claim of every class member.

[41] If the common issues are resolved in favour of the defendant, that will be the end of the matter. If they are resolved in favour of the class, a class proceeding can provide a framework for the resolution of the individual issues. It

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is realistic to expect that having tried the common issues the trial judge will have a full appreciation of the individual issues and will be well equipped to devise a procedure for the resolution of those issues. Section 25 of the *CPA* gives the judge authority to craft fair, inexpensive and efficient procedures in order to do so. This is ancillary to the broad discretion conferred on the court under s. 12 to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination".

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[42] While damages might be a more complex individual issue, s. 6.1 of the *CPA* expressly provides that the need for individual assessments of damages is not, in itself, a bar to certification. See *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, at para. 195, aff'd 2013 1284 (Div. Ct.), aff'd, 2014 ONCA 677.

[43] In my view, therefore, a class action in this proceeding has the potential to address the barriers to access to justice and can promote the resolution of claims that cannot be efficiently litigated through individual proceedings or by alternatives such as joinder.

[44] Although class actions have been with us in Ontario for almost 25 years, there have, at most recent report, been less than 20 common issues trials: see Jon Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario" (2014) 4 Western Journal of Legal Studies. Few of these have

resulted in individual issues trials. If class actions are to deliver on their promise of access to justice it is perhaps time to test some of the assumptions made about the "manageability" of the individual issues stage of a class action. This appears to be an ideal case in which to do so.

**French language issue**

[45] The appellant raised for the first time an argument based on the difference between the French and English versions of the information folder. Instead of the "best efforts" language, one French version states, "afin de reproduire le plus précisément possible la performance de l'indice de rendement global S&P 500." Another French version uses the wording "afin d'afficher globalement, le plus …".

[46] The appellant claims that the phrase "best efforts" is a concept unique to common law jurisprudence that has a distinct meaning and specific legal implications. He says that the result is that the proposed class, which includes those who received French and English folders, is overbroad.

[47] This issue was not raised in the courts below and there is no evidentiary basis for it in the record. For this reason, I would not consider it. It can be addressed, if necessary, in the ordinary course of case management, through the creation of a sub-class and sub-class common issues.

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## F. ORDER

[48] For these reasons, I would dismiss the appeal, with costs of the leave motion and the appeal payable to the respondent in the agreed amount of $65,000, inclusive of disbursements and all applicable taxes.

Released: “GRS” “AUG 22 2016”

“G.R. Strathy C.J.O.”
“I agree R.A. Blair J.A.”
“I agree P. Lauwers J.A.”

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# Tab 15

**CITATION:** MM Fund v. Americas Gold and Silver Corp., 2022 ONSC 6515
**COURT FILE NO.:** CV-21-00663826-00CP
**DATE:** 20221122

2022 ONSC 6515 (CanLII)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** MM FUND, Plaintiff

**– and –**

AMERICAS GOLD AND SILVER CORPORATION and DARREN BLASUTTI, Defendants

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Eli Karp and Sajjad Nematollahi*, for the Plaintiff

*Mark Gelowitz, Robert Carson, and Elie Farkas*, for the Defendant

**HEARD:** September 14, 2022

## MOTION FOR LEAVE / CERTIFICATION OF CLASS ACTION

[1] In August 2020, the Defendant, Americas Gold and Silver Corporation ("Americas Gold"), issued a prospectus, raised millions of dollars on the market, and went excavating for gold at its Relief Canyon property in Nevada. Less than a year later, in May 2021, Americas Gold announced that what's buried in Nevada will, for the most part, stay in Nevada.

[2] What were the odds?

### I. Double motion, twin issues

[3] The Plaintiff, an investor in Americas Gold who has sued for compensation for its loss, brings two motions at once. Although the statutory bases for the motions differ, but they present the same fundamental question: is the evidentiary foundation in the record sufficient to proceed to the next stage of the action?

[4] The Plaintiff seeks leave to commence an action for secondary market misrepresentation under section 138.8 of the *Securities Act*, RSO 1990, c S 5 ("*OSA*"). As Defendants' counsel points out, to obtain leave the Plaintiff must lead "credible evidence" to establish a reasonable possibility that the action will be resolved in the Plaintiff's favour. This threshold test "is designed to prevent an abuse of the court's process through the commencement of actions…based on speculation or suspicion rather than evidence": *Silver v Imax Corp*., [2009] OJ No 5573, at paras 330-331 (SCJ).

[5] The Plaintiff simultaneously seeks to certify the claim under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c 6 ("*CPA*"). As Defendants' counsel again points out, certification requires the Plaintiff to establish that there is "some basis in fact" to support the claim: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para 118. This threshold test "should not involve an assessment of the merits" of the claim, but it does require "that there be an evidentiary foundation…to support the certification criteria": *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 OR (3d) 252, at para 74 (Div Ct).

## II. The facts and the claim

[6] Americas Gold is a Toronto-based mining company whose shares trade on the TSX and the NYSE.

[7] This shareholders' action arises out of representations made during the course of the excavation and development of a gold mine at Relief Canyon, located in Pershing County, Nevada. Relief Canyon was the most significant asset owned by Americas Gold at the relevant time. It is an open-pit mine that Americas Gold acquired in April 2019 and that was targeted for commencement of commercial production in the second quarter of 2020. After delays that Americas Gold attributed to "teething pains," it declared commercial production at Relief Canyon had commenced in January 2021.

[8] Between issuance of its initial prospectus in August 2020 and its follow-up prospectus in January 2021, Americas Gold raised $73.3 million from investors, including the Plaintiff. The funds were to be used for corporate purposes and more specifically, according to the company's Short Form Base Shelf Prospectus dated January 29, 2021, to advance Relief Canyon towards full commercial production.

[9] In a press release dated May 17, 2021, Americas Gold advised the market that it was testing a different extraction process at Relief Canyon, and that it was continuing to evaluate options to extract ore. Americas Gold also announced that it was undertaking an updated "pit mapping […] and extensive re-assaying program", targeted to finish late in the third quarter of 2021. The press release disclosed that Relief Canyon had been experiencing modelling, construction and operational deficiencies, which negatively impacted gold recovery and production at the mine.

[10] Specifically, the press release stated that the company had identified that "carbonaceous material existed within the pit and an 'unknown quantity' of it had been crushed, stacked and

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placed on the leach pad", thereby reducing the expected production of gold from the process that had been employed there. It explained:

> Phase 2 mining, which commenced in late Q4-2020/early Q1-2021, has demonstrated a more structurally complex area than initially interpreted, caused by additional faults and folds. Gold mineralization is strongly influenced by structural controls. The impact of the structural complexity, combined with the increased mining selectivity to reject carbonaceous material, has decreased ore availability in Q1-2021 and into Q2-2021.

[11] For the first quarter of 2021, Americas Gold disclosed that Relief Canyon had produced only 1,346 gold equivalent ounces. Its first quarter Interim Financials stated that these "[i]mpairment indicators were identified during the three-month period ended March 31, 2021 from gold production of the Relief Canyon mine", and that Americas Gold had prepared an updated model for the Relief Canyon mine as of March 31, 2021.

[12] Ultimately, Americas Gold reported that Relief Canyon was unable to achieve sustainable production levels, and in a News Release dated August 16, 2021 announced that it had suspended mining operations at Relief Canyon. Consequently, Americas Gold took impairment and write-off charges against the value of its assets and inventory in the amount of $78.6 million. Stock market records produced by the Plaintiff show that the price went from $4.5 per share on August 1, 2020 to $1.5 per share on August 29, 2021.

[13] The Statement of Claim alleges that the adverse news contained in the May 17, 2021 disclosure revealed material facts that Americas Gold knew and should have disclosed earlier. Specifically, the Plaintiff alleges that these facts should have been disclosed in the prospectuses that Americas Gold filed in August 2020 and January 2021.

[14] In their factum, Plaintiff's counsel allege that the Defendants had prior knowledge of the problems they ultimately had to disclose to the public. They characterize the May 17, 2021 disclosure as an "acknowledge[ment] that material adverse facts existed as at the time of each Prospectus" and an acknowledgement that "at all times during the Class Period, Relief Canyon had been experiencing severe modelling, construction and operational deficiencies".

[15] The Defendants take issue with this characterization. In their factum, Defendants' counsel submit that the Plaintiff "has done nothing more than: (i) identify an instance in May 2021 in which Americas Gold provided an update on developments at the Relief Canyon mine; and (ii) note that Americas Gold share price declined after this point in time."

[16] It is the Defendants' view that the Plaintiff, in bringing this claim, would require the Court to make a significant inferential leap and to speculate that prospectuses issued by Americas Gold months earlier omitted to state material facts that were only later disclosed in May 2021. The Defendants submit that one needs expertise in the industry to understand whether the geological phenomena described in the May 2021 disclosure were previously evident or were at least

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suggested by the surface formations at Relief Canyon, and whether the Defendants ought to have known prior to May 2021 that the Relief Canyon mine would be unable to achieve sustainable gold production.

[17] Defendants' counsel point out that the Plaintiffs have not put forward any geologist or other expert witness to explain the scientific ramifications of what was described in the prospectuses and in the May 17, 2021 press release. They submit that as a consequence there is no evidence indicating that the material facts that emerged in the press release were or could have been known at an earlier date. Since the facts that the Defendants are alleged to have known were underground, it is their view that expert evidence is needed to explain why one would have expected a mining company to be in a position to make any disclosure at an earlier stage.

[18] Defendants' counsel contend that the omission of any such expert evidence is fatal to the motion for leave under section 138.8 of the *OSA*.

## III. The test for leave

[19] On a motion for leave to commence a secondary market misrepresentation claim under Part XXIII.1 of the *OSA*, the Plaintiff must establish (a) that the action is brought in good faith; and (b) that there is a reasonable possibility that the Plaintiff will prevail at trial. Moreover, leave to proceed must be obtained for each alleged misrepresentation: *Paniccia v MDC Partners Inc.*, 2018 ONSC 3470, at para 86.

[20] The leave requirement is more than a mere formality. It has been characterized by the Supreme Court of Canada as a "robust deterrent screening mechanism", for which it is necessary to "undertake a reasoned consideration of the evidence to ensure that the action has some merit": *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 (CanLII), [2015] 2 SCR 106, at paras 38-39.

[21] More to the point, there must be credible evidence supporting the claim and a plausible analysis of the statutory provisions on which it is based. The record must contain enough evidence to persuade the Court that there is a reasonable possibility that the action will be resolved in the Plaintiff's favour: *Ibid.*, at para 39. The burden is on the Plaintiff to establish that the claim is based on more than speculation; accordingly, the motion record must contain evidence that the alleged misrepresentation caused the Plaintiff's loss: *Silver v. Imax Corporation*, 2009 CanLII 72342, at paras 330-331 (SCJ). Failing that, the Defendants need not file a substantive response: *Abdula v. Canadian Solar Inc.*, 2014 ONSC 5167, at para 64.

[22] Most importantly, the evidence must allow the Court to reason forward, not backward. That is, the evidence must be such that it establishes the actual misrepresentation rather than the consequences of an alleged misrepresentation. The Court of Appeal has made the point that backward reasoning – i.e. presuming a material misrepresentation on the basis of evidence of a drop in share price – does not meet the test for leave. The Plaintiff must lead evidence that ties the

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decline in share price to the misrepresentation or omission in question: *Wong v. Pretium Resources Inc*., 2022 ONCA 549, at para 107.

[23] I pause here to note that the hurdle posed by section 138.8 of the *OSA* requires evidence, but it does not specifically require expert evidence to be put forward in every case. There are cases in which the factual evidence in the record is sufficient to establish that an actionable misrepresentation has occurred.

[24] For example, in *Gowanlock v. Auxly Cannabis Group Inc*., 2021 ONSC 4205, the defendant, a nascent cannabis producer, had stated in a published Management Discussion and Analysis document that the construction of its cultivation facility was well underway when in fact it had not even begun. A public correction was then issued, prompting the share price to plummet. No expert report was produced by the plaintiff because none was needed to understand the claim. The issue was not whether something analogous to "carbonaceous material" was found at some subterranean level at the site and what that might mean for the defendant's business; rather, the issue was that a building had been promised and none had been built. The meaning could not have been clearer.

[25] It is important to note that the case at bar is a material facts case, not a material change case. The Plaintiff does not argue that the Defendants failed to update changes in their public disclosure statements, but rather that they failed to disclose facts that existed at the time their prospectus was issued. As a starting point, therefore, the Plaintiff must prove not that something was discovered later that made the Relief Canyon site non-viable and that should then have been disclosed; rather, it must show that there was something that was known at the time the prospectus was issued that made the project non-viable.

[26] It stands to reason that one does not commit a misrepresentation by omitting that which was not known. The inquiry does not ask whether there were unknown things buried in the ground that could make the mine less profitable than predicted. That kind of omission does not amount to an omission of a fact that existed at the time the prospectus was issued, and thus was not a fact that had to be disclosed. In this context, the May 2021 public statement – which Plaintiff's counsel characterize as a "correction" – along with the precipitous drop in share price for Americas Gold – do not speak for themselves. They do not on their face reveal to the non-expert what a mining company would have known or not known at the outset or from the surface of the mine.

[27] For this reason, courts have determined that the analysis of material misrepresentation entails looking beyond the text of the relevant documents or press statements. The analysis "requires an examination of the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market": *Badesha v. Cronos Group*, 2021 ONSC 4346, at para 51, rev'd on other grounds 2022 ONCA 663.

[28] The allegation that is at the heart of this claim is not one of a blatant, on its face contraction between the May 2021 disclosures and Americas Gold's August 2020 and January 2021 prospectuses. The prospectuses described the mining site and the surface geology; the May 2021

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disclosure described what was revealed underground. The relationship between these two statements is not apparent to the naked eye without the aid of expert testimony explaining what it all means. As the Court of Appeal instructed in *Rahimi v. SouthGobi Resources Ltd*., 2017 ONCA 719, at para 66, a court cannot simply assume that specialized knowledge that is simply a matter of common sense and thus ignore or dispense with professional elucidation of the matter.

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[29] Plaintiff's counsel argues that the facts disclosed by Americas Gold in May 2021 were not only knowable, but were known at the time it issued its two prospectuses in August 2020 and January 2021. In making this claim, counsel points to p. 140 of the August 2020 prospectus, which discusses the potential for problems lurking at the Relief Canyon site:

> The Company is targeting commercial production by the end of Q4 – 2020. As of August 14, 2020, Relief Canyon had sold approximately 1,565 ounces of gold and 5,512 ounces of silver. While the Company was successful in meeting several important commissioning targets, including initial construction capital and planned mining and crushing rates, gold extraction has been slower than planned. While Relief Canyon has experienced start-up challenges typical to a heap leach operation, there are a number of factors impacting gold extraction, notably: "the metallurgical characteristics of the initial material stacked on the leach pad sourced from the existing three pits, inconsistent operating practices, solution application rathes on the leach pad, and the failure of the radial stacker. The Company and its consultants have undertaken an analysis of recent performance and have implemented a number of procedural changes to address these issues, including improved ore control, increased training, standardization of operating practices and reagent optimization.

[30] This suggestion of challenges that have not yet been fully identified was followed-up, and discussed in an updated fashion, at p. 229 of the January 2021 prospectus. There, Americas Gold explained the ways in which the funds raised by the past year's public offering had been utilized in assessing the challenges and investigating the mine's viability:

> The net proceeds of the August 2020 Offering that were re-allocated to development costs to achieve commercial production at Relief Canyon were predominantly utilized in connection with payments to the mining contractor, reagents, diesel, equipment lessors, drilling and explosives, consultants, employee-related expenses, and other operating costs. The achievement of commercial production is a capital intensive process, and Relief Canyon experienced start-up challenges typical of a heap leach operation as well as a structural failure to its large radial stacker which resulted in reduced stacking rates from the use of a temporary stacker until the large radial stacker returned to operations in early December 2020. In response to certain of these challenges the Company and its consultants undertook an analysis of the operation's performance and implemented a number of procedural changes to address these challenges, including improved ore control, increased training, standardization of operating practices and reagent

> optimization… These challenges ultimately resulted in additional time and development-related costs to bring Relief Canyon to commercial production.

[31] Reading these passages in the two prospectuses, it is difficult to understand what the Plaintiff's complaint really is. In my view, the two excerpts referenced by Plaintiff's counsel do precisely what one would expect them to do in the circumstances – i.e. they disclose that there are challenges underground, and describe the methods in which the company is engaged in investigating these challenges. The prospectuses do not seem to hide anything from the reader, nor do they (or could they) reveal the more extensive difficulties discovered, and disclosed, several months after their publication.

[32] What followed in May 2021 – the announcement that "carbonaceous material existed within the pit" which "demonstrated a more structurally complex area than initially interpreted" – was a further technical update. It was not a contradiction of what came before it, nor was it a late-in-the-day disclosure of something previously known. The entire disclosure sequence, from August 2020 to January 2021 to May 2021, followed a pattern that anyone would expect it to follow as the exploration of the mine site moved forward.

[33] It may be trite to say, but the challenge of determining the viability of a new mining project is that the value lies underground. If it were obvious all along where the gold is and how to extract it from the earth, it would lack the rarity that gives it much of its value. It takes time to unearth, and the disclosure that accompanies such a project proceeds in stages as one digs – i.e. as the truth about the mine and the precious metal within it is physically revealed.

[34] The claim at bar does not state that Americas Gold's prior financial statements have been, or need to be, restated. The focus is on its recording impairment charges in the first quarter of 2021, reflecting the information contained in the May 2021 public statement. However, it is well established that the Plaintiff does not satisfy its burden on a leave motion by pointing to a decline in share price following an impairment: *O'Brien v. Maxar Technologies Inc*., 2022 ONSC 1572, at paras 98, 127. Absent credible evidence that the impairment was indicative of a prior misrepresentation, the fact of the impairment does not establish a reasonable possibility of success: *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864, at paras 165, 169-70, 182, 185-93, aff'd 2014 ONCA 901, at paras 62-75.

[35] Furthermore, the record before me does not contain evidence that the May 2021 disclosure constituted a "corrective disclosure". On its face, it appears to be an announcement of the discovery of new facts – i.e. facts that identify a structural complexity in the Relief Canyon ore body – or a change in circumstances – i.e. adjustments to the mine plan. It certainly does not expressly, or even implicitly, acknowledge the existence of any misrepresentation.

[36] In order to come to that conclusion, I would have to "engage in a reasoned consideration of evidence of the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market": *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, at para 51.

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As Defendants' counsel observes, this requires "evidence, opinion, and argument, and also an analysis of the perceived or effective meaning of the words in the secondary market, which once again is not a mechanical exercise, but rather one that involves evidence": *Ibid*., at para 50. As already indicated, the Plaintiff has adduced no evidence that would permit me to undertake such an analysis.

[37] Given the lack of a proper evidentiary basis for the claim, the test for leave under section 138.8 of the *OSA* has not been met. The secondary market misrepresentation claim cannot proceed.

## IV. The test for certification

[38] The Plaintiff also brings common law and primary market misrepresentation claim. Those claims do not require leave to proceed under section 138.8 of the *OSA*. But in order for the action to proceed as a class action, it requires certification under section 5(1) of the *CPA*.

[39] The test for certification is well-known and set out as a multi-step analysis in section 5(1)(a) through (e) of the *CPA*, as follows:

> 5 (1) The court shall, subject to subsection (6) and to section 5.1, 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.

[40] Most of these steps are uncontroversial in a claim of this nature. As against the corporate Defendant, there are certainly recognized cause of actions in misrepresentation based on both the *OSA* and common law. I would, however, agree with Defendants' counsel that there is no viable

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cause of action as against the individual Defendant, who is alleged to have acted in his corporate capacity only.

[41] There is an identifiable class of shareholders who held shares during the relevant dates. Moreover, the Plaintiff has a viable litigation plan and has no apparent conflict with other class members. Furthermore, on access to justice and judicial economy grounds a class action would be the preferred proceeding in a shareholders action like this if all other hurdles can be jumped; however, as discussed below, the "some basis in fact" analysis, which is crucial to the consideration of the common issues, also has impact on preferability: *AIC Limited v. Fischer*, [2013] 3 SCR 949l, at para 48; *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at paras 99, 123.

[42] Defendants' counsel has pointed out that the Plaintiff is improperly named; it is a trust, and so the proper entity to serve as Plaintiff would be the trustee. The trust itself does not have capacity to sue and be sued. Plaintiff's counsel has acknowledged this error and has committed to correcting it if and when the action proceeds any further. Since this formal defect can be readily cured, I would not let it form an impediment to certification.

[43] For present purposes, the controversial issue for certification is section 5(1)(c) – whether the claims have common issues that will advance the proceeding if considered in common. This can only occur if, first and foremost, there is "some basis in fact" for the asserted claims: *Pro-Sys*, *supra*, at para 118.

[44] The following are the common issues as proposed by the Plaintiff. I have left out the common issues relating to secondary market misrepresentation, since those claims have not been granted leave to proceed.

GENERAL

1. Did Americas Gold release the prospectuses?

2. If the answer to (1) is yes, did any of the Prospectuses contain one or more misrepresentations?

3. If the answer to (2) is yes, which prospectus contained what misrepresentation(s)?

4. If the answer to (2) is yes, when and how the misrepresentations in the prospectuses were publicly corrected?

PRIMARY MARKET LIABILITY

5. If the answer to (2) is yes, are either of the Defendants liable under section 130 of the Securities Act and, if necessary, the equivalent provisions of other jurisdictions' securities legislation?

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6. If the answer to (2) is yes, are either of the Defendants liable in common law negligence simpliciter and/or common law negligent misrepresentation?

7. If the answer to either (5) and/or (6) is yes, to whom are the Defendants liable, and what is the proper measure of the damages or compensation to be paid by them?

OTHER MATTERS

8. Can some or all of the damages of the Class be calculated in the aggregate pursuant to section 24 of the CPA?

9. If the answer to (15) is yes, what is the aggregated damages to be awarded to the Class?

10. Is Americas Gold vicariously liable for the acts and/or omissions of Darren Blasutti and of its other directors, officers, agents, employees and representatives?

11. Should the Defendants pay for the costs of administering the recovery? If so, how much should the Defendants pay?

12. If the Court determines that either of the Defendants are liable and should pay compensation to the Class, and if the Court considers that the participation of the Class Members or any of them is required: (a) are any directions necessary; (b) should any special procedural steps be authorized; (c) should any special rules relating to the admission of evidence and means of proof be made; and (d) what directions, procedural steps, or evidentiary rules ought to be given or authorized.

[45] As a general matter, a "common issue" is one which "is necessary to the resolution of each class member's claim": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para 39. Moreover, the Court must be satisfied that the evidence demonstrates that there is at least some basis in fact for the proposed common issues: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para 25. This analysis entails more than "a bare assertion in the pleadings" that the common issues have evidentiary support: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 79.

[46] The *CPA* certification motion and the *OSA* leave motion have been brought together here, and so both rely on the same factual record. As a matter of logic alone, that leaves the Plaintiff with an uphill battle on certification since in the leave motion the record has been found to lack sufficient evidence to indicate that the claim will be successful at trial.

[47] That said, the Court of Appeal has instructed that "[i]t does not automatically follow from the denial of leave for the statutory claims that there will be no basis in fact for all of the class definition, common issues and preferable procedure certification criteria": *Kinross, supra*, at para 97. The focus on a certification motion is essentially on the form rather than the merits of the action. The court's function is to determine whether the claim is suitable to proceed as a class

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proceeding: *Fischer*, *supra*, at paras 39-42; *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401, at para 50 (Ont CA).

[48] Accordingly, the "some basis in fact" analysis that is essential to class action certification must proceed even where a leave motion has made an initial negative determination about the factual record. As the Court of Appeal put it, "[t]he fact that the court, on a leave motion, has determined that the statutory claims have no reasonable possibility of success and that the evidence supporting the statutory and common law actions would essentially be the same does not mean that there is not some basis in fact": *Kinross*, at para 99.

[49] With all of that, certification under the *CPA* and leave under the *OSA* have been described as serving a similar function – to keep out unmeritorious claims. As the Divisional Court has explained, it is integral to the court's gatekeeping function that "some factual basis – in the form of admissible evidence – to support the allegation[s]": *Williams v. Canon Canada Inc.*, 2012 ONSC 3692, at para 23.

[50] The standard for certification is not an especially high one, but it does require the Court to move beyond mere "symbolic scrutiny" of the claim: *Lin v. Airbnb, Inc.*, 2019 FC 1563, at para 33. Using a metaphor that seems appropriate to the case at bar, Perell J. stated in *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487, at para 134, rev'd in part on other grounds, 2018 ONSC 6487 (Div Ct), that "while the standard is low, it is not subterranean."

[51] As part of the evidentiary requirement, the courts have also scrutinized certification records to ensure that there is a plausible methodology for assessing damages. As the Supreme Court of Canada has said, the evidence – generally that of an expert witness – must be "sufficiently credible or plausible to establish some basis in fact" to support the claim: *Pro-Sys*, at para 118. Calculating damages in a shareholders' class action is generally not a methodologically difficult task, since the pre-existing share price and the diminished share price are readily available and the difference is easily calculated.

[52] But the fact is that the area of analysis that most frequently requires expert evidence must be analyzed for its plausibility. Unless it is "glaringly obvious…that the presence of the…Defect…reduced the value", a plausible method of connecting the alleged misrepresentation to the class members' loss is a threshold requirement for certification: *MacKinnon v. Volkswagen Group Canada Inc.*, 2022 ONSC 5501, at para 16 (Div Ct), quoting *Williams v. Toyota Motor Corporation*, 2022 FCA 344, at para 173.

[53] As explained in the leave to proceed analysis above, the connection between the Defendants' prospectuses and the eventual drop in shareholder value is anything but "glaringly obvious". In fact, the Court of Appeal has indicated that there would be no misrepresentation at all if the chronology of the Defendant's knowledge of the problem and disclosure of the problem were out of sync – knowledge must proceed disclosure: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, at para 104.

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[54] The Court emphasized that the timing of a defendant's knowledge of an omission is crucial to any analysis of a securities misrepresentation case. It stressed that the *OSA* defines a misleading representation or omission as one that misleads the reader "in light of the circumstances in which it was made": *Ibid*. In an observation that foreshadows the Plaintiff's claim here, the Court stressed that, "The 'circumstances in which it was made' do not include circumstances which arose after the statement was made": *Ibid*.

[55] In other words, what the Court of Appeal refers to as the "chronology problem" requires an actionable misrepresentation to have at least been knowable prior to the impugned misrepresentation by omission: *Ibid*., at para 101. A corporate defendant and its executives can be liable for misrepresentation by omission if they were not aware of facts that they negligently omitted to disclose; there are matters that the company does not know but should know, and it may be liable for losses caused by the failure to disclose them. But no case has said that a failure to disclose facts that are unknowable because they do not yet exist or are, literally, underground, can form the basis of a viable misrepresentation claim.

[56] Given the nature of the claim and the lack of expert geological evidence to help understand the technicalities of mining exploration, there is no basis in fact for the most foundational of the Plaintiff's claims. The entire pleading is premised on an assumption that what later became unearthed in the exploration process was already known or knowable at the outset. The very first series of proposed questions – "…did any of the Prospectuses contain one or more misrepresentations?" – is unanswerable on the current state of the record. And if this cornerstone of the claim crumbles, the rest of the edifice likewise cannot stand as a class proceeding.

[57] To be clear, the evidentiary standard required for certification under section 5(1) of the *CPA* is lower than that required for leave under section 138.8 of the *OSA*. It is possible, for example, that expert evidence submitted on behalf of a plaintiff, though contested by a defendant, might satisfy the *CPA*'s "some basis in fact" standard although it does not rise to the *OSA*'s reasonable possibility of success standard. After all, the Supreme Court has emphasized "the importance of not allowing the requirement to establish 'some basis in fact' to lead to a more fulsome assessment of contested facts going to the merits of the case: *Fischer*, at para 42.

[58] In the present case, however, the record contains factual evidence that requires an expert to interpret but no expert evidence to weigh at all. Without *any* evidence demonstrating that there was an omission in Americas Gold's prospectuses or in its other public statements, there is no basis in fact on which the common issues can stand. Without common issues, the entire certification exercise becomes meaningless; the issues cannot really be addressed in common, and a class action cannot possibly represent the preferable procedure: *Kinross*, at para 123.

[59] Americas Gold may have thought its Nevada property had, almost literally, an ace in the hole. Its extraction was then found to be unsustainable and the share price fell, but the record contains no basis in fact for the allegation that this was knowable in advance. Not every investment is a gold mine; sometimes investors are, unfortunately but fairly, dealt a bad hand.

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## V. Disposition

[60] The secondary market claims pleaded by the Plaintiff do not meet the threshold of presenting credible evidence that establishes a reasonable possibility that the action will be resolved in the Plaintiff's favour. The motion for leave under section 138.8 of the *OSA* is dismissed.

[61] The primary market and common law claims pleaded by the Plaintiff do not meet the threshold of presenting some basis in fact for the claims of liability. The motion for certification under section 5(1) of the *CPA* is dismissed.

[62] The parties may make written submissions on costs. I would ask counsel for the Defendants to send brief written submissions by email to my assistant within two weeks of the date hereof, and for counsel for the Plaintiff to send equally brief submissions by email to my assistant within two weeks thereafter.

**Date:** November 22, 2022 Morgan J.

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# Tab 16

**DATE: 20051118**
**DOCKET: C42414**

# COURT OF APPEAL FOR ONTARIO

**McMURTRY, C.J.O., ROSENBERG and GILLESE JJ.A.**

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| **B E T W E E N :** | ) | |
| | ) | |
| **WILFRED ROBERT PEARSON** | ) | **Kirk M. Baert, Eric Gillespie** |
| | ) | **and Celeste B. Poltak** |
| | ) | **for the appellant** |
| **Plaintiff** | ) | |
| **(Appellant)** | ) | |
| | ) | **Alan Lenczner, Larry P.** |
| **- and -** | ) | **Lowenstein and Mahmud Jamal** |
| | ) | **for the Respondent, Inco Limited** |
| **INCO LIMITED, HER MAJESTY** | ) | |
| **THE QUEEN IN RIGHT OF** | ) | **David Estrin, David McRobert** |
| **ONTARIO, THE CORPORATION OF** | ) | **and Laura Young for the intervener,** |
| **THE CITY OF PORT COLBORNE,** | ) | **The Environmental Commissioner** |
| **THE REGIONAL MUNICIPALITY** | ) | **of Ontario** |
| **OF NIAGARA, THE DISTRICT** | ) | |
| **SCHOOL BOARD OF NIAGARA and** | ) | **Paul Muldoon** |
| **THE NIAGARA CATHOLIC** | ) | **for the intervener, the Canadian** |
| **DISTRICT SCHOOL BOARD** | ) | **Environmental Law Association** |
| | ) | |
| **Defendants** | ) | **Robert V. Wright** |
| **(Respondent)** | ) | **for the intervener, Friends of the** |
| | ) | **Earth** |
| | ) | |
| | ) | **Heard: May 30, and June 3, 2005** |

**On appeal from the order of the Divisional Court dated February 6, 2004 and costs order dated July 19, 2004 (O'Driscoll, Then and MacKenzie JJ.), dismissing an appeal from the orders of Nordheimer J. dated July 16, 2002 and September 9, 2002.**

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**ROSENBERG J.A.:**

[1] In this appeal, the court is called upon to consider whether a class proceeding is a suitable vehicle in an environmental case. In *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere* (2000), 201 D.L.R. (4th) 385 (S.C.C.) at para. 26, McLachlin C.J.C. wrote that the class action plays an important role in today's world. She noted that pollution cases may be especially suited to class proceedings. As she said, "Environmental pollution may have consequences for citizens all over the country." But, in *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19, the Supreme Court of Canada upheld the dismissal of an application to certify an environmental action as a class proceeding under the *Class Proceedings Act,* S.O. 1992, c. 6, the "*CPA*"). Speaking for the Court at para. 37, McLachlin C.J.C. reiterated that in a proper case an environmental claim could be pursued through a class proceeding:

> While the appellant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts.

[2] From 1918 to 1984 Inco operated a refinery in Port Colborne that processed nickel. Over that 66-year period the refinery spewed tons of nickel oxide into the environment. It is alleged that this nickel oxide contaminated the Port Colborne environment, especially a low-income area adjacent to and downwind from the refinery known as the Rodney Street area. Mr. Pearson, the proposed representative plaintiff, lives in the Rodney Street area. In September 2000, the provincial Ministry of the Environment released a report stating that Inco had discharged contaminants into the natural environment that posed a risk to the natural environment and to human health for some of the residents of Port Colborne. The appellant says that the release of this report had a serious impact upon property values in the Port Colborne area. He seeks to have this action certified as a class proceeding on behalf of the former and present property owners of much of Port Colborne. He says that this is the kind of case that falls within the words of McLachlin C.J.C. in *Hollick*. I agree. I would, therefore, allow the appeal.

[3] Nordheimer J. case managed this action and is an experienced class proceedings judge. His reasons for decision can now be found at [2002] O.J. No. 2764, 33 C.P.C. (5th) 264. I will make frequent reference to his thorough reasons. His decision refusing to certify this action as a class proceeding is entitled to considerable deference. However, there have been two important developments since his decision that in my view dictate

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that the decision be overturned. First, the appellant has significantly narrowed his claim to damages for the devaluation of real property values arising from soil contamination. The claim before the motion judge was much broader and included sweeping claims for damages from the alleged adverse health effects from nickel oxide contamination. Second, in December of 2004, this court released its decision in *Cloud v. The Attorney General of Canada* (2004), 247 D.L.R. (4th) 667. That decision suggests a somewhat more liberal approach should be taken to certification of class proceedings. These two developments drive my decision to find that this action should be certified as a class proceeding.

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**THE FACTS**

[4] As the appellant's claim was originally framed, this was a wide-ranging action that alleged various forms of damage. The appellant also named many other defendants besides Inco, including Her Majesty the Queen in right of Ontario, the Corporation of the City of Port Colborne, the Regional Municipality of Niagara, the District School Board of Niagara and the Niagara Catholic District School Board. The appellant and the school board reached a resolution of the matter prior to the certification motion and they did not participate in the motion. The motion judge found that there was no reasonable cause of action against the City or the Region and the appellant did not appeal that finding. The appellant settled the case against the Crown prior to the hearing of this appeal. As a result, only Inco responded in this court and I will limit my discussion of the facts to those that concern the claim against Inco.

[5] For 66 years the Port Colborne refinery operated by Inco emitted nickel oxide into the natural environment until the refinery ceased producing nickel in 1984. The appellant asserts that this substance is toxic and has affected the physical and emotional health and well being of the residents of Port Colborne. The appellant also asserts that the nickel oxide has caused widespread damage to the lands, homes and businesses in Port Colborne. The impact is said to be particularly severe for the residents of the Rodney Street area.

[6] The appellant asserts that the nickel contamination in Port Colborne is significantly higher than elsewhere in Ontario and soil sampling in some locations shows extremely high levels of contamination. The appellant claims that the Inco Refinery in Port Colborne is the source of this nickel contamination. While Inco appears to accept responsibility for release of nickel oxide into the environment, the appellant claims that the company denies responsibility for high levels of contamination found inside the homes and five centimetres below the ground surface (where most of the contamination is now found). The appellant's and Inco's experts agree that at least 20,000 tonnes of nickel have been deposited by Inco across Port Colborne and that most, if not all, of the nickel is likely nickel oxide. Nickel oxide is classified by the federal government as a

Group One-Carcinogenic to Humans toxic substance, meaning that there is a direct causal relationship between exposure to nickel oxide and cancer in humans, and that the risk of cancer exists at any level of exposure.

[7] In the original claim, the plaintiff also alleged that subsurface operations by Inco involved the taking of water for refining operations. Inco's attempts to control the migration of contaminants from its property have led to settling and subsidence, causing damage to homes and related structures.

[8] The event that triggered this lawsuit was an announcement in September 2000 by the Ministry of the Environment ("MOE") informing the public of high levels of contamination in Port Colborne. The appellant claims that house sales in the Rodney Street neighbourhood have dropped, that mortgage financing has become difficult and that house prices have dropped compared to other areas in the Niagara Peninsula. The appellant attributes the impact on property values to the 2000 MOE announcement.

[9] Approximately 1,000 people live in the Rodney Street area and approximately 18,500 people live in Port Colborne. The homes in the Rodney Street area are very modestly priced and the owners tend have limited incomes; many are elderly and on fixed incomes or are unemployed or underemployed.

[10] The appellant claims that since the 2000 MOE announcement, "house prices in the Rodney Street area have declined by approximately forty-five percent when compared to those in other parts of Port Colborne, Fort Erie and Welland. House prices across the balance of the east side of Port Colborne have also declined by more than ten percent" and on the west side by two to three percent. (Reasons of motion judge at para. 23).

[11] As I mentioned, the appellant's action as originally framed, and for which he sought certification, embraced the whole spectrum of potential losses, including health effects. The original claim also concerned contamination by other substances that the appellant claimed were emitted from the Inco refinery. A brief excerpt from the statement of claim will show the breadth of these complaints:

> (a) short term and long term exposure to substances including but not limited to the carcinogen oxidic nickel, copper, cobalt, chlorine, arsenic, zinc and lead, leading to irritation and inflammation of the skin, eyes, nasal passages and lungs, coughing, choking, inability to breathe, burning sensations in the chest and abdomen, nausea, vomiting, headaches, dizziness, collapse, loss of consciousness, loss of impairment of the senses of smell and taste, loss of appetite, swelling of exposed areas, pain and suffering, loss of income,

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> impairment of earning ability, future care costs, medical costs, loss of amenities and enjoyment of life, anxiety, nervous shock, mental distress, emotional upset, and out of pocket expenses, and;
>
> (b) short term and long term exposure to, but not limited to, oxidic nickel, copper, cobalt, chlorine, arsenic, zinc and lead, which exposure has led and will continue to lead to long term health consequences, including but not limited to increased risks of cancer and lung disease. As a result of this exposure, some Class members have already, and others will continue to experience needless illness, loss of amenities and enjoyment of life, and will die premature deaths.

[12] The appellant also pleaded damages for *Family Law Act*, R.S.O. 1990, c. F-3 claims because of the effects of the contaminants on the relatives of the Port Colborne residents. The appellant has since modified the claim, limiting it to the decrease in property values that followed the 2000 MOE announcement.

[13] As indicated, Inco does not deny that its refinery is the source, or at least the primary source, of the nickel oxide. It disputes that it has any responsibility for many of the other contaminants such as arsenic and lead. It claims that most of the nickel emissions occurred before 1960 and emissions since 1984 have been negligible. It points out that the MOE has been monitoring the facility for many years and has been doing tests of air and soil in the area since the 1970's. In 1999, the MOE undertook a study designed to augment earlier samplings of nickel and other contaminants in Port Colborne area surface soils. The study produced a map showing approximate areas and patterns of contamination. There is considerable variation in contaminant levels as they exist at the various locations within the geographical boundaries proposed for the class.

[14] While Inco accepts responsibility for nickel oxide contamination in the Port Colborne area, it disputes the fundamental claim by the appellant as to the impact of the contamination on property values. To quote from the respondent's factum, "The issue of Inco's emissions in Port Colborne is an old and very public one." It therefore disputes the appellant's claim that the 2000 MOE announcement caused the decline in property values. In fact, Inco has produced expert evidence suggesting no impact on property values from the announcement. It adduced expert evidence showing that the largest increase in Port Colborne average sale prices occurred after September 2000; even in the Rodney Street area there was a positive impact on sale prices. Inco criticizes the methodology used by the appellant's expert who reached the opposite conclusion.

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[15] Inco denies that there is proof of any adverse health effects in Port Colborne attributable to nickel and it denies that there is any scientific evidence that nickel in any form in the levels found in Port Colborne has ever caused cancer.

[16] Inco takes the position that the existence and extent of impacts on residential property values can only be determined through a case-by-case assessment. It says that property values are affected by a myriad of factors. Further, even if a causal link could be established between any one environmental factor and property values, the impact on any one property would have to be determined by an individual assessment. It submits that the largest claims would be expected to come from agricultural property. It would be extremely difficult to prove any effect on crops from any particular contaminant.

[17] Inco points out that it has agreed to participate in the Community Based Risk Assessment process that was initiated before the appellant made his claim. To benefit from the CBRA a resident of Port Colborne does not have to establish legal liability, show that the contaminants originated with Inco, show any harm or damage or meet judicial standards of proof. Rather, Inco will perform the necessary remediation on a "no questions asked" basis depending on the results from the scientific model and individual property characteristics. According to Inco's experts, such remediation efforts have been very effective in the United States in eliminating property value impacts caused by environmental contamination or the publicity surrounding it.

[18] Inco submits that the appellant has entirely recast his case to make it suitable for certification as a class proceeding. It submits that while the appellant's focus is now on property values rather than the actual level of contamination, this claim was not to be found in the statement of claim that was before the motion judge. It also submits that the attempt to tie the diminution in value of the properties to the 2000 MOE announcement is simply an attempt to avoid limitation period problems that would otherwise arise from the fact that pollution from the Inco facility was well known for decades.

**THE FINDING OF THE MOTION JUDGE**

[19] Section 5(1) of the *CPA* sets out the prerequisites for certification of a class action. They may be summarized as follows:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims or defences of the class members raise common issues;

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(d) a class proceeding would be the preferable procedure for resolution of the common issues; and

(e) there is a representative plaintiff.

**(a) Cause of Action**

[20] The motion judge noted that Inco conceded that the Fresh as Amended Statement of Claim disclosed reasonable causes of action against it. All the other prerequisites were in issue on the certification motion.

**(b) Identifiable Class**

[21] Before the motion judge, the identifiable class was defined as "all persons owning or occupying property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west." The boundaries were marked on a map of Port Colborne. The motion judge found, at para. 100, that this geographic definition of the proposed class had the effect of "arbitrarily both including and excluding areas where the soil contains the same level of nickel of which the plaintiff complains". He also found, at para. 101, that the temporal component was arbitrary since it could exclude persons who had suffered harm but had moved away before 1995. The appellant chose the temporal requirement to avoid problems of limitation periods. However, this merely highlighted the arbitrary nature of the class definition since a person who only recently discovered the facts necessary to found a claim could have a valid claim despite the *Limitations Act*, S.O. 2002, c. 24, Sch. 8. Accordingly, the appellant failed to meet the identifiable class requirement.

**(c) Common Issues**

[22] The appellant identified ten common issues relating to Inco. The motion judge found that the appellant had met the common issues requirement in relation to Inco. The common issues as framed before the motion judge that applied to Inco were as follows:

(i) Were the contaminants arsenic, chlorine, cobalt, copper, lead, nickel and zinc (the "Contaminants of Concern) discharged by Inco?

(ii) How widespread is the distribution of the Contaminants of Concern?

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(iii) At what level do the Contaminants of Concern pose risks to the natural environment or to human health, or both?

(iv) Did Inco owe a duty of care to the class to prevent the ongoing discharge of the Contaminants of Concern, and if so, what duty was owed?

(v) What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of the Contaminants of Concern?

(vi) Did Inco breach the standard of care referred to in [(v)] above?

(vii) Did the ongoing discharge of the Contaminants of Concern by Inco amount to a public nuisance?

(viii) Did the ongoing discharge of the Contaminants of Concern by Inco amount to a trespass?

(ix) Is Inco strictly liable to the class for ongoing discharge of Contaminants of Concern as a result of failure to prevent the escape of dangerous substances (*Rylands v. Fletcher*)?

(x) Does the defendants' conduct justify an award of punitive damages to the class, and if so, what amounts of punitive damages is appropriate?

[23] Although the motion judge found that as against Inco the appellant had met the common issue requirement, he added a caveat at para. 108 because of the complexity of the issues:

> It would be fair to say that the proposed common issues relating to Inco would still pass the test as common issues, that is, they are all issues that would be common to each class member's claim and whose determination in favour of the representative plaintiffs would mark success for each member of the class. As I will point out later when I deal with the

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> issue of preferable procedure, the fact that these issues are common does not in any way reduce the extreme complexity that will be involved in resolving those issues.

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[24] Although the appellant succeeded before the motion judge on the question of common issues, I will revisit that question below. It is necessary to do so because the appellant has so significantly narrowed his claim. By doing so, the appellant stripped out some of the complexity but he has also reduced the number of common issues. For example, (iii) obviously is no longer in issue. It is not possible to reach a conclusion on preferable procedure without having a clear understanding of the common issues.

### (d) Preferable Procedure

[25] The motion judge analyzed the question of preferable procedure by reference to the three accepted goals of a class proceeding: judicial economy, access to justice and behaviour modification.

#### *(i) Judicial economy*

[26] The motion judge found that a class proceeding would not advance the goal of judicial economy because the answer to the common issues would be "of no more than theoretical interest until the particular factual circumstances of each individual claimant is examined" (at para. 118). This is because

> the process of determining whether a causal link exists for any given class member with respect to any given allegation of harm is extensive and very much individualized. Given the wide variety of harm alleged and the size of the proposed class, [the] class proceeding [would] quickly become unmanageable because it would inevitably disintegrate into the need for thousands of individual trials with potentially tens, if not hundreds, of thousands of individual issues to be resolved (para. 119).

For example, each of the 20,000 members of the class would have to be examined for discovery. The motion judge noted that the exposure of the claimants to the contaminants was central to the claims but this could only be determined on an individual basis. Further, there would need to be an examination of each person's health history, occupation, habits and so on. It would be necessary to know the degree of concentration of any contaminants found in the person's yard and home. The evidence demonstrated that there was considerable variation in contaminant levels. The motion judge found that,

accordingly, this case was similar to *Hollick*, where the Supreme Court of Canada held that an environmental claim should not be certified as a class proceeding.

[27] The motion judge dealt directly with the question of property value, which is now central to the appellant's application for certification, at paras. 122 and 123:

> In addition, individual issues would manifest themselves as to whether the presence of any contaminants affect property value and prices and, if so, to what extent. The plaintiff put forward evidence from certain real estate agents regarding a downward trend in housing prices in Port Colborne over the past few years. Inco put forward the opinion of a real estate economist who detailed the different factors that go into the value of any given house. He also reviewed recent sales information for the Port Colborne and surrounding areas and concluded that the data did not support a view that overall property values were adversely affected by the public announcement concerning contaminants that occurred in September 2000. In addition, he observed that, even if a property value impact can be shown and causally linked to a particular environmental factor to the exclusion of all others, a further individualized analysis is required to determine the actual economic effect such an impact had on the individual property owner. The existence of any gain or loss depends upon, among other things, when a property owner bought, sold, and/or refinanced his home and the knowledge or perception of the parties at the time of the various transactions.
>
> I do not propose to review the evidence that was offered by both sides regarding the impact on property values in any greater detail. It is sufficient to say that property values are impacted by a wide variety of factors. For example, they may be affected by the quality of schools available, the presence of criminal activity, heavy traffic, other industrial pollution, proximity to transit, restaurants, shopping malls, entertainment, and so on. Further, even if environmental concerns can be demonstrated to have adversely affected property values, whether that translates into an actual economic impact on any given home owner can only be determined on a case-by-case analysis given the myriad of other factors that go into determining actual property value.

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> The issue of lost property value, which may form the bulk of the smaller claims advanced, alone demonstrates the enormous complexity and individualized nature of the inquiries that would be left once any common issues are determined.

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[28] The motion judge noted that this was a particular problem in considering the agricultural-related losses. The appellant presented no evidence as to how those claims might be valued. Inco's evidence demonstrated that the process would be extremely complex and highly idiosyncratic.

[29] In the result, the motion judge concluded that if "[the] action were certified as a class proceeding, it would quickly become unmanageable" (at para. 128).

### *(ii) Access to justice*

[30] The motion judge reached a similar conclusion with respect to the goal of access to justice. He agreed with the appellant that the CBRA programme "standing alone" would not be a viable alternative to a class proceeding since the CBRA does not provide compensation. However, the CBRA had to be seen "as part of the available alternative procedures, in conjunction with other alternatives such as joinder, test cases and the like" (at para. 131). The motion judge was also concerned about the premature or precipitous determination of claims. Since the individual class members would be required to prove their own individual claims, the trial of these claims would present substantial issues of risk and expense. Some members of the class might not be prepared to pursue their claims at the time dictated by the class proceeding timetable. This could be unfair for claimants whose disease and condition might not manifest until some time in the future. As the motion judge said at para. 132:

> In other words, given the nature of the claims and the substantial individual commitment required of class member to prosecute them to conclusion, some of the proposed class members would appear to have a substantial interest in controlling their own litigation.

### *(iii) Behaviour modification*

[31] Finally, the motion judge concluded that certifying the action as a class proceeding would not achieve the goal of behaviour modification. Inco's activities in Port Colborne were the object of active involvement by the MOE and its operations were subject to orders from the MOE and might well be in the future. Furthermore, Inco had made

commitments to remedy some of the problems caused by the refinery and had funded the CBRA. According to the motion judge at para. 133:

> In other words, the modification of behaviour, insofar as that can occur, has already begun. Certification of this action as a class proceeding will not materially add to it. Indeed, it might have the opposite effect in that it might cause Inco to become less co-operative which in turn would only prolong the process towards an overall remedy.

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[32] The motion judge also noted that in *Hollick*, the Supreme Court held that when dealing with environmental concerns other statutory avenues of redress are available and should be taken into account. These other avenues not only included the CBRA process and the MOE involvement but access to the regulatory regime under the *Environmental Protection Act*, R.S.O. 1990, c. E-19, and the Environmental Review Tribunal.

[33] Thus, the motion judge concluded that a class proceeding is not the preferable procedure for the resolution of the identifiable common issues.

**(e) Representative Plaintiff**

[34] Section 5(1)(e) of the *CPA* provides that it must be shown that the representative plaintiff:

> (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 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 the other class members.

The motion judge held that the appellant had not satisfied any of these requirements.

[35] The motion judge found that the ability of the representative plaintiff to bear the costs that would be necessary for the proper prosecution of the class action was an important consideration. The motion judge was also concerned that various cost orders had not been paid until the eve of the certification motion. He said, at para. 141, that this

"raises a concern about the financial resources which the representative can bring to bear in the prosecution of this action especially given that this litigation will be complicated, time consuming and expensive". The motion judge considered the appellant's description of his financial arrangements, such as seeking funding through public donations, private contributions, corporate donations and through legal counsel, to be vague. In his view, absent a commitment from the Class Proceedings Committee to provide funding, the representative plaintiff must have "concrete and specific alternative funding arrangements in place and [must] provide the specifics of those arrangements in the certification material" (at para. 143). The motion judge did note the "Catch 22" problem with this position in that the Committee will only consider an application for funding after a statement of defence has been filed despite the fact that defendants often withhold filing a statement of defence until after the issue of certification is resolved.

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[36] The motion judge was also of the view that the litigation plan was not sufficient as it was "long on generalities and short on specifics" (at para. 144). In particular, he stated:

> It does not address issues such as the experts that will be used, what investigations have been or are to be undertaken, witness interviews to be conducted, how documents are to be managed and, most importantly, how the myriad of individual issues that will remain, after the common issues are resolved, are going to be addressed. While some of the elements that are missing from the actual plan, such as the experts to be used, can be found from a review of the affidavit of Wolfgang Kaufman, filed on behalf of the plaintiff, I believe that a proper litigation plan should incorporate all of the required elements within the four corners of the plan itself.

[37] The motion judge was also concerned that the appellant might have a conflict with other members of the proposed class. The appellant was a resident of the Rodney Street area and likely had an interest in pursuing the claims "in a much more aggressive fashion" than other residents less affected by the contamination. Or as he said at para. 146:

> Put another way, those individuals who live in areas where the level of contamination is much lower, and who would, as a result, more likely have very small claims, might well be amendable to a resolution of those claims of a much different character than would the individuals with the larger claims. It seems to me, therefore that there is an obvious potential for conflict between these two groups.

[38] The motion judge pointed out that this was not simply a hypothetical concern. The appellant filed an affidavit that was highly critical of the Public Liaison Committee. The City of Port Colborne established the PLC as part of the CBRA process. It is composed of residents of the city and "[i]ts role is to solicit public input, inform the public, monitor the progress of the CBRA and provide input to Inco and the MOE" (at para. 79). A resident of Port Colborne who supported the work of the PLC came forward to dispute the allegations in the affidavit filed on behalf of the appellant but was rebuffed by the appellant's counsel. He therefore went to the City, which was then a defendant, and the City filed his affidavit as part of its material. The motion judge was of the view that the divergence in views expressed in the two affidavits "amply demonstrate[d] the potential for conflict among members of the proposed class going forward" (at para. 147).

[39] The motion judge did not believe that the problems with the litigation and potential for conflict could be dealt with after certification. He adopted a principle from *Southwestern Refining Co. v. Bernard*, 22 S.W.3d 425 (Tex. 2000) at 435: "we reject this approach of certify now and worry later."

[40] Accordingly, the motion judge dismissed the motion for certification. The appellant appealed to the Divisional Court.

**REASONS OF THE DIVISIONAL COURT**

[41] Writing for the Divisional Court, in reasons now reported at 183 O.A.C. 168, 6 C.E.L.R. (3d) 117, 44 C.P.C. (5th) 276, Mackenzie J. noted that the appellant was putting forward a very different case than the case that faced the motion judge. He had deleted the allegations respecting health hazards and limited the claim for damages to the devaluation of real property arising from contamination of the soil as a result of Inco's nickel refining operation. While Inco objected to the recasting of the certification motion, the Court was satisfied that there was no prejudice and that the appeal should be considered on its merits.

[42] The Divisional Court held, however, that the change in the nature of the claim did not detract from the thrust of the observations made by the motion judge about the identifiable class and preferable procedure requirements. It took the view that grounding the class in a geographic definition based on a guideline for background levels of nickel oxide was irrational and arbitrary (at para. 31). It held, in effect, that even when the claim was limited to diminution of property values, individual issues would overwhelm any common issues. The Court was also of the view that the appellant had not put forward any methodology appropriate to establish loss on a class wide basis. In summary, the Court found no error by the motion judge "on the criteria dealing with the class definition, regarding the common issues being overwhelmed by the individual claims and defences, and considering the preferable procedure requirement and

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advancing the … objectives of the *CPA*" (at para. 36), nor was there a reversible error in the motion judge's reasons as they applied to the narrowed claims put before the Court.

**ANALYSIS**

[43] The decision of the motion judge on a certification motion is entitled to substantial deference. The judges hearing these motions have developed a special expertise. Furthermore, the judges have often case-managed the proceedings and are therefore especially familiar with the factual context, as was the motion judge in this case. The decision as to preferable procedure is, in my view, entitled to special deference because it involves weighing and balancing a number of factors. In *Caputo v. Imperial Tobacco Ltd.*, [2005] O.J. No. 842 (Sup. Ct. J.) at para. 29, Winkler J. described the consideration of whether a class proceeding is the preferable procedure for determining the common issues as "a matter of broad discretion". As such, the reviewing court will intervene where the judge has made a palpable and overriding error of fact or otherwise erred in principle. Any errors of law are, however, reviewable on the correctness standard.

[44] However, in my view, less deference is owed to the decision of the motion judge in this case for the two reasons previously identified. The factual context has changed dramatically because the appellant has substantially narrowed the claim and there has been a shift in the legal landscape as a result of this court's decision in *Cloud*.

**(a) Causes of Action**

[45] While the cause of action requirement for certification is not directly in issue, it is important to properly identify the appellant's claim against Inco. The appellant has framed his claim in nuisance, negligence, trespass and strict liability in accordance with the doctrine in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

[46] With respect to negligence, the appellant claims at para. 31 of the Fresh as Amended Statement of Claim that Inco owed a duty of care to the persons living within close proximity of the refinery because it knew or ought to have known that a lack of sufficient care would cause damage to the class members. The claim sets out the various acts of negligence, such as the failure to provide adequate safety equipment or procedures to prevent the release of contaminants from the refinery and detect the release of contaminants, failure to warn class members of known hazardous emissions and failure to comply with specific statutory obligations under s. 14 of the *Environmental Protection Act* by causing contaminants to be discharged into the natural environment that have resulted in adverse effects.

[47] Inco takes the position that in framing the causes of action in the way that he did, the appellant is attempting to complicate the basis of liability. In this way, the appellant has artificially inflated the number and complexity of the common issues to make the

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action appear ripe for certification as a class proceeding. Inco submits in this court that its basis of liability is simple and straightforward given the doctrine in *Rylands v. Fletcher*. Inco appeared to concede that if nickel escaped from its property, and it clearly did, it is liable and the only real issue is damages, which will require individual assessments.

[48] In effect, the appellant has done the opposite of what the plaintiff did in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) where the plaintiffs elected to limit their allegations to systemic negligence without reference to the circumstances of any individual class member. The election to limit the allegations may have made the individual component of the proceedings more difficult in *Rumley*. It would be easier for any given complainant to show causation if the established breach were that the defendant residential school had failed to address her own complaint of abuse. However, McLachlin C.J.C. agreed at para. 30 with the British Columbia Court of Appeal that the plaintiffs in *Rumley* were "entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so".

[49] Inco's point is well taken. The appellant cannot broaden the grounds of liability to make a simple case appear complex to give the illusion that the case is suitable for certification. However, it is not clear that the appellant has done so in this case. The appellant is entitled to plead bases for negligence in the alternative. Inco has not yet pleaded to the claim. The appellant had no reason to assume that Inco would admit liability in accordance with the *Rylands v. Fletcher* doctrine.[1] In considering whether the appellant has met the preferable procedure requirement, the court must look to what is really in issue in the case. If based on what is truly in dispute the common issues are relatively unimportant, a class action will not be the preferable procedure and the action should not be certified.

[50] Inco also strongly contests the basis for the cause of action. It says that the evidence fails to demonstrate any connection between the 2000 MOE announcement of elevated nickel contamination and property values. Inco also says that this damage theory was advanced for the first time in this court; that the appellant is recasting its case and that this theory of liability was not pleaded anywhere in the appellant's statement of claim.

[51] There is no doubt that the appellant's theory of liability has evolved in an attempt to make the action more amenable to certification. I do not think it is correct, however, to say that this theory has not been pleaded. It seems to me that paragraph 24 of the Fresh as Amended Statement of Claim adequately captures the theory presented to this court:

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[1] I assume, as appears to be the case, that the *Rylands v. Fletcher* doctrine has not been totally subsumed in Canada by negligence or nuisance. See G.H.L. Fridman, *The Law of Torts in Canada* 2d 3d. (Scarborough: Carswell, 2002) at 218.

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> 24. The ongoing discharge of contaminants (including known carcinogens) and other activities at the Refinery, and the failure of the defendants to take proper or appropriate steps to prevent or minimize the effects of these contaminants and activities, has resulted in (but is not limited to) the following types of losses or injuries to property:
>
> …
>
> (b) loss of value of property owned, occupied or used by Class Members, including the complete devaluation of certain properties, and loss of the ability to sell, finance or mortgage numerous properties.

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[52] The appellant was only required to plead the facts upon which he relies, not the evidence, such as the 2000 announcement by the Ministry. There is no question that there is a conflict in the evidence about whether the 2000 MOE announcement did have an effect on property values. Inco says that its superior expert evidence shows that there is no connection. That is an issue for trial. Evidence is not admissible on the question of whether there is a cause of action pleaded within the meaning of s. 5(1)(a) of the *CPA*. See *Gariepy v. Shell Oil Co*. (2002), 23 C.P.C. (5th) 360 (Ont. Sup. Ct. J.) at paras. 34 – 37, *Markson v. MBNA Canada Bank* (2004), 71 O.R. (3d) 741 (Sup. Ct. J.) at para. 27, and *Macleod v. Viacom Entertainment Canada Inc.* (2003), 28 C.P.C. (5th) 160 (Ont. Sup. Ct. J.) at para. 5.

**(b) Identifiable Class**

[53] The motion judge and the Divisional Court held that the proposed class was arbitrary, both geographically and temporally. The main concern was that the proposed class was under inclusive; I will deal first with the motion judge's treatment of this issue and then treatment by the Divisional Court.

[54] The approach by the motion judge was largely a product of the nature of the claim as it was presented to him. He pointed out that using geographic boundaries to define the class had the effect of "arbitrarily both including and excluding areas where the soil contains the same levels of nickel of which the plaintiff complains" (at para. 100). Now that the claim has been limited to the decrease in property values, irrespective of actual levels of nickel oxide, the basis for a finding of geographical arbitrariness disappears. In light of *Hollick*, as discussed below, it is open to a plaintiff to define the class by using geographical boundaries notwithstanding that of necessity there will always be an element of arbitrariness in doing so.

[55] At the appeal before the Divisional Court, the appellant had narrowed his claim. The Divisional Court, however, did not take this change into account in their reasons. Rather, they adopted the position of the Crown, which was still a party before the Divisional Court, that "grounding of a class definition upon a MOE guideline number for background levels of nickel is itself irrational and arbitrary" (at para. 31). As reconfigured, the claim does not depend on nickel concentrations on the property of the proposed class members, but whether their property values decreased because of the 2000 MOE announcement. In view of this error, it is open to this court to determine whether the identifiable class requirement has been met.

[56] In my view, the appellant has met the identifiable class requirement. The appellant has defined the class by objective criteria. As in *Hollick* at para. 17, "a person is a member of the class if he or she owned … property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action." Again, to use the words of *Hollick* at para. 17, "while the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)." The class definition was slightly refined before this court as follows:

> All persons owning property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west, or where such person is deceased, the heir(s), executor(s), administrator(s), assign(s) or personal representative(s) of the estate of the deceased persons.

[57] That the class can be defined by objective criteria does not fully determine the identifiable class issue. The appellant must also show a rational relationship between the class and the common issues. In *Hollick*, at para. 21, McLachlin C.J.C. held that this requirement is not an onerous one, all that is required is "some showing" that the class is not "unnecessarily broad".

[58] *Hollick* involved an environmental claim arising from the operation of the Keele Valley landfill. The plaintiff claimed damages for noise and physical pollution and defined a geographical area comprising 30,000 people. In that case, the Court found that the fact that there were several hundred complaints from different parts of the area over a ten-year period satisfied the requirement of showing some rational relationship between the class and the common issues. It is apparent that the Court did not apply the unnecessarily broad requirement very strictly if all that was required was a showing that approximately two percent of the proposed class had complained.

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[59] In this case, the appellant has produced evidence that property values in the defined area have declined after the 2000 MOE announcement. That is sufficient to show that the class is not unnecessarily broad. While Inco disputes the value of the appellant's evidence, and has provided evidence to show that property values have not declined and indeed have kept pace with property values in other parts of the Niagara region, that factual dispute is a matter for trial. It is not to be resolved at the certification stage where all that is required is some showing of a relationship between the proposed class and the common issues.

[60] I am also satisfied that the identifiable class requirement was met despite the finding by the motion judge that the proposed class definition was under inclusive. The motion judge reasoned that just as the class should not be unnecessarily broad, "the corollary is also true and that is that the class should not be defined in a manner that includes individuals with claims while at the same time arbitrarily excluding others who have the same claims" (at para. 100). The motion judge found the class was under inclusive because the evidence showed comparable amounts of contamination outside the defined area. With the change in the nature of the claim this rationale no longer applies. The Divisional Court did not specifically address this issue.

[61] The principle that a proposed class should not be under inclusive must be approached with considerable caution. If this principle were applied too strictly, few environmental claims could ever be certified as class proceedings. The very nature of pollution is that its effects are often widespread and diffuse. Air and water contamination rarely, if ever, stop at fixed boundaries. It seems counterintuitive that Inco can defend against the certification motion by showing that it managed to contaminate an even wider area than that proposed by the appellant. The appellant submits that as a result of the 2000 MOE announcement that Port Colborne properties had higher than expected nickel oxide contamination, property values in Port Colborne declined. Limiting the class to Port Colborne is logical and reasonable. I note that there was no suggestion in *Hollick* that the identifiable class in that case was under inclusive despite the obvious point that the noise and air pollution could not have stopped at any precise boundary.

[62] Finally, the identifiable class requirement was met despite the temporal limitation. In this case, the appellant has chosen a date to avoid limitation period issues. The motion judge was concerned that this definition was arbitrary because individuals who formerly lived in Port Colborne prior to March 1995, but who only discovered the facts necessary to found a claim after that date, might have a valid claim but would be excluded from the proposed class. However, since the complaint has been refined to the reduction in property values, the temporal limitation is no longer a concern. There is now a logical connection between the claim and the definition of the class since the appellant now seeks to certify a class of owners whose property values appear to have been directly impacted by the 2000 MOE announcement of high levels of nickel on their lands. People

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no longer owning the land when the announcement was made can have no claim. It follows, of course, that the class definition must be further refined to limit the class to persons owning property since September 20, 2000 when the announcement was made. That announcement and the damage to property values resulting from the disclosure of Inco's contamination of the Port Colborne property has become the sole focus of the claim. People who owned lands before this date might well have a claim against Inco from the alleged contamination, but that is not the claim encompassed by this proposed class action. As indicated, it is not a legitimate complaint that the appellant has chosen to define the class in a way that makes the claim more amenable to certification. See *Rumley, supra* at para. 30.

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[63] Finally, in any event, it is now clear as a result of this court's decision in *Cloud, supra* at paras. 61, 81-82 and 95, that the possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

**(c) Common Issues**

[64] By the time the case reached the Divisional Court, the appellant had recast the common issues in the following manner:

> **A. COMMON ISSUES OF FACT**
>
> 1. (a) Is Inco the source of the elevated levels of nickel found on class members' lands?
>
> (b) Did nickel contamination (from atmospheric deposition or fill) in the Rodney Street Area originate from Inco?
>
> 2. Is there sufficient evidence to establish, without individual testing, that all class members' lands have been contaminated with nickel in excess of 43 ppm?
>
> 3. Is there sufficient evidence to establish, without individual testing, that class members' lands initially contained levels of nickel below or at 43 ppm and that no source other than Inco has significantly added to this level of nickel?

4. Can class members' claims for property damages be assessed by group or area and, if so, what is the quantum of damages?

## B. COMMON ISSUES OF LAW REGARDING INCO

5. Did Inco owe a duty of care to the class to prevent the ongoing discharge of nickel and, if so, what duty was owed?

6. What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of nickel?

7. Did Inco breach the standard of care referred to in issue 6 above?

8. Did the ongoing discharge of nickel by Inco amount to a public nuisance?

9. Did the ongoing discharge of nickel by Inco amount to a trespass?

10. Is Inco strictly liable to the class for the ongoing discharge of nickel as a result of a failure to prevent the escape of a dangerous substance (*Rylands v. Fletcher*)?

…

## C. PUNITIVE DAMAGES

14. Did the defendants' breach of conduct justify an award of punitive damages to the class, and if so, what amount of punitive damages is appropriate?

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[65] I did not understand Inco to dispute that there remained common issues despite the recasting of the claim. Inco does, as noted above, take the position that many of the common issues are of no real moment to the litigation because the case will stand or fall on the *Rylands v. Fletcher* claim. That is a matter to be considered in discussing the preferable procedure. The common issue requirement is a "low bar" to certification: *Cloud, supra* para. 52. As Goudge J.A. wrote in *Cloud* at para. 53, "an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and event though many individual issues remain to be decided after its resolution". Further, as he wrote at para. 58, "the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure."

[66] In my view, despite the fact that the claim is now much narrower, the appellant has met the common issue requirement.

**(d) Preferable Procedure**

[67] In *Cloud*, at paras. 73-75 Goudge J.A. identified a number of principles that apply in determining whether the plaintiff has met the preferable procedure requirement. I would summarize them as follows:

> 1. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
>
> 2. The analysis must keep in mind the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.
>
> 3. This determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole.
>
> 4. The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.

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[68] I will consider the three aspects of the preferable procedure requirement bearing in mind these principles.

***(i) Judicial economy***

[69] Inco submits that the resolution of this case is determined by the result in *Hollick* where the Supreme Court found that a similar environmental claim did not meet the preferable procedure requirement. In *Hollick, supra* at para. 32 McLachlin C.J.C. found that any common issues were "negligible in relation to the individual issues". This finding turned on the fact that "there [was] no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition". Thus, the plaintiff could not meet the judicial economy advantage of a class proceeding. It appears that the claim in *Hollick* was broadly framed, alleging that the air and noise pollution unreasonably interfered with the use and enjoyment of the class members' land. See the reasons of the Divisional Court in *Hollick* reported at (1998), 168 D.L.R. (4th) 760 para. 10 and reasons of this court reported at (1999), 181 D.L.R. (4th) 426. At paras. 22 and 23 of the reasons of the Court of Appeal in *Hollick*, Carthy J.A. said the following:

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. A trial judge dealing with liability as a common issue would immediately discover that there was no economy in the proceedings and that the trial would be unmanageable. Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified. To add to the already impossible task, complaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property or caused personal discomfort justifying compensation.
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation. An issue such as "Did the defendant emit pollutants into the

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> atmosphere over a six-year period, and if so, when, and to what extent?" would result in a virtual Royal Commission into the operation of this landfill site without any measurable advance in the litigation. One could assume from the evidence of complaints that odours have escaped this site from time to time over the years. The issue is whether these odours caused sensible personal discomfort or interfered with the enjoyment of property to such an extent that the individuals affected are deserving of compensation.

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[70] As the claim was originally framed in this case, a class proceeding would also not have the advantage of judicial economy. The individual claims of injury to health and related claims would dwarf the resolution of the common issues. With the narrowing of the claim that is no longer the case. The claim now concerns the single issue of reduction in property values. Inco argues, however, that even the resolution of this claim will require individual assessments since property values are highly idiosyncratic. But, that submission fails to meet the fundamental point of the appellant's claim. The appellant has staked his claim on the propositions that public knowledge of nickel contamination in the Port Colborne area has had a detectable impact on property values in that area and that as the source of the contamination, Inco must pay damages to owners whose property values have fallen. As the appellant put the issue in para. 22 of his factum, "what has been 'overlaid' on each property's value is a decline associated with the announcement of high levels of contamination". The appellant may or may not be able to demonstrate these propositions, but they constitute a substantial element of each class member's claim. If the appellant is able to demonstrate this effect, the only individual issue remaining will be for each class member to show the amount of the effect on his or her property. If the appellant is unable to demonstrate this connection, it would be open to the trial judge to decertify the action pursuant to s. 10 of the *CPA*.

[71] Framed in this way, the appellant's case resembles *Rumley* and *Cloud* rather than *Hollick*. Resolution of the common issues will determine the question of Inco's liability for the nickel oxide pollution and whether knowledge of that pollution impacted on property values in the defined area. I would not describe resolution of these issues as negligible in relation to the individual issues. Even if Inco is right and the case does depend upon resolution of the *Rylands v. Fletcher* issue, that is not an inconsequential matter. To make out the strict liability claim based on that doctrine any plaintiff would have to show a non-natural use of land, the escape of something (here, nickel oxide) likely to cause mischief, and damage. As Goudge J.A. said in *Cloud*, at para. 86: "Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes."

[72] The result in *Rumley* is also instructive. *Rumley* involved alleged sexual, physical and emotional abuse at a residential school for children with disabilities. In *Rumley*, the court found that the preferable procedure requirement was met even though under the British Columbia legislation the common issues must predominate over those affecting only individual class members. As McLachlin C.J.C. said in *Rumley, supra* at para. 36:

> While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members.

[73] The same can be said here. There is no dispute that the refinery emitted nickel oxide. The essential question is whether Inco is liable in tort for those emissions and whether the emissions affected property values of the class members. Just as injury and causation would have to be litigated in individual proceedings following resolution of the common issues in *Rumley*, so too will there have to be individual litigation of the relatively narrow issue of quantifying the effect on particular properties. Furthermore, the individual issues of injury and causation in *Rumley* would seem to me to be much more substantial than the individual issues that would remain in this case.

[74] As was said in *Cloud* at para. 84, "[t]his assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial."

[75] Inco also relies upon this court's decision in *Chadha v. Bayer Inc*. (2003), 63 O.R. (3d) 22. In *Chadha*, the plaintiff alleged that the manufacturers of iron oxide pigments had entered into an unlawful conspiracy to fix the price of the pigments, thus illegally increasing the price of bricks and paving stones that use the pigments. The plaintiff alleged that this increase in price had been passed through to purchasers of new homes. On the certification motion, a crucial issue was whether the loss component of liability could be proved on a class-wide basis. The plaintiff's expert simply assumed that increased cost had been passed on to consumers. There was no evidence to support that theory and no methodology suggested for proving it or dealing with the variables that affect the end price. Therefore, proof of loss as a component of liability could not be a

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common issue. The only remaining common issues in the case were not sufficient to justify a finding that a class proceeding was the preferable procedure.

[76] There are clearly some similarities between *Chadha* and this case. Inco disputes that the 2000 MOE announcement concerning nickel contamination caused any loss to Port Colborne property owners and submits that property valuation is an idiosyncratic exercise dependent upon a large number of variables. Unlike *Chadha*, however, the appellant has adduced expert evidence to show a link between the 2000 MOE announcement and the decline in property values. That evidence purports to demonstrate a decline in property values in Port Colborne as compared to other comparable communities in the Niagara Region during the relevant time, and shows that the only relevant event during the time was the announcement about nickel contamination. While Inco disputes the value of this evidence, the certification motion is not the place for resolving that controversy. Contrary to the holdings by the motion judge and the Divisional Court this is not an example of "certify now and worry later." (See reasons of the motion judge at para. 148 and the Divisional Court at para. 34).

[77] If the appellant can prove that Inco is liable for the loss in value of the property there would then have to be individual assessments. But, this is not unusual in class proceedings. See *Cloud*, at para. 90. Alternatively, this may be a case for an aggregate assessment of damages as contemplated by s. 24 of the Act if the appellant can show that every member of the class was adversely affected by the disclosure of the nickel pollution by Inco. See *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (Sup. Ct. J.) at paras. 63 and 64.

***(ii) Access to justice***

[78] In *Hollick*, the Supreme Court of Canada also found at para. 33 that allowing a class proceeding in that case would not serve the interests of access to justice in relation to the alleged pollution arising from the Keele Valley landfill site. The City of Toronto operated the site under a Certificate of Approval issued by the Ministry of the Environment. The Certificate required the City to establish a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "offsite impact". See reasons of the Supreme Court of Canada in *Hollick* at para. 3. McLachlin C.J.C. described the Trust Fund as "an ideal avenue of redress" (at para. 33) for the many small claims that would be superior to full-blown litigation. She noted that no claims had been made against the Fund which suggested to her that the claims are "either so small as to be non-existent or so large as to provide sufficient incentive for individual action" (at para. 33). She did, however, point out that "the existence of a compensatory scheme under which class members can pursue relief is not [in] itself grounds for denying a class action -- even if the compensatory scheme

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promises to provide redress more quickly." The existence of such a scheme is, however, one consideration to take into account when assessing concerns of access to justice.

[79] Inco makes the same point here relying, as did the motion judge, on the existence of the CBRA. The CBRA provides for remediation but does not provide any kind of monetary compensation. The motion judge recognized that "standing alone" the CBRA was not a viable alternative but it should be considered as part of the "available alternative procedures, in conjunction with other alternatives such as joinder, tests cases and the like" (at para. 131). Now that the appellant has limited his claim to loss of property value, the argument that the CBRA provides an adequate alternative is even stronger in some respects. The purpose of remediation is to alleviate the effects of the pollution by the addition of substances to existing soil to stabilize soil conditions, the use of certain vegetation that naturally absorb nickel from soil or the removal of contaminated soil. In theory, remediation should remove the impact of the pollution, including the impact on property values.

[80] Despite the strong argument supporting the alternative of the CBRA, I am satisfied that it does not address the access to justice concerns. The CBRA does not address the core issue of this lawsuit: the alleged widespread damage to land values throughout Port Colborne caused by the past pollution. Remediation is limited to qualifying individual properties with significant contamination. It is open to the class members to argue that it does not address the injury already caused. Inco may be able to show that land values may rebound after remediation, but that is an issue for the trial.

[81] The motion judge was also concerned with the possibility for the premature or precipitous determination of claims because of "the possibility that diseases and conditions will manifest themselves at some future times" (at para. 132). The premature determination of claims is no longer a concern since the health claims have been dropped from the proposed class proceeding.

[82] The motion judge also took into account at para. 130 that "the entire situation in Port Colborne is currently under the watchful eye of the MOE". He noted that the MOE had "already made orders requiring Inco to take certain remedial steps". I do not see that the continued involvement of the Ministry is a serious factor in addressing access to justice concerns. The Ministry's involvement is prospective. It may prevent further contamination in this one location but there is no suggestion that the Ministry's involvement can address monetary losses from the past pollution.

[83] Finally, the motion judge took into account that there may be many very large claims and that those claimants could band together to pursue their claims, presumably through joinder or a test case. The motion judge suggested that the smaller claimants might well benefit from findings made in these large lawsuits. The large claims would appear to fit into two classes. Claimants, such as people within the Rodney Street area

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who allegedly suffered the most serious health effects and owners of agricultural lands who might have large claims for damage to crops. The large health claims are no longer part of the class proceeding. There is mention in the record of one lawsuit involving the Augustine family, but that action, which was launched in the mid-90's and relates to agricultural land, appears to be stalled at the discovery stage. The evidence is conflicting as to the reason for the delay. It is far from clear that this action or any like it could provide any alternative to the class proceeding for the vast majority of the members of the class. These claims involve entirely different and much more complex issues.

[84] On the other hand, it may well be the case that many of the people whose property values were most seriously impacted, such as the Rodney Street owners, are also the most vulnerable and least able to prosecute their individual claims. Many of them are "elderly persons and others on fixed incomes, as well as partially employed or unemployed persons, persons with disabilities and recipients of social assistance" (reasons of motion judge at para. 22). Obviously, not all of these people would be property owners and would therefore not fall within the class in any event. However, those who do would find it extremely difficult to mount an action against Inco. In *Cloud*, at para. 88 Goudge J.A. quoted a passage from *Rumley* at para. 39 that has some application to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

### *(iii) Behaviour modification*

[85] The motion judge also found that certifying the class action would not achieve the goal of behaviour modification since the MOE was already involved and Inco had established the CBRA. I have concerns with two aspects of the motion judge's reasoning in coming to this conclusion.

[86] First, according to the motion judge, Inco had "begun to take account of the costs arising from the operations of the Refinery….In other words, the modification of behaviour, insofar as that can occur, ha[d] already begun" (at para. 133). The motion judge also noted that in *Hollick*, McLachlin C.J.C. at para. 35 took into account the other avenues by which the complainant could ensure that the defendant City took full account of the costs of its actions, outside the City's Small Claims Court Trust Fund, through procedures under Ontario environmental legislation. The same avenues are available to the plaintiffs in this case outside the CBRA. In particular, under the *Environmental Protection Act*, citizens affected by a cleanup order have a statutory right to appeal the

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order to the Environmental Review Tribunal, and from there, to the Divisional Court on a question of law and to the Minister on a question of fact or policy.

[87] In my view, the motion judge took too narrow a view of the goal of behaviour modification. In *Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 (Ont. Div. Ct.) at 514, Moldaver J. adopted the following description of this goal: "modifying the defendants' behaviour so as to inhibit misconduct by those who might ignore their obligations to the public". In a similar vein, McLachlin C.J.C. at para. 29 of *Western Canadian Shopping Centres, supra* described how

> class actions serve efficiency and justice by ensuring that actual and *potential* wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. [Emphasis added].

[88] Thus, modification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well suited to class proceedings. To repeat what McLachlin C.J.C. said in *Western Canadian Shopping Centres, supra* at para. 26 "Environmental pollution may have consequences for citizens all over the country."

[89] Second, the motion judge speculated that certification might have the effect of making Inco less co-operative. In my view, it was an error in principle for the motion judge to take into account the possibility that Inco might become less co-operative if the action were certified, thus delaying the implementation of the CBRA. I do not agree with the proposition that property owners must abandon their legal rights and their right to be made whole in order to buy the co-operation of a defendant they say has caused widespread harm to the community. Furthermore, there is little evidence to support this suggestion and it seems inconsistent with Inco's approach to its responsibilities in Port Colborne. The following is drawn from para. 13 of Inco's factum in this court:

> The appellant did not dispute that since the creation of the MOE, Inco has scrupulously complied with environmental standards and voluntary abatement measures. One of the appellant's own witnesses—a former MOE employee assigned to monitor Inco's facility in the 1970s and 80s—

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> testified that Inco actively pursued voluntary abatement efforts, never installed anything without proper regulatory approval, never failed to install anything which had been approved, and never violated any conditions of approval.

In any event, even though the CBRA is a voluntary program, the motion judge noted the Ministry's indication that, "if Inco were to attempt to withdraw from the CBRA the MOE would use its regulatory authority to require Inco's continued participation" (at para. 130).

[90] While the impact of the narrower action will be more restrained, I am satisfied that a class proceeding can achieve the goal of behaviour modification in view of the other inadequate alternatives.

[91] To conclude, I am satisfied that the narrower claim meets the preferable procedure requirement.

**(e) Representative Plaintiff**

[92] The motion judge held that the appellant failed all three requirements for a representative plaintiff. Those requirements are fair and adequate representation, a workable litigation plan, and no conflict of interest on the common issues. The Divisional Court did not consider this issue. In my view, the motion judge erred in principle in his approach to this question.

[93] In *Western Canadian Shopping Centres, supra* at para. 41 McLachlin C.J.C. explained the concept of adequate representation as involving factors such as

> the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[94] In this case, the motion judge unreasonably emphasized the appellant's ability to pay any costs incurred. As the motion judge recognized, the appellant was unable to access funding through the Class Proceedings Committee because Inco and the other [then] defendants had not filed a statement of defence. Nevertheless, the appellant had

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paid significant cost orders made against him, albeit somewhat tardily. It was an error in principle to hold, as the motion judge did, that it was incumbent on the appellant to have "concrete and specific alternative funding arrangements in place and to provide the specifics of those arrangements in the certification material" (at para. 143). There is nothing in the legislation itself that imposes such a rigorous requirement on the plaintiff. The capacity of the representative plaintiff to fund the litigation is merely one factor in determining whether the plaintiff can adequately represent the class.

[95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (Sup. Ct. J.). In referring to the reasons of the motion judge in this case and the statement from *Western Canadian Shopping Centres* about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following at paras. 91 and 94:

> The statements in [*Western Canadian Shopping Centres*] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA.
>
> …
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[96] If there are large costs orders outstanding when the certification motion is heard they can be taken into account by the motion judge. However, in this case the

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outstanding orders had been paid. I agree with Cullity J. that there is no requirement under our legislation for the plaintiffs to demonstrate that they have concrete and specific funding arrangements.

[97] The motion judge was also not satisfied with the litigation plan. In my view, the motion judge took an unreasonably rigid view by requiring that all the details for the litigation be "within the four corners of the plan itself" (at para. 144). The elements of the litigation plan, especially for litigating the narrower issues with which we are now concerned, can be found in the litigation plan and in the affidavit of Mr. Kaufmann. Obviously, it would be easier for the judge hearing the certification motion to have all the elements of the plan in one place, but it would not be consistent with the generous approach required by the cases, especially *Cloud*, to defeat a motion for certification because there are two sources for the litigation plan.

[98] The motion judge also erred in principle in finding that the appellant had a conflict of interest. This finding was based in part on the possibility that as a resident of the Rodney Street Area the appellant was likely to be more aggressive than other residents of Port Colborne who were less affected by the pollution and who may have suffered less injury. In *Western Canadian Shopping Centres*, at para. 41 McLachlin C.J.C. held that the court should be satisfied that the representative plaintiff "will vigorously and capably prosecute" the claim. It would be an odd result if this appellant's obvious interest in vigorously prosecuting the claim was seen as disqualifying him as the representative plaintiff. I think the court should be more concerned with a "straw man" plaintiff who has no particular interest in the litigation. In any event, it was mere speculation that the appellant's keen interest in pursuing the litigation would lead to a conflict of interest. If it turns out that the appellant is not properly representing the interests of the class, the court can take steps at that point. For example, s. 14 of the *CPA* provides that to "ensure the fair and adequate representation of the interests of the class … the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding."

[99] The motion judge also relied upon the fact that an interested citizen and supporter of the CBRA was unable to obtain assistance from the appellant's counsel in putting his position before the court. It is not surprising that residents of Port Colborne will have different views about the efficacy of the CBRA and similarly different views about proceeding by way of a class proceeding. However, the conflict of interest with which the *CPA* is concerned in s. 5(1)(e)(iii) is "an interest in conflict with the interests of other class members" "on the common issues". There was no evidence to suggest that the difference of opinion about the efficacy of the CBRA represented a conflict of interest on the common issues. Any residents of Port Colborne who disagree with pursuing this litigation may opt out of the class proceeding.

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[100] In my view, the appellant has met the representative plaintiff requirements in s. 5(1)(e).

## COSTS

[101] The motion judge awarded significant costs against the appellant and there was considerable argument in this court about the principles that should apply to the awarding of costs against the proposed representative plaintiff on certification motions. While the court received very helpful submissions from the appellant, the respondents and the intervenors, in light of my conclusion on the certification motion, I need not address those issues.

## DISPOSITION

[102] In my view, the appellant has shown that the action satisfies the requirements for certification under s. 5(1) of the *CPA*. Accordingly, I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order certifying the action consistent with these reasons. The case should be remitted to the supervision of the Regional Senior Justice or to such judge as he directs to manage the action.

[103] The parties may make written submissions as to costs here and below. Those submissions are to be exchanged and filed within three weeks of the release of these reasons. Within a further two weeks, each party may then file a written reply. There will be no costs order for or against the intervenors.

Signed: "M. Rosenberg J.A."
"I agree R.Roy McMurtry C.J.O."
"I agree E.E. Gillese J.A."

**RELEASED: "RRM" November 18, 2005**

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# Tab 17

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**SUPREME COURT OF CANADA**

**CITATION:** Sharbern Holding Inc. *v.* Vancouver Airport Centre Ltd., 2011 SCC 23, [2011] 2 S.C.R. 175

**DATE:** 20110511
**DOCKET:** 33280

**BETWEEN:**

**Sharbern Holding Inc.**
Appellant
and
**Vancouver Airport Centre Ltd., Larco Hospitality Management Inc., MM&R Valuation Services Inc. doing business as HVS International — Canada and HVS International — Canada**
Respondents

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

**REASONS FOR JUDGMENT:** (paras. 1 to 178)

Rothstein J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ. concurring)

Sharbern Holding Inc. *v*. Vancouver Airport Centre Ltd., 2011 SCC 23, [2011] 2 S.C.R. 175

**Sharbern Holding Inc.** *Appellant*

v.

**Vancouver Airport Centre Ltd., Larco Hospitality Management Inc., MM&R Valuation Services Inc. doing business as HVS International — Canada and HVS International — Canada** **Respondents**

**Indexed as: Sharbern Holding Inc. *v.* Vancouver Airport Centre Ltd.**

**2011 SCC 23**

File No.: 33280.

2010: October 6; 2011: May 11.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Commercial law — Property — Disclosure statements — Company developing and marketing two hotels on same property — Purchasers of strata units*

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*in each hotel entering into differing agreements with developer — Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units — Hilton not performing as expected and owners of Hilton units incurring losses — Whether developer liable for misrepresentation under B.C. Real Estate Act for material false statements — Whether developer able to avail itself of statutory defence — Whether deemed reliance under Real Estate Act was rebuttable — Real Estate Act, R.S.B.C. 1996, c. 397, s. 75.*

*Torts — Negligent misrepresentation — Disclosure statements — Company developing and marketing two hotels on same property — Purchasers of strata units in each hotel entering into differing agreements with developer — Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units — Hilton not performing as expected and owners of Hilton units incurring losses — Whether developer liable for negligent misrepresentation under common law.*

*Fiduciary duty — Agent — Company developing and marketing two hotels on same property — Purchasers of strata units in each hotel entering into differing agreements with developer — Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units — Developer entering into non-competition agreements with owners of Marriott units on behalf of owners of Hilton units without prior consent — Hilton not performing as expected and owners*

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*of Hilton units incurring losses — Whether developer owed a fiduciary duty to owners of Hilton units — If so, whether developer was in breach of its fiduciary duty.*

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The respondent developer Vancouver Airport Centre Ltd. ("VAC") was incorporated for the purpose of developing and marketing two hotels on the same property: a Marriott hotel and a Hilton hotel. The two hotels were essentially identical and were joined by a concourse of shops and other amenities. Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC. The two hotels were marketed and developed at different times, resulting in differences in the financial arrangements offered to the purchasers of each hotel. VAC offered purchasers in the Marriott hotel a guarantee and VAC was entitled to a monthly management fee of a percentage of the gross rental revenue as well as an incentive management fee. VAC did not offer purchasers in the Hilton hotel a guarantee, and VAC's monthly management fee for the Hilton was lower than for the Marriott. The Hilton Disclosure Statement did not disclose the differences in financial arrangements as between the Hilton Owners and the Marriott Owners. The Hilton Owners incurred losses.

S represents a class of investors who purchased strata lots in the Hilton hotel from VAC. S claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton Owners and those given to the Marriott Owners. S alleged that the differences resulted in an undisclosed

conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels.

The trial judge concluded that the undisclosed differences in financial arrangements gave rise to at least a potential conflict of interest, particularly in view of the potential for common management of the two hotels. She then concluded that VAC negligently misrepresented both the absence of an actual or potential conflict of interest and the nature of the agreements between VAC and the Marriott Owners and found both misrepresentations material. While her reasons were not entirely clear, it appears she found VAC liable both under common law and under the *Real Estate Act*. The trial judge concluded that under the *Real Estate Act* the investors were deemed to rely on material misrepresentations by VAC and that such deemed reliance was a non-rebuttable presumption. The trial judge also found that in its capacity as manager, VAC was a fiduciary of the Hilton Owners, that a conflict existed with respect to VAC's interests as between the Hilton and the Marriott, and that VAC was liable for breach of fiduciary duty because it did not disclose that conflict. She also found that VAC was liable for breach of fiduciary duty as manager.

The Court of Appeal allowed VAC's appeal. The appellate court found that the details of the financial arrangements between the two hotels were not material. As to breach of fiduciary duty, the Court of Appeal determined that there was no breach by VAC.

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*Held*: The appeal should be dismissed.

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Both the *Securities Act* and the *Real Estate Act* governed VAC's disclosure obligations. VAC's disclosure obligations were limited to disclosing specific prescribed matters. VAC issued one document that combined the two Acts' requirements: the Hilton Disclosure Statement.

S claims that VAC is liable for misrepresentations found in the Hilton Disclosure Statement which resulted in the non-disclosure of a material conflict of interest leading to two potential causes of action: one under s. 75 of the *Real Estate Act*, and the other at common law under the tort of negligent misrepresentation.

Under the *Real Estate Act*, a material false statement in a disclosure statement will result in the developer being liable to investors for any resulting loss they may have sustained. However, s. 75 also contains a defence which provides that if the developer had reasonable grounds to believe and did believe that the material false statement was true, it would not be liable.

A materiality standard is a legislated and regulatory balancing between too much and too little disclosure. The jurisprudence has recognized that it is not in the interests of investors to be buried in trivial information that will impair decision making. The *Real Estate Act* does not define what is meant by the term "material" when it is used in the context of the "material false statement" required for liability

under s. 75. Information is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision to invest. In other words, information is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. Materiality is a question of mixed law and fact, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention. In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. The next step is to consider the omitted information against the backdrop of what was disclosed. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. Investors' behaviour evidence is relevant to the materiality assessment. Evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.

The trial judge erred in law with respect to assessing the materiality of the alleged false statements in three ways. First, once she had determined that the differences in financial arrangements created a potential or actual conflict of interest, she found that there was an obligation to disclose them as if they were inherently

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material. This approach misinterprets the statutory requirement as well as the test for materiality. While it is true that in certain situations, common sense inferences will be sufficient to establish materiality, in this case, there was evidence to support the opposite inference that the omitted information was not material in the context of what had already been disclosed. Therefore, a more detailed analysis of the evidence constituting the total mix of information was required in order to make a determination about what a reasonable investor would have considered significant.

Second, the trial judge erred by reversing the burden of proof of materiality from the plaintiff to the defendant. Once the trial judge was satisfied that S had proven the existence of a conflict of interest, she turned to VAC to show why it was not material. The result was that she made the determination that the conflict of interest was material without requiring S to satisfy its burden, as plaintiff, of proving materiality.

Third, the trial judge erred when she failed to consider all of the evidence relevant to the determination of materiality. Relevant evidence was available concerning the general economic climate at the time the strata lots were sold, the financial arrangements offered to Hilton Owners, the disclosure made by VAC of common management and risk factors, and the limited extent of VAC's ability to act upon the differences in financial arrangements in its own interests. There was also evidence of the conduct of fully informed investors, either prior to making their investment decisions or subsequent to their investment, when they had learned of the

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guarantee given to the Marriott Owners. This evidence was relevant to the trial judge's materiality assessment.

While S was not required to prove that investors would not have purchased the Hilton strata lots had they known about the differences in financial arrangements, it did have the burden of proving materiality, on a balance of probabilities. S failed to adduce evidence to prove the materiality of the differences in financial arrangements.

Even if VAC were shown to have made a material false statement, the statutory defence contained in s. 75(2)(b)(viii) of the *Real Estate Act* would preclude VAC from being found liable under s. 75(2). To rely on the defence, VAC had to show that it subjectively believed the representations it made were true and that it objectively had reasonable grounds for such a belief. The statutory defence does not appear to have been considered by the trial judge. Evidence of common industry practices and of VAC's limited practical means and incentives to prefer the Marriott hotel over the Hilton hotel indicates that VAC subjectively believed, and objectively had reasonable grounds to believe, that it was making true statements when it did not disclose the details of the differences in financial arrangements and represented in the Hilton Disclosure Statement that it had entered into agreements with the Marriott that were similar in form and substance to those governing the Hilton and that it was not aware of any existing or potential conflicts of interest.

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The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase. While the *Real Estate Act* did not expressly provide for a rebuttable presumption, the use of the word "deemed" does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable.

VAC is also not liable for the tort of negligent misrepresentation. The trial judge did not consider whether VAC breached the standard of care. S's failure to demonstrate how VAC breached the standard of care is fatal to its common law claim.

Although VAC, as manager of the Hilton, had fiduciary obligations to S, S did not discharge its onus of proving a breach of fiduciary duty. The nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. When VAC was acting as an issuer, its relationship with S was not fiduciary in nature. However, when VAC began acting as S's agent under the Hotel Asset Management Agreement, a fiduciary relationship arose. VAC's position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to S.

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The disclosure obligations with respect to VAC's fiduciary duty are different from the disclosure obligations under the *Real Estate Act*. As a fiduciary, VAC was obligated to disclose any material facts or information, such as if there was a substantial risk that VAC's fiduciary relationship with the Hilton Owners would be materially and adversely affected by VAC's own interests or by VAC's duties to another. VAC's statutory duty was simply to disclose to investors certain prescribed information, without making material false statements. It is also necessary to inquire whether circumstances changed during the course of the fiduciary relationship such as to require VAC to make additional disclosure and obtain renewed consent.

S did not adduce evidence to establish that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC. S also failed to establish the materiality of the non-competition agreement implemented by VAC to prevent the Hilton and Marriott hotels from undercutting each other's room rates. The evidence before the trial court could not support a finding that VAC was liable for a breach of fiduciary duty either for failing to disclose the differences in financial arrangements or in implementing the non-competition policy.

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**Discussed:** *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331; *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), rev'g 512 F.2d 324

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(1975); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; **referred to:** *Sparling v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4th) 682, aff'd [1986] 2 S.C.R. 537; *Harris v. Universal Explorations Ltd.* (1982), 17 B.L.R. 135; *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 189 B.C.A.C. 251; *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *St. Peter's Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616; *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394; *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *McGuire v. Graham* (1908), 11 O.W.R. 999; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631.

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*Stephen R. Schachter, Q.C.*, and *Geoffrey B. Gomery*, for the appellant.

*Peter A. Gall, Q.C.*, *Donald R. Munroe, Q.C.*, *M. Ali Lakhani* and *Edward Iacobucci*, for the respondents.

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The judgment of the Court was delivered by

ROTHSTEIN J. —

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I. Introduction

[1] When securities are offered to the general public, the rule of *caveat emptor* no longer applies. Securities legislation imposes on issuers a statutory duty of disclosure. That duty may vary in detail from one Act to another or from one jurisdiction to another. However, the common theme is that issuers must disclose to potential investors information affecting their investment decision. Even so, issuers are not subject to an indeterminate obligation, such that an unhappy investor may seize on any trivial or unimportant fact that was not disclosed to render an issuer liable for the investor's losses. Rather than issuers being required to provide unlimited disclosure, disclosure obligations have been enacted to provide a balance between too much and too little disclosure.

[2] The appeal arises from a class action lawsuit in which the appellant, Sharbern Holding Inc. ("Sharbern"), represents a class of investors who purchased strata lots in a Hilton hotel (the "Hilton Owners") from the respondent developer, Vancouver Airport Centre Ltd. ("VAC"). Sharbern claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton Owners, and those given to purchasers of strata lots in the adjacent Marriott hotel (the "Marriott Owners") that VAC was developing on the same property. Sharbern alleged that the differences resulted in an undisclosed conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels.

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[3] Two main questions are raised on appeal. The first is whether VAC is liable for alleged misrepresentations contained in the offering memorandum and disclosure statement (the "Hilton Disclosure Statement") that VAC used to sell the Hilton strata lots. The second is whether VAC is liable for breach of fiduciary duty when it acted as manager of the Hilton under an agreement (the "Hotel Asset Management Agreement") entered into between VAC and the Hilton Owners, including Sharbern. In the reasons that follow, I conclude that Sharbern's claims fail on both grounds, and I would dismiss the appeal.

[4] As to the first question, I am of the opinion that the trial judge erred in law in concluding that VAC is liable for misrepresentation, either under the statutory cause of action found in the *Real Estate Act*, R.S.B.C. 1996, c. 397, or under the common law of negligent misrepresentation.

[5] Under s. 75 of the *Real Estate Act*, VAC could only be liable if it is found to have made material false statements to Sharbern, and cannot rely on the defence contained in the section. I am of the respectful view that the trial judge erred in law with respect to the materiality of the alleged false statements. The legal errors were: treating the conflict of interest as inherently material; reversing the burden of proof of materiality from the plaintiff to the defendant; and failing to consider all of the evidence relevant to the determination of materiality. She further erred in not considering the statutory defence which would avail to the benefit of VAC.

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[6] Although this Court has previously dealt with the issues of materiality and disclosure obligations in the context of securities law, this case represents the first time that the Court has considered the common law test for materiality. Even though the test is not new in Canadian law, this case represents an opportunity to clarify important aspects of the test.

[7] Under the common law of negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there is no evidence capable of supporting a finding of breach of standard of care, her finding under the common law of negligent misrepresentation cannot stand.

[8] As to the second question, although VAC, as manager of the Hilton, had fiduciary obligations to Sharbern, Sharbern did not discharge its onus of proving a breach of fiduciary duty. A fiduciary is required to disclose material facts and information, and conflicts of interest. VAC's position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to Sharbern. The trial judge again failed to consider all the relevant evidence on the issue of materiality that was before her, and Sharbern did not adduce evidence to support a finding that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC.

II. Facts

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A. *The Hilton and Marriott Hotels*

[9] VAC is owned by Larco Investments Ltd. ("Larco Investments"), a company involved in real estate and hotel development. By the mid 1990s, there was an extraordinary boom in the Richmond hotel market. Larco Investments already owned the Best Western Richmond Inn in that market, and decided to develop and market two additional hotels on the same property. It incorporated VAC for that purpose. The Marriott hotel, a strata-titled hotel tower marketed through an offering memorandum and disclosure statement issued September 11, 1996, opened for business in June 1998. A second, identical strata-titled hotel tower was built and marketed through the Hilton Disclosure Statement issued February 3, 1998. It opened as a Hilton hotel in June 1999. The two hotels were essentially identical and were joined by a concourse of shops and other amenities.

[10] Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC, whereby VAC was given exclusive management of the hotel for 20 years, with an option to renew. In return, VAC contracted to, among other things, use commercially reasonable efforts to rent out the strata units, maximize each owner's proportionate share of monies available for distribution, and faithfully perform its duties and responsibilities and supervise and direct hotel operations.

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[11] The two strata unit hotels were marketed and developed at different times, resulting in differences in the financial arrangements offered to the purchasers of each hotel. Since the popularity of marketing a strata unit hotel in an urban area solely for the income stream was unknown, VAC offered purchasers in the Marriott hotel a gross operating guarantee. For the first five years of the hotel's operation, VAC guaranteed a gross return of 12% of the purchase price of the owner's unit, so that each strata lot owner's annual proportionate share of funds available for distribution after projected operating expenses and other deductions was a projected net return of 8.29%.

[12] Under the Hotel Asset Management Agreement entered into between the Marriott Owners and VAC, VAC was entitled to a monthly management fee of 5% of the gross rental revenue, and an incentive management fee equal to 25% of the amount by which the owners' net annual return on investment exceeded 8%.

[13] VAC's evidence was that it intended to market the Hilton with a guaranteed rate of return, but was advised by Larco Investments' securities solicitor that changes to securities regulations precluded making reference to a guarantee in the Hilton Disclosure Statement. Instead, VAC marketed the Hilton on the basis of projections. In an effort to increase the projected return for potential investors of the Hilton strata units, VAC increased the revenue available to them by including food and beverage revenues (which were retained by VAC for the Marriott hotel),

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decreasing the management fee charged by VAC under the Hotel Asset Management Agreement to 3%, and removing the hotel lobby lease expense.

[14] The guaranteed gross return offered to Marriott Owners, and the 5% gross rental revenue and added incentive provided to VAC as its fee for managing the Marriott versus the 3% management fee provided to VAC for managing the Hilton (collectively the "Compensation Differences"), are the differences in the financial arrangements made with purchasers of the two hotels that are the essential focus of Sharbern's claims on appeal.

[15] While the Hilton Disclosure Statement disclosed that VAC owned the Best Western Richmond Inn and that VAC was currently developing the adjacent Marriott hotel, it did not disclose the Compensation Differences as between the Hilton and Marriott Owners.

[16] The marketing of the Hilton strata units was not as successful as that of the Marriott, in which all of the units were sold within a few hours. At some point, VAC decided to retain the last 24 Hilton units rather than continue to incur significant marketing costs. Ultimately, neither hotel achieved their anticipated financial performances. By 2001, the Richmond hotel market was one of the weakest hotel markets in Canada. The hotel market was further weakened by the events of September 11, 2001. The Marriott did not achieve a 12% gross return on investment for any of the years covered by the 5-year guarantee. As a result, VAC sustained

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liability of over $13 million under the guarantee, which was ultimately paid by Larco Investments. The Hilton Owners incurred losses instead of obtaining the projected 16.6% returns. The Hilton did not perform as well as the Marriott.

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B. *Procedural Background*

[17] On June 16, 2003, Sharbern brought an action against VAC, HVS International — Canada ("HVS") and Larco Hospitality Management Inc. (formerly known as HMS Hospitality Management Services Ltd. ("HMS")). HVS was the company that prepared the financial projections for the Hilton hotel that were included in the Hilton Disclosure Statement. HMS was an affiliate of VAC that carried out the day-to-day management of the Hilton hotel, the Marriott hotel and the Best Western Richmond Inn.

[18] Sharbern obtained certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, on behalf of approximately 200 unit owners (*Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232 (CanLII), aff'd 2006 BCCA 96, 223 B.C.A.C. 80). Twenty-four common issues on liability were certified. The trial judge summarized what she called the "central contentious" common liability issues (2007 BCSC 1262, 38 B.L.R. (4th) 171, at para. 10 and Appendix A), which I paraphrase as:

1. Whether the financial projections made by HVS were negligent misrepresentations, and whether the investment returns projected by VAC in the Hilton Disclosure Statement constituted fraudulent or negligent misrepresentations.

2. Whether VAC's representations about conflicts of interest and the nature of the financial arrangements as between the Hilton and Marriott hotels were fraudulent or negligent.

3. Whether the members of the Hilton class could be deemed to have relied on any of the impugned representations pursuant to s. 75(2) of the *Real Estate Act* and the effect of the repeal of the *Real Estate Act*.

4. Whether VAC and HMS owed fiduciary and/or trust duties to the members of the Hilton class, and if so, whether they breached those duties.

## III. Lower Court Decisions

### A. *British Columbia Supreme Court, 2007 BCSC 1262, 38 B.L.R. (4th) 171*

[19] Madam Justice Wedge made a number of findings that are not at issue in this appeal. She determined that neither VAC nor HVS were liable for negligent misrepresentation concerning the financial projections. She observed that the allegation of fraud against VAC with respect to the projected investment returns had

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been withdrawn by Sharbern. She found that HMS did not owe fiduciary duties to Sharbern. In supplemental reasons, she also clarified that VAC was not liable for fraudulent misrepresentation with respect to its conflict of interest representations because Sharbern did not "prove that VAC did not have an honest belief in the representation and either intended to deceive investors or was reckless as to whether it did so" (2008 BCSC 245 (CanLII), at para. 12).

[20] With respect to her findings that are at issue in this appeal, Wedge J. concluded that the undisclosed Compensation Differences gave rise to at least a potential conflict of interest, particularly in view of the potential for common management of the two hotels. She then concluded that VAC negligently misrepresented both the absence of an actual or potential conflict of interest and the nature of the agreements between VAC and the Marriott Owners. She found both misrepresentations material. It is not entirely clear from Wedge J.'s reasons whether she found VAC liable under the common law or under the *Real Estate Act*, although I proceed on the basis that she found VAC liable under both.

[21] Wedge J. concluded that under the *Real Estate Act*, the investors were deemed to rely on material misrepresentations by VAC. She determined that such deemed reliance was not a rebuttable presumption, irrespective of the actual knowledge of the investors.

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[22] She also found that in its capacity as manager, VAC was a fiduciary of the Hilton Owners, that a conflict existed with respect to VAC's interests as between the Hilton and the Marriott, and that VAC was liable for breach of fiduciary duty because it did not disclose that conflict. Finally, she found that VAC was also liable for breach of fiduciary duty as manager, because of a non-competition arrangement that it put in place between the Marriott and the Hilton, preventing each hotel from competing for certain customers with the other or with the Richmond Inn.

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B. *British Columbia Court of Appeal, 2009 BCCA 224, 57 B.L.R. (4th) 1*

[23] VAC appealed and Sharbern cross-appealed aspects of the trial decision. The Court of Appeal allowed VAC's appeal, overturning Wedge J.'s findings with respect to misrepresentation, deemed reliance and breach of fiduciary duty. Sharbern's cross-appeal was dismissed.

[24] On the issue of misrepresentation, Chiasson J.A. found that the details of the financial arrangements between the two hotels were not material. He observed that at trial "VAC relied on the extensive factual and expert evidence it adduced concerning actual and industry practice in the management of multiple hotels by a single entity" and that "[t]here was no evidence to the contrary and no evidence objectively to support the conclusion a reasonable investor would be concerned about the details of the financial arrangements" (para. 76). He found that

> [h]aving made the disclosure [VAC] did, recognizing industry and actual practice and considering the subjective belie[f] of [VAC's officers and employees], VAC did not misrepresent that it was unaware of any conflict that reasonably could affect materially the investment decisions of the Hilton Hotel investors. [para. 84]

He therefore ruled that the trial judge had erred in concluding VAC materially misrepresented its conflict of interest and its agreements with the Marriott Owners.

[25] As to breach of fiduciary duty, Chiasson J.A. determined that there was no breach by VAC. He observed that the answer to whether VAC was "obliged to tell the Hilton Hotel unit owners the details of its financial arrangements with the Marriott Hotel unit owners . . . depends on whether that information was material" (para. 98). He went on to conclude that "in the circumstances of this case, the information objectively was not material" (para. 99). In his view, "the consent given to VAC to act for competing hotels is an answer to any contention the implementation of the price competition policy was *per se* a breach of fiduciary duty" (para. 104). The issue was again reduced to the question of whether VAC was required to disclose the details of its financial arrangements with the Marriott. Chiasson J.A. concluded it was not.

## IV. Issues

[26] This appeal raises five issues, which I will address in turn:

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1. Did the trial judge err in finding that VAC was liable under s. 75 of the *Real Estate Act* for material false statements?

2. Did the trial judge err in not considering the statutory defence available to a developer under s. 75(2)(b)(viii) of the *Real Estate Act*, and whether VAC could avail itself of that defence?

3. Did the trial judge err in finding that the deemed reliance under s. 75(2)(a) of the *Real Estate Act* was non-rebuttable?

4. Did the trial judge err in finding that VAC was liable for negligent misrepresentation under the common law?

5. Did the trial judge err in finding VAC liable for breach of fiduciary duty?

V. Analysis

A. *Misrepresentation Under the Real Estate Act*

(1) VAC's Statutory Disclosure Obligations

[27] I commence with a summary of the statutory disclosure requirements that were applicable in the context of this case.

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[28] The Hilton hotel strata lots were a combination of an interest in real estate and an interest in a rental pool, governed by the *Securities Act*, R.S.B.C. 1996, c. 418, and the *Real Estate Act*. Both statutes governed VAC's disclosure obligations. Pursuant to those obligations, VAC marketed the strata lots using a document that was a combination of both a *Securities Act* "offering memorandum" and a *Real Estate Act* "disclosure statement".

[29] As to VAC's disclosure obligations under the *Securities Act*, the strata lots were marketed on the basis of exemptions then found in ss. 45(2)(*5*) and 74(2)(*4*) of that Act. Section 45(2)(*5*) provided that VAC did not have to register with the British Columbia Securities Commission to trade in the strata lots. Section 74(2)(*4*) provided that VAC did not have to provide a *Securities Act* prospectus for the strata lots. Both exemptions applied to trades — such as those involving the strata lots — in which a person purchased the security as a principal and the security had an aggregate acquisition cost of not less than a prescribed amount, in this case $97,000.

[30] The minimum acquisition cost and the requirement that the purchaser be acting as principal imply that these conditions serve as a proxy for a degree of sophistication on the part of the investor, justifying a more defined disclosure obligation than that found under the prospectus requirements. Because the strata lots fell under these *Securities Act* exemptions, VAC was only required to submit an offering memorandum (British Columbia Securities Commission, Notice and Interpretation Note No. 96/36, "Real Estate Securities" (online)). VAC's disclosure

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obligations under an offering memorandum were limited to disclosing specific matters that were prescribed by the B.C. Securities Commission in a document referred to as Form 43B.

[31] As to VAC's disclosure obligations under the *Real Estate Act*, s. 66(1) of that Act provided that the Superintendent of Real Estate could permit VAC to issue a disclosure statement as opposed to a prospectus. The Superintendent of Real Estate appears to have exercised that discretion in this case. VAC's disclosure obligations in a disclosure statement were limited to specific matters that were prescribed by the Superintendent of Real Estate (pursuant to *Real Estate Act*, ss. 66(3)(a) and (c)).

[32] Rather than issuing a separate offering memorandum and a separate disclosure statement, the Superintendent of Real Estate and the Securities Commission appear to have allowed developers to issue one document that combined the two. The Hilton Disclosure Statement was such a document. In that document, as I have just explained, VAC was only required to disclose certain prescribed matters. Of those prescribed matters, the only two of relevance to this appeal are Items 9 and 13 of Form 43B.

[33] Item 9 of Form 43B required VAC to include a statement drawing attention to the speculative nature and inherent risks of a real estate investment and to disclose specific factors that "make the offering a risk or speculation":

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**ITEM 9 Risk Factors**

(1) State:

**A real estate investment is, by its nature, speculative. If a purchaser is purchasing the real estate as an investment, the purchaser should be aware that this investment has not only the usual risks when purchasing real estate, but also those risks that are inherent to the nature of real estate securities.**

(2) Disclose the risk factors that make the offering a risk or speculation.

***Instructions:*** Risk factors may include but are not limited to such matters as risks associated with real estate investments generally, reliance on the developer/managers efforts, ability and experience, inexperience of management, lack of financial expertise, reliance on the financial strength of the person offering the guarantee or financial commitment, cash flow and liquidity risks, financing risk, potential liability to make additional contributions beyond initial investments, restricted rights of a holder in the management and control of the strata corporation or business, inability to change the manager, restrictions on resale of the real estate securities, developer/manager conflicts of interests, and where the offering provides holders with a means to participate financially in a business such as a hotel, motel, resort or apartment hotel or other commercial enterprise, the general risks of the business, absence of an operating history of the business, and competition.

(3) If the real estate securities include a rental pool, state:

**The success or failure of the rental pool will depend in part on the abilities of the manager of the rental pool.**

(4) If the owner will be responsible for paying a portion of the costs of the operation of the rental pool, state:

**If the revenue generated from the rental pool is less than the costs of operating the rental pool, then the purchaser must make additional contributions over and above the purchasers initial investment and financing costs.**

(5) If the real estate securities include a guarantee or other financial commitment, state:

**The ability of [the person providing the guarantee] to perform under the [guarantee or other financial commitment] will depend on the financial strength of [the person]. See [the persons] financial**

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> **statements on page [*]. There is no assurance that [the person] will have the financial ability to be able to satisfy its obligations under the [guarantee or other financial commitment] and therefore you may not receive any return from your investment.** [Text in brackets in original.]

[34] Item 13 of Form 43B required VAC to include a statement describing conflicts of interest and provided:

> **ITEM 13 Conflicts of Interest**
>
> Describe any existing or potential conflicts of interest among the developer, manager, promoter . . . in connection with the real estate securities which could reasonably be expected to affect the purchaser's investment decision.

[35] Article 4.9(i) of the Hilton Disclosure Statement is related to the Item 9 obligation to disclose risk factors:

> 4.9 **Risk Factors**
>
> . . .
>
> (i) **Liabilities and Obligations of the Developer.** The Developer is currently developing the Vancouver Airport Marriott, a 237 room full service hotel, on the Parent Property. The Vancouver Airport Marriott is scheduled for completion in or about June of 1998. In this regard, the Developer has entered into purchase agreements, ancillary documents similar in form and substance to the Agreements, and certain additional agreements with purchasers of strata lots comprising the Vancouver Airport Marriott, all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements.
>
> (A.R., vol. II, at p. 164)

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Article 4.1 of the Hilton Disclosure Statement provided that "Agreements" meant "the Bylaws, the Hotel Asset Management Agreement, the Hotel Use Covenant, the Joinder in Covenant Agreement and the Purchase Agreement".

[36] Article 4.11 is related to the Item 13 obligation to disclose conflicts of interest:

> 4.11 **Conflicts of Interest**
>
> The Developer is not aware of any existing or potential conflicts of interest . . . that could reasonably be expected to materially affect the purchaser's investment decision. . . .

(2) Liability Under the *Real Estate Act*

[37] Sharbern claims that VAC is liable for misrepresentations contained in arts. 4.9(i) and 4.11 of the Hilton Disclosure Statement in that they resulted in the "non-disclosure of a material conflict of interest" (A.F., at para. 1). There are two potential causes of action here: one under s. 75 of the *Real Estate Act*, and the other at common law under the tort of negligent misrepresentation. I will first deal with the cause of action under the *Real Estate Act*.

[38] Section 75 of the *Real Estate Act* provides the statutory mechanism pursuant to which an investor can hold a developer liable with respect to the representations found in a disclosure statement. Under the *Real Estate Act*, if a

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"material false statement" is contained in a disclosure statement, the developer will be liable to investors for any resulting loss they may have sustained, and investors are deemed to have relied upon the representations made in the disclosure statement. However, s. 75 also contains a defence which provides that if the developer had reasonable grounds to believe and did believe that the material false statement was true, it would not be liable. (Although s. 75 uses the term "prospectus", a disclosure statement is deemed under s. 66(2) of the *Real Estate Act* to be a prospectus for the purposes of the section.) The relevant parts of s. 75 of the *Real Estate Act* provide:

> **75** (1) In this section, **"prospectus"** includes every statement and report and summary of report required to be filed with the prospectus under this Part.
>
> (2) If a prospectus has been accepted for filing by the superintendent under this Part,
>
> (a) every purchaser of any part of the subdivided land, shared interests in land or time share interests to which the prospectus relates is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not, and
>
> (b) if any material false statement is contained in the prospectus,
>
> (i) every person who is a director of the developer at the time of the issue of the prospectus,
>
> (ii) every person who, having authorized the naming, is named in the prospectus as a director of the developer,
>
> (iii) every person who is a developer, and
>
> (iv) every person who has authorized the issue of the prospectus

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> is liable to compensate all persons who have purchased the subdivided land, shared interests in land or time share interests for any loss or damage those persons may have sustained, unless it is proved
>
> . . .
>
> (viii) that, with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, the person had reasonable grounds to believe and did, up to the time of the sale of the subdivided land, shared interests in land or time share interests believe that the statement was true . . . .

[39] Under s. 75(2)(b) of the *Real Estate Act*, Sharbern has the onus to demonstrate that either or both of arts. 4.9(i) and 4.11 contained a "material false statement". As the plaintiff, Sharbern bears this onus under the principle that the party who alleges a fact has the burden of proving it. Nothing in the language of s. 75 suggests that a plaintiff advancing a statutory cause of action under the *Real Estate Act* does not bear this onus. In order for art. 4.9(i) to contain a material false statement, the representation that VAC made indicating that it had entered into agreements with the Marriott that were "similar in form and substance" to those governing the Hilton must be shown to be a material false statement. For art. 4.11 to contain a material false statement, VAC's representation that it was "not aware of any existing or potential conflicts of interest . . . that could reasonably be expected to materially affect the purchaser's investment decision" must be found to be a material false statement. If Sharbern satisfies that onus, VAC must then demonstrate that it

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had reasonable grounds to believe and did believe that the material false statements were true, in order to rely on the defence.

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(3) Materiality

[40] In *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, Binnie J. wrote that "disclosure lies at the heart of an effective securities regime" and that the extent of disclosure is a matter of legislative policy that involves "[b]alancing the needs of the investor community against the burden imposed on issuers" (para. 5). The materiality standard for disclosure "supplants the 'buyer beware' mind set of the common law with compelled disclosure of relevant information" while "recogniz[ing] the burden" that is placed on issuers to provide such disclosure (para. 32).

[41] A materiality standard is a legislated and regulatory balancing between too much and too little disclosure. As the Supreme Court of the United States cautioned in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), at pp. 448-49:

> . . . if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking.

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[42] Sharbern argues that in a prospectus context under the *Real Estate Act*, "asymmetries in knowledge and vulnerability" exist which would suggest that the materiality standard of disclosure should be high (A.F., at para. 32). I infer that it is Sharbern's position that when balancing the requirement to disclose in a prospectus context, the emphasis should be on more disclosure. Although Sharbern does not suggest that VAC, in its capacity as developer, was acting as a fiduciary, Sharbern does say that VAC's disclosure obligations should be the same as that of a fiduciary.

[43] Potential investors are indeed vulnerable to the superior knowledge of an issuer as to what need and need not be disclosed. That is the reason for legislated disclosure obligations in a securities context. However, the jurisprudence has recognized that it is not in the interests of investors to be buried "in an avalanche of trivial information" that will impair decision making (*TSC Industries*, at p. 448). As I will explain, the materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision.

(4) The Test for Materiality

[44] The *Real Estate Act* does not define what is meant by the term "material" when it is used in the context of the "material false statement" required for liability under s. 75. The parties submit that in interpreting materiality under s. 75, the Court should adopt the approach set out by the Supreme Court of the United States in *TSC Industries*. In that case, the materiality of an omitted fact in a proxy solicitation

context was determined based on whether there was a substantial likelihood that the disclosure of the omitted fact would have assumed actual significance in the deliberations of a reasonable investor.

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[45] The materiality test was described by the U.S. Supreme Court in *TSC Industries*:

> . . . An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills'* general description of materiality as a requirement that "the defect have a significant *propensity* to affect the voting process." It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. [Emphasis in original; p. 449.]

The U.S. Supreme Court characterized materiality "as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts" (p. 450).

[46] The *TSC Industries* test is not a new concept in Canadian securities law. The test has been adopted by a number of Canadian appellate courts: see *Sparling v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4th) 682 (Ont. C.A.), aff'd [1986] 2 S.C.R. 537;

*Harris v. Universal Explorations Ltd.* (1982), 17 B.L.R. 135 (Alta. C.A.); and *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 189 B.C.A.C. 251.

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[47] A disclosure statement under the *Real Estate Act* is analogous to the proxy solicitation in *TSC Industries*. The analogy exists because the two documents share similar characteristics. That is, both are (i) prepared unilaterally by management or a developer, (ii) prepared pursuant to statutory and/or regulatory obligations, (iii) used to provide information to investors (current or potential) to allow them to make informed choices, and (iv) used by investors in making decisions (either deciding how to vote or whether to invest). Both are used by investors to make informed investment decisions based on information provided to them by a party that unilaterally controls what specific information to disclose, pursuant to statutory obligations. Therefore, it is appropriate to consider the *TSC Industries* test to determine the materiality of the representations under the *Real Estate Act*.

[48] The U.S. Supreme Court indicated that it was "universally agreed" that the question of materiality is objective (*TSC Industries*, at p. 445). Materiality is based on an examination of how the information would have been viewed by a "reasonable investor". The U.S. Supreme Court concluded that the objective standard formulated in *TSC Industries* "best comports with the policies" (p. 449) of the proxy disclosure rules — the purposes of which were "not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise

adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice" (p. 448).

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[49] In order to define the appropriate threshold as to "just how significant a fact must be" (*TSC Industries*, at p. 445) to a reasonable investor before it becomes material, the court imposed a standard that requires that there must be a "substantial likelihood" that an omitted fact "would" be considered important. This standard was imposed rather than the lesser standard which would require disclosure if an omitted fact "might" have been considered important. In adopting the "would" standard, the U.S. Supreme Court approved of the words of Chief Judge Friendly of the U.S. Second Circuit Court of Appeals in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (1973), where he wrote:

> We think that, in a context such as this, the "might have been" standard . . . sets somewhat too low a threshold; the very fact that negligence suffices to invoke liability argues for a realistic standard of materiality. . . . While the difference between "might" and "would" may seem gossamer, the former is too suggestive of mere possibility, however unlikely. When account is taken of the heavy damages that may be imposed, a standard tending toward probability rather than toward mere possibility is more appropriate. [p. 1302]

[50] At the same time, the U.S. Supreme Court clarified that a shareholder is not required to prove that the omitted fact would have caused a reasonable investor to change his or her vote. What is required is proof of a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder. The standard was seen as consistent with the court's

description of materiality in its earlier decision in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), that the defect or omission "have a significant *propensity* to affect the voting process" (p. 384 (emphasis in original)).

[51] Given that materiality is determined objectively, from the perspective of a reasonable investor, I would add that the subjective views of the issuer do not come into play when assessing materiality. As I will discuss later, with respect to VAC's liability under the *Real Estate Act*, VAC's subjective views only are taken into account when considering the defence under s. 75(2)(b)(viii), not when considering whether a false statement was material. I make this observation because in art. 4.11 of the Hilton Disclosure Statement VAC represented that it was "not aware of any existing or potential conflicts of interest". The Court of Appeal appears to have treated this language as importing a subjective element into the analysis of VAC's conflict representation, rather than treating it as an element of the statutory defence.

[52] Finally, the U.S. Supreme Court indicated that the importance of an omitted fact must be considered in the light of whether it would be viewed by a reasonable investor as having "significantly altered the 'total mix' of information made available". In certain situations, evidence of the information made available may be such that common sense inferences will be sufficient to establish materiality. In other cases, where there is evidence that supports competing inferences, a court may be required to carry out a more complex analysis to determine what the reasonable investor would have considered important. For the majority of cases,

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materiality is a contextual matter, involving the application of a legal standard to specific facts, that must be determined in light of all of the information that was made available to an investor. Canadian and American authorities and commentary on materiality indicate that assessing materiality is a "fact-specific inquiry" (*Basic Inc. v. Levinson*, 485 U.S. 224 (1988), at p. 240). Materiality is "to be determined on a case-by-case basis" (p. 250) in light of all of the relevant circumstances.

[53] The United States Securities and Exchange Commission ("SEC"), in SEC Staff Accounting Bulletin: No. 99 — "Materiality" (August 12, 1999 (online)), says that quantitative and qualitative factors should be considered in assessing materiality and that this requires "a full analysis of all relevant considerations" (pp. 2-3). The SEC wrote that "an assessment of materiality requires that one views the facts in the context of the 'surrounding circumstances,' as the accounting literature puts it, or the 'total mix' of information, in the words of the [U.S.] Supreme Court" (p. 3). A fact-driven, contextual approach to determine materiality is also recommended in the Canadian Securities Administrators *National Policy 51-201 Disclosure Standards* (July 12, 2002).

[54] Despite materiality being a question of mixed law and fact, Sharbern asserts that "there is no need for a plaintiff to tender industry or expert evidence as to what would influence a reasonable investor because the question of materiality of conflicts of interest in a prospectus is uniquely for the court, involving a question of construction" (A.F., at para. 40). To support this assertion, Sharbern refers to the

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words of Binnie J. in *Kerr* where he wrote that "disclosure is a matter of legal obligation" (para. 54). In *Kerr*, Binnie J. was writing in the context of explaining that the business judgment rule "should not be used to qualify or undermine the duty of disclosure" (*ibid.*).

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[55] The business judgment rule is applied by courts when they are asked to resolve disputes involving business decisions made by managers (*Kerr*, at para. 54). In *Kerr*, Binnie J. adopted Weiler J.A.'s description of the business judgment rule at p. 192 in *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.) as follows:

> The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision . . . . [Emphasis deleted . . . .] [Text in brackets in original; para. 54.]

[56] Binnie J. explained that the business judgment rule has been traditionally justified with respect to business decisions because (i) "judges are less expert than managers in making business decisions", and (ii) "[i]n order to maximize returns for shareholders, managers should be free to take reasonable risks without having to worry that their business choices will later be second-guessed by judges" (*Kerr*, at para. 58). These traditional justifications for the rule "do not apply to disclosure decisions" (*ibid.*).

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[57] As I have explained, the question of materiality involves the application of a legal standard to a given set of facts. Judges are not less expert than business managers when it comes to the application of a legal standard to a given set of facts; neither do managers' assessments of risk have anything to do with meeting their disclosure obligations. As Binnie J. observed, "[i]t is for the legislature and the courts, not business management, to set the legal disclosure requirements" (*Kerr*, at para. 55).

[58] Nothing in these reasons departs from the law as set out in *Kerr*. VAC's statutory obligation in this case was to disclose certain prescribed matters and, in doing so, to not make material false statements. While VAC made its own assessment of what information it was required to include in the Hilton Disclosure Statement, it is the court that determines whether the disclosure made meets VAC's legal obligations. The court must therefore inquire into what the reasonable investor would consider as significantly altering the total mix of information made available. This is a fact-specific inquiry, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.

[59] In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. In the present case, what I will refer to as "disclosed information" was the information contained in the Hilton Disclosure Statement. The next step in determining whether

an omitted fact or information ("omitted information") would be considered as significantly altering the total mix of information made available is to consider the omitted information against the backdrop of what was disclosed. In the present case, the significance of the Compensation Differences must be ascertained by comparing the omitted information (the guaranteed rate of return to Marriott Owners and the 5% management fee and added incentive payable to VAC by the Marriott Owners) to the disclosed information. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. In this case, for example, evidence about the strong economic environment at the time investors made their investment decisions would help to evaluate whether the guaranteed rate of return given to Marriott Owners would have been significant in the context of the projections for high occupancy rates for the Hilton hotel that were disclosed in the Hilton Disclosure Statement.

[60] Another type of evidence relevant to the materiality assessment is evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations ("behaviour evidence"). For example, a plaintiff would not be precluded from introducing evidence, if available, that the defendant acted on a conflict of interest even though that evidence pertained to events arising subsequent to the investors making their investment decisions. Similarly, a defendant would not be precluded from bringing evidence that investors had information not included in the disclosure documents at

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the time they were making their investment decisions, or that investors who had the information acted in a certain way. Beyond this behaviour evidence, evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.

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[61] In sum, the important aspects of the test for materiality are as follows:

i. Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;

ii. An omitted fact is material if there is a substantial likelihood that it *would* have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely *might* have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;

iii. The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;

iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and

v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

(5) Analysis of the Trial Judge's Materiality Assessment

[62] I now turn to the trial judge's materiality assessment. In my respectful view, the trial judge made three interrelated errors of law in her treatment of the materiality of VAC's alleged conflict of interest stemming from the Compensation

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Differences, which impact upon her assessment of whether the Hilton Disclosure Statement contained a material false statement. First, she equated the existence of a potential or actual conflict of interest with materiality, essentially treating a conflict of interest as inherently material. Second, she reversed the onus on Sharbern as plaintiff to prove materiality and placed an onus on VAC to disprove materiality. Third, she failed to consider all of the evidence available to her on the issue of materiality. I will deal with these errors in turn.

[63] Although much time was dedicated to the question in her analysis, the key issue before the trial judge was not whether a potential or actual conflict of interest existed. The existence of non-material conflicts of interest had been acknowledged by VAC in arts. 4.9(i) and 4.11 of the Hilton Disclosure Statement. Rather, the key issue was whether the Compensation Differences and the potential or actual conflict of interest they created were *material*, thereby rendering VAC's failure to disclose them "material false statements" attracting liability under the statute.

[64] A careful review of Wedge J.'s reasons shows that once she had determined that there was a potential or actual conflict of interest, she found that there was an obligation to disclose the conflict as if the existence of the conflict itself was inherently material. For example, before she had even considered the issue of materiality, Wedge J. states, at para. 310, that "[g]iven the existence of the conflict described above, VAC was required to disclose the nature of those agreements" evidencing the Compensation Differences. Similarly, when speaking about the

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evidence led by VAC concerning the benefits to the hotels of sharing resources and expenses, she determined that "[i]t is for the investor to decide whether the benefits of cost and resource sharing outweigh the detriment of the conflict. An investor cannot engage in that weighing process unless the conflict is disclosed" (para. 304). Again, this is before the trial judge had made any determinations with respect to the materiality of the conflict of interest.

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[65] Treating a conflict of interest as inherently material led the trial judge to other manifestations of the same error of law. One is that she misinterpreted the statutory disclosure requirement. She said that the conflict of interest must be disclosed so that investors can weigh its costs and benefits against those of other factors. However, the statutory requirement does not impose on issuers an obligation to disclose all facts that would permit an investor to sort out what was material and what was not. This approach would not only result in excessive disclosure, regardless of materiality, it would overwhelm investors with information and impair, rather than enhance, their ability to make decisions.

[66] Further, by holding that the failure to disclose the existence of conflict of interest is sufficient to attract liability for a material false statement, the trial judge misinterpreted the test for materiality. If the mere existence of a potential or actual conflict of interest creates an obligation to disclose it, without a proper inquiry into the materiality of the conflict, this approaches the standard of material fact used by the Court of Appeals in *TSC Industries* of "all facts which a reasonable stockholder

might consider important" (*sub nom. Northway, Inc. v. TSC Industries, Inc.*, 512 F.2d 324 (7th Cir. 1975), at para. 3). That standard has been rejected by the U.S. Supreme Court and now by this Court in these reasons.

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[67] In assessing materiality, the trial judge pointed to the test set out in *TSC Industries* and concluded:

> I am satisfied that VAC's ability to make more money under the Marriott guarantee when a potential customer chose the Marriott over the Hilton would have assumed actual significance in the deliberations of a reasonable investor, as would the fact that VAC made more money in management fees if the Marriott revenue was relatively higher than the Hilton revenue. [para. 321]

However, she does not address how or why there is a substantial likelihood that the Compensation Differences would be viewed by reasonable investors in the Hilton strata lots as significantly altering the total mix of the information made available. She appears to make a common sense inference that the Compensation Differences would have been material, without offering any analysis of how the conflict created by the Compensation Differences would fit into the mix of all other relevant information, nor does she take notice of what the total mix of information would be.

[68] There was evidence, which I will discuss more fully below, which could have supported the opposite inference, that the Compensation Differences or the omitted information were not material in the context of what had already been disclosed to investors. For example, the disclosed information included information

about the economic environment at the time of the sale of the strata lots; the financial benefits offered to the Hilton Owners, such as the management fee payable to VAC; information about common management by VAC and resulting risk factors; and information relevant to VAC's limited ability to prefer its own interests. The trial judge also had behaviour evidence led by VAC about what the conduct of fully informed investors had been. In my view, this evidence demonstrated that competing inferences could be drawn in this case and added a layer of complexity to the materiality analysis that took it outside the realm of drawing a simple, common sense inference. A more detailed analysis of the evidence constituting the "total mix" of information was required in order to make a determination about what a reasonable investor would have considered significant.

[69] Wedge J.'s error in treating a conflict of interest as inherently material is interrelated with her second error, which was to reverse the onus of proof. Once she was satisfied that Sharbern had proven the existence of a conflict of interest, she turned to VAC to show why it was not material. The result was that she made the determination that the conflict of interest was material without requiring Sharbern to satisfy its burden, as plaintiff, of proving materiality.

[70] Having found a conflict of interest to be inherently material, the trial judge looked to VAC to show proof that it was not. She considered VAC's submissions that the Compensation Differences would not have been material in light of all the disclosed information about common management in the Hilton Disclosure

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Statement. She then stated: "I cannot agree with VAC's submission concerning materiality" (para. 320) and concluded that "the presence of an actual or potential conflict of interest on the part of [VAC] would concern any reasonable person contemplating investing more than $100,000 in a strata unit" (para. 321). While observing that "no expert evidence was advanced with respect to the knowledge of the reasonable investor" (para. 317), she neither proceeded with an analysis of other evidence of materiality adduced by Sharbern, nor commented upon the absence of any such evidence. As stated above, the onus of proving the materiality of a fact, statement or omission rests with the person alleging materiality. Sharbern did not adduce any evidence supporting the materiality of the Compensation Differences (other than the Hilton Disclosure Statement and the omitted information). It did not provide evidence to explain or place the omitted information into the context of the disclosed information in a way that would show its materiality. There is nothing in the trial judge's analysis to indicate that Sharbern satisfied its burden.

[71] The third error evident from the decision of Wedge J. is that she failed to consider all the evidence available to her on the issue of materiality. I am not unmindful that "[i]n reviewing the decisions of trial judges in all cases . . . it is important that the appellate court remind itself of the narrow scope of appellate review" with respect to factual matters (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 11; see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 46). When a question of mixed fact and law is at issue, the findings of a trial judge should be deferred to unless it is possible to extricate a

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legal error (*Housen*, at para. 37). Within this narrow scope of review, an appellate court may "reconsider the evidence" proffered at trial when there is a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his [or her] conclusion" and thereby erred in law (*Van de Perre*, at para. 15). As I will now explain, Wedge J. ignored and misconceived evidence relevant to the question of materiality in a way that affected her conclusions.

[72] The statutory disclosure requirements only oblige issuers to disclose certain prescribed information. Where the issuer's disclosure is challenged, the court must determine whether the omitted information was material in the context of the "total mix" of information made available to the investor. While Wedge J. considered some evidence in relation to materiality (i.e. the language and general circumstances surrounding the Hilton Disclosure Statement), she failed to consider other relevant evidence. For example, she rejected much of the evidence adduced by VAC as being irrelevant to the issue of the existence of a conflict of interest. There is no indication that she considered that evidence, as she was required to do, in assessing the materiality of the Compensation Differences.

[73] As I will detail below, evidence of factors such as the general economic climate at the time the strata lots were sold, the financial arrangements offered to Hilton Owners, the disclosure made by VAC of common management and risk factors, and the limited extent of VAC's ability to act upon the Compensation Differences in its own interests may be of little weight in determining whether a

potential or actual conflict of interest existed as a result of the Compensation Differences. However, as mentioned above, those factors constituted disclosed information that would come into play as relevant to the issue of whether reasonable investors would have considered the omitted information important to their investment decision.

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(a) *The Economic Environment*

[74] The Hilton Disclosure Statement warned that "[t]o the extent that there are more hotel rooms available in a particular market than there is demand for those rooms, then both occupancy and room rental rates may be adversely effected [*sic*]. There are other hotels which are planned for the Richmond and Vancouver markets" (art. 4.9(b)). However, it also stated that "Richmond is ranked as having the highest hotel occupancy of any market in Canada and the United States for the full year 1996" and was showing similar promise for 1997 (point 5 of the executive summary). The information about the high hotel occupancy rates in Richmond, coupled with the optimistic projections made in the Hilton Disclosure Statement, are relevant considerations the trial judge should have taken into account and suggested that the Hilton would not have a problem with occupancy rates, or need to worry about competition from the Marriott. This information about the economic environment was disclosed information forming part of the total mix of information made available to investors, against which they would have weighed the importance of the omitted information.

(b) *Financial Benefits to Hilton Owners*

[75] The omitted information about VAC's agreements with the Marriott Owners would have been assessed by a reasonable investor in comparison to the disclosed information about the financial arrangements given to Hilton Owners. Although they did not receive a guarantee, the lower management fee of 3% instead of 5% and an added incentive had been given to Hilton Owners to increase their projected rate of return. The advantage of paying a low percentage management fee could have supported an inference that there were financial arrangements to counterbalance the omitted information about financial arrangements for the Marriott Owners even if they left the alleged incentive for favouritism unchanged.

(c) *Disclosure of Common Ownership and/or Management and Risk Factors*

[76] The Hilton Disclosure Statement disclosed that the developer of the Hilton was also developing the Marriott, and was the owner of the Richmond Inn. In the risk factors, VAC disclosed that its agreements with the Marriott "give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements" with the Hilton strata lot owners (art. 4.9(i)). VAC also disclosed that the Asset Manager would be the same for the Hilton and the Marriott, and that the day-to-day management of the Hilton would be subcontracted to the manager of the Richmond Inn. The Hilton Disclosure Statement states that "[t]he success of the Hotel will depend in large measure on the ability of

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the Developer as Asset Manager" and that "the success or failure of the Rental Pool will depend in part on the managerial abilities of the Asset Manager" (art. 4.9(e) (emphasis deleted)).

[77] Although the trial judge rejected VAC's submission that its disclosure of potential conflicts had been sufficient, she noted in her reasons that because the two hotels were in direct competition for clientele, "the interests of their owners were not congruent" (para. 299). Nonetheless, she acknowledged that "Hilton Owners consented to VAC acting for other principals competing in the same market" (para. 425). While all of this evidence was reviewed by the trial judge in other contexts, in my respectful opinion, she failed to assess whether there was a substantial likelihood that a reasonable investor in a Hilton strata lot would have viewed the Compensation Differences and their potential for creating a conflict of interest as significantly altering the information already possessed about the potential risk factors.

(d) *VAC Had No Practical Means or Incentive to Favour the Marriott*

[78] VAC led evidence at trial in an attempt to show why it would not have preferred the Marriott and that it did not do so. VAC submits that this evidence shows that the conflict of interest did not manifest itself in practice, and that VAC had no practical means or the incentive to favour the Marriott over the Hilton. VAC argues that this evidence "support[s] VAC's conclusion that the potential conflict of interest was not material at the time of disclosure" (R.F., at para. 91). The trial judge

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considered this evidence in the conflict of interest stage of her analysis. There, she found that it did "not go to the issue of the existence of conflict" but rather "goes only to whether VAC would have acted on the opportunities raised by the conflict" (para. 306). She does not appear to have considered it with respect to whether it would be relevant to the question of materiality.

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[79] The evidence adduced by VAC that would show it had limited practical means and limited incentives to favour the Marriott over the Hilton includes evidence that VAC had a limited ability to market the hotels in a manner that favoured one hotel over the other. Evidence led at trial and discussed by the trial judge in her fiduciary duty analysis suggested about half of the hotels' traffic was generated by marketing at the international/national level by the Hilton and Marriott chains. While we should avoid considering this percentage, which did not constitute disclosed information, the Hilton Disclosure Statement did disclose that investors could expect to "benefit from [the] strength of Hilton's worldwide reservations system and the worldwide recognition provided by [the Hilton chains]" (point 3 of the executive summary).

[80] The Hotel Asset Management Agreement under which VAC managed the Hilton hotel was disclosed information. That agreement required VAC to manage the Hilton hotel in a commercially reasonable manner and contained a number of obligations to use reasonable efforts. Even if the Hilton Owners had been aware of the omitted information, their concerns about any potential favouritism of the

Marriott hotel would have been displaced by this contractual obligation imposed on VAC. The requirement to operate the hotel in a commercially reasonable manner would be inconsistent with VAC favouring one hotel to the detriment of the other, and served as a means to contractually preclude VAC from doing so.

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(e) *Evidence of Conduct of Fully Informed Investor*

[81] Another piece of evidence that should have been included in the trial judge's materiality assessment was that Tevan Trading Ltd. ("Tevan") (the largest investor in the Hilton strata lots other than VAC's parent company) owned units in both the Hilton and the Marriott. Tevan purchased six Hilton units on March 17, 1998, and then additional Hilton units on March 23, 1998, along with four Marriott units on the same day. The Marriott units became available to Tevan because certain buyers in the Marriott had cancelled their purchases. While the details of the Compensation Differences would have been known to Tevan when it invested in the Hilton on March 23, 1998, they did not appear to affect Tevan's decision to invest in the Hilton as well as the Marriott. It is true that Tevan is only one investor, and there is no evidence about Tevan's intentions in buying strata units in the Hilton and Marriott. Thus, one cannot jump to the conclusion that Tevan alone represents the "reasonable investor". Nonetheless, the trial judge was required to consider this behaviour evidence as part of her determination of the substantial likelihood that a reasonable investor would have seen any conflict created by the Compensation

Differences as significantly altering the total mix of information he or she had available.

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(f) *Evidence of the Investor Committee Meetings*

[82] Finally, there was also relevant behaviour evidence concerning the Hilton Owners' investor committee meetings. Minutes of those meetings record questions raised by the Hilton Owners over concerns they had with the hotel. There is no indication in these Minutes that the Hilton Owners were concerned about the Compensation Differences prior to the filing of their statement of claim in June 2003. This lack of concern would suggest that the Compensation Differences were not material.

[83] In particular, VAC disclosed the existence of the guarantee in favour of the Marriott Owners at an investors committee meeting with the Hilton Owners on June 14, 2000. The timing of the disclosure of the differential management fee is not clear. While numerous concerns were raised by the investors during these meetings — ranging from concerns over pastry contracts to concerns over strata fees, advertising and the franchise agreement — none of the Minutes of any of the investor committee meetings subsequent to the June 14, 2000 disclosure record any questions that would evidence a concern over the guarantee.

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[84] Under the guarantee, VAC sustained a liability of over $13 million. The financial impact or incentive for VAC from the management fee differentials would have been considerably less. While the differential in management fees might be thought to support Sharbern's argument that it created an incentive for VAC to favour the Marriott, from the perspective of the Hilton Owners, the lower management fee payable would also have appeared favourable to them. Further, VAC manager Timothy Mashford, who was present during many of the investor committee meetings, testified that at no time did any of the investors express any concern that the Hilton, Marriott and Richmond Inn were being commonly managed by VAC.

[85] In sum, the evidence summarized in the preceding paragraphs should have been considered by the trial judge in applying the materiality standard to the facts of this case. Some of the evidence referred to above helps to place the omitted information in the factual context of the total mix of disclosed information, in order to evaluate whether the omitted information would have been considered important by reasonable investors in making their investment decisions. While not part of the total mix, the behaviour evidence of fully informed investors, either prior to making their investment decisions (e.g. the Tevan evidence) or subsequent to their investment (e.g. the investor committee meetings evidence), when they learned of the guarantee, was also relevant to the trial judge's determination of whether the reasonable investor would have considered the Compensation Differences material.

(6) Sharbern's Burden of Proof

[86] For its part, Sharbern was not required to prove that investors would not have purchased the Hilton strata lots had they known about the Compensation Differences. However, Sharbern did have the burden of proving, on a balance of probabilities, the substantial likelihood that disclosure of the omitted information would have significantly altered the total mix of information made available to reasonable investors in the Hilton strata lots.

[87] To the extent it existed, in cases where common sense inferences are not sufficient, a plaintiff could lead the following types of evidence in the discharge of that burden:

i. that potential investors who knew of the Compensation Differences declined to invest in Hilton strata lots or exhibited concern and doubts about the investment because of them;

ii. that potential investors declined to invest in the Hilton strata lots because they found there was insufficient disclosure about the common management of the Hilton and Marriott hotels and the conflict of interest;

iii. that once the Hilton Owners became aware of the Compensation Differences, they expressed significant concerns about them and challenged VAC's ability to properly manage the Hilton hotel in accordance with its contractual obligations;

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iv. that VAC's marketing efforts and management of the hotel were not carried out diligently in good faith; and

v. that VAC acted on the conflict of interest to the detriment of Hilton Owners.

Some of this evidence might have required expert evidence. However, if it existed, evidence could have been obtained through the pre-trial discovery process, including production of documents, or demonstrated at trial through the cross-examination of VAC's employees. The above list is not exhaustive, nor is a plaintiff required to lead all of the evidence on that list in order to prove materiality. Because the materiality determination is case-specific, the evidence that is required in any given case will vary with the circumstances.

[88] The only evidence adduced by Sharbern in relation to these types of considerations was evidence of a non-competition policy implemented by VAC in 2002 that provided that the Hilton, the Marriott and the Richmond Inn would not engage in price competition with respect to each other's top ten clients by undercutting room rates. Without deciding upon the merits or actual effect of the policy, the trial judge commented that because the Marriott had been in operation one year longer than the Hilton, it had a competitive advantage over the Hilton such that any agreement favouring the *status quo* was to the benefit of the Marriott. Sharbern alleged that the policy was detrimental to the Hilton hotel and therefore proved that

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VAC had used its position as a common manager to favour the Marriott hotel and, consequently, its own interests.

[89] As the non-competition policy was developed long after the time period of VAC's statutory disclosure obligations, I will concentrate my analysis of it on the alleged breaches of fiduciary duty. As discussed more fully below, in my view the materiality of the non-competition agreement was not established on the evidence. The evidence was that the Marriott would match the Hilton's pricing in order to retain customers. It is indeed dubious that any hotel would sit idly by and watch its competitor take its customers through lower pricing in a poor market environment without taking steps to retain those customers. It is apparent that VAC saw price competition as merely resulting in an attrition of revenue for all three hotels and sought to prevent such a result. That could hardly be seen as prejudicial to the Hilton. Moreover, whether or not it could be viewed as material or as having an effect on the Hilton occupancy rates would have depended upon an assessment of how it compared with the other arrangements that existed between the hotels, such as evidence about the sharing or referral of Marriott customers to the Hilton and Richmond Inn. We do not have the benefit of such an assessment.

[90] Sharbern failed to adduce any other evidence to prove there was a substantial likelihood that disclosure of the Compensation Differences would have significantly altered the total mix of information that was made available to reasonable investors in the Hilton strata lots.

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(7) Conclusions on Materiality

[91] In sum, the trial judge erred in law by treating this conflict of interest as inherently material, reversing the onus of proof of materiality, and failing to consider all of the evidence relevant to the determination of materiality. It also appears from the record before the trial court that no evidence was adduced by Sharbern which could reasonably have supported a finding that the Compensation Differences and any conflict of interest they created were material. Separating materiality from the conflict of interest analysis, applying the burden of proof appropriately and taking account of all relevant evidence, I am of the opinion that it has not been demonstrated that there was a substantial likelihood that disclosure of the Compensation Differences would have assumed actual significance in a reasonable investor's investment decision.

B. *The Statutory Defence*

(1) The Legal Test

[92] Even if VAC were found to have made a "material false statement", s. 75(2)(b)(viii) of the *Real Estate Act* provides VAC with a defence if it can prove that it "had reasonable grounds to believe and did, up to the time of the sale . . . believe that the statement was true". To rely on the defence, VAC had to show (1) that it subjectively believed the representations it made were true, and (2) that it objectively

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had "reasonable grounds" for such a belief. In considering the defence, the question is not whether VAC's conclusion itself was reasonable. Rather it is whether VAC subjectively believed its representations, and whether that belief had an objective basis in the sense that there were reasonable grounds for the belief.

[93] The statutory defence found in s. 75(2)(b)(viii) of the *Real Estate Act* does not appear to have been considered by the trial judge. It is not mentioned by her at any point. At para. 323, Wedge J. reproduced portions of s. 75 of the *Real Estate Act*; however, she did not go so far as to reproduce the portion of s. 75 that contained the statutory defence. In addition, the common liability questions made no mention of the statutory defence.

[94] When a trial judge does not consider a statutory defence, an appellate court may do so or remit the defence to the trial court for its consideration (*Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33). In this case, it is both feasible on a practical level and in the interests of justice for this Court to make a fresh assessment of the evidence on the record with respect to the defence.

[95] In my opinion, even if VAC were shown to have made a material false statement, the statutory defence contained in s. 75(2)(b)(viii) of the *Real Estate Act* would preclude VAC from being found liable under s. 75(2). As I will shortly explain, the evidence indicates that VAC subjectively believed, and objectively had reasonable grounds to believe, that it was making true statements when it did not

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disclose the details of the Compensation Differences and represented in the Hilton Disclosure Statement: (i) that it had entered into agreements with the Marriott that were "similar in form and substance" to those governing the Hilton (art. 4.9(i)); and (ii) that it was "not aware of any existing or potential conflicts of interest . . . that could reasonably be expected to materially affect the purchaser's investment decision" (art. 4.11).

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[96] The evidence establishing the subjective and objective components of the defence is evidence of (i) common industry practices and (ii) VAC's limited practical means and incentives to prefer the Marriott. Significantly, Sharbern did not draw this Court's attention to any evidence that would negate the defence.

(2) Common Industry Practice Evidence

[97] The Hilton Disclosure Statement disclosed that VAC's parent company, Larco Investments, itself or through its subsidiaries, concurrently owned or managed a Delta and a Ramada hotel in Vancouver, a Holiday Inn at Whistler, a Delta and a Radisson hotel in Toronto and other hotels across Canada. As noted by the Court of Appeal, "VAC relied on the extensive factual and expert evidence it adduced concerning actual and industry practice in the management of multiple hotels by a single entity. There was no evidence to the contrary and no evidence objectively to support the conclusion a reasonable investor would be concerned about the details of the financial arrangements" (para. 76).

[98] Wedge J. rejected VAC's industry practice evidence finding it of "little probative value" in relation to whether it proved that a conflict of interest existed in the common management of the Hilton and the Marriott (para. 296). This finding was based on her view that

> there was no evidence offered by VAC (or its experts) as to whether those properties were in the same competitive set, whether the management fee or other financial arrangements governing the properties were the same, whether those details were disclosed to the owners, or, most importantly, whether there were representations to investors concerning potential or actual conflicts of interest as a result of common management. [*ibid.*]

However, as I will now explain, I am of the opinion that Wedge J. erred in law when she said that there was "no evidence", as there was evidence. Further, while proving the lack of a material conflict of interest in one common management scenario may be of little help in proving or disproving the existence of a material conflict of interest in another, evidence that hotel managers routinely act for competing hotels would be relevant to the question of whether resulting conflicts of interest are generally seen as material.

[99] VAC adduced evidence that it was a common industry practice for different hotels to be commonly managed in the same market, with different management contracts and financial arrangements for each hotel, and with different owners who were not aware of the terms of the contract with the other hotels. VAC's witnesses, including Joann Pfeifer, testified that they believed that common management would be an advantage allowing the participating hotels to maximize

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profits. Joel Rosen, who was qualified as an expert in the hotel consulting field, testified that it was a common practice in the hotel industry for the same manager to commonly manage competing hotels in the same market and that this practice had "been the case for many years" (R.R., vol. 6, at p. 1159). In his expert report, Mr. Rosen opined that "a hotel management company operating multiple competing properties in a market is not uncommon" (R.R., vol. 30, at p. 6006). By way of example he discussed certain luxury hotels in various cities in the United States, remarking that

> the management contracts may be the same or different in each city, depending on the negotiations at the time the contracts were determined. The fees may differ, the calculation of the incentive fee may differ, the termination clause may differ, etc. The contracts do not mirror each other at all in each city and in fact the owner of one hotel would not know the terms of the contract at the other hotel in their city.
>
> (*Ibid.* (emphasis added))

[100] VAC also adduced evidence of the perspective and experience of its principals and senior managers. VAC's sole director and officer, Amin Lalji, when asked about separately owned, commonly managed hotels, testified that "there were plenty of examples prevailing in the market where this is a common practice of most hotel companies, where they would be managing hotels for different ownership structures" (R.R., vol. 8, at p. 1478). Lalji then cited examples in the B.C. market in which there was common management of competing hotels. Similarly, a senior manager hired by Lalji, Joann Pfeifer, testified that some of the Delta hotels in

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Vancouver were managed by the same company, with different owners, and with different compensation structures in place for the manager.

[101] The evidence is that it was a common industry practice for different competing hotels to be commonly managed with the different owners not being aware of the terms of the contracts at each hotel. From this evidence, it can be inferred that VAC had both a subjective and objective basis for concluding that a reference to the Compensation Differences in the Hilton Disclosure Statement was neither expected nor required.

(3) Evidence of Limited Practical Means and Incentives to Prefer

[102] The evidence of VAC's limited practical means and incentives to prefer the Marriott over the Hilton (which I summarized above) is also relevant to determining whether the subjective and objective components of the statutory defence have been established. For example, evidence, provided on the details of industry and client practices that would have affected comparative occupancy rates and limited VAC's ability to induce Hilton clients to switch to the Marriott, is relevant to whether there was an objective basis for VAC's belief that the Compensation Differences were not material. Evidence was adduced that relative hotel occupancy was affected to a large degree by independent factors such as international or national marketing.

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[103] With respect to the hotel business that was generated locally, the trial judge observed that much was won through a formal request-for-proposal process from corporate clients. The manner in which VAC participated in this formal request-for-proposal process would have been subject to VAC's contractual obligations under the Hotel Asset Management Agreement to manage the Hilton in a commercially reasonable manner. To avoid liability for breach of contract, VAC would have no room under the formal request-for-proposal process to market the hotels in a manner that favoured the Marriott over the Hilton. Thus, there was an objective basis for VAC believing that, even if the Compensation Differences created an incentive to favour the Marriott, it could not have materially affected the relative occupancy rates of the Hilton or the Marriott had it tried to do so.

[104] Evidence of VAC's knowledge and motivations would also be relevant to the inquiry. Such evidence included testimony provided by VAC's senior manager that she could not have retained managers for the Hilton and the Marriott if these managers had been directed to favour one hotel over the other. One of VAC's principals also testified that neither Larco Investments nor VAC would have risked their reputations by engaging in preferential conduct.

[105] Further, evidence about the sharing of common resources and expenses between the Marriott, the Richmond Inn and the Hilton, such as joint contracts for airport shuttle bus service, airline crew transportation, dry cleaning, hotel laundry and armoured car pickup, and shared personnel such as a chief engineer, executive

housekeeper and payroll assistant, substantiates VAC's belief that the Hilton would derive benefits from the common management arrangement. In my opinion, the efficiencies of shared services and the potential for business referrals could reasonably have factored into VAC's assessment of whether the Compensation Differences were material.

[106] According to s. 75(2)(b)(viii) of the *Real Estate Act*, the relevant time period to assess VAC's beliefs is "up to the time of the sale". When the lots were being marketed, occupancy rates were expected to remain high. The evidence was that VAC would not have been concerned at that stage about liability from the guarantee of gross revenues given to Marriott Owners, especially given that, on the evidence, it had intended to make the same offer to Hilton Owners until dissuaded by legal advisors. Similarly, it had reduced the management fee payable by Hilton Owners, not to provide a benefit to itself or an advantage to Marriott Owners, but in order to give increased revenues to Hilton Owners.

[107] In my view, the evidence supports the claim that VAC subjectively believed and had a reasonable basis for believing that the financial arrangements for the two developments were similar, despite the differences in detail. It is no coincidence that Sharbern's action against VAC focussed mainly on the claims of negligent misrepresentation and fraud in relation to the financial projections. Occupancy rates and how they might be influenced by the Compensation Differences

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only seemed important in hindsight, with the change in economic conditions, 9/11, the SARS crisis, and the increased supply of hotel rooms in Richmond.

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[108] The evidence adduced by VAC proves, on a balance of probabilities, that VAC subjectively believed and had reasonable grounds for believing that the Compensation Differences would not materially affect a purchaser's investment decision, that its agreements with the Marriott Owners were similar to its agreements with the Hilton Owners, and that the representations it made in the Hilton Disclosure Statement were true.

(4) No Evidence to Negate the Defence

[109] Sharbern did not direct this Court to any evidence to the contrary or to specific passages in the reasons of the trial judge that would have negated the defence established by VAC's evidence. During oral argument, when asked if there was a specific passage in the trial judge's reasoning that negated the defence, Sharbern's counsel observed that there was "not a specific passage" but rather that "the burden of [the trial judge's] reasoning as a whole" was responsive to the question of the defence (transcript, at p. 9). Counsel also asserted that "it would be obvious in the circumstances" (*ibid.*, at pp. 8-9). With respect, it is not obvious, particularly in light of the evidence led by VAC showing that the subjective and objective components of the defence had been established.

[110] A finding of fraud at trial would have contradicted the conclusion drawn from the evidence that VAC subjectively believed the truth of its representations. There was no such finding. Similarly, a finding that VAC negligently misrepresented the absence of a potential or actual conflict of interest in the Hilton Disclosure Statement could preclude VAC from proving that there were reasonable grounds for its belief in the truth of its representations, and prevent it from establishing the objective basis of its statutory defence. However, as I will set out more fully below, in my view the trial judge did not consider all of the elements necessary to establish negligent misrepresentation.

[111] As a result, even if VAC were found to have made material false statements, VAC cannot be held liable under s. 75 of the *Real Estate Act* because the evidence establishes that the statutory defence found in s. 75(2)(b)(viii) applies.

C. *Deemed Reliance*

[112] A final issue with respect to VAC's potential liability under the *Real Estate Act* is whether the deemed reliance provided for under the statute is rebuttable when the contrary is proved, with evidence, on a balance of probabilities. Section 75(2)(a) of the *Real Estate Act* provides that every purchaser of any part of land to which a prospectus relates "is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not". Given my conclusion that VAC cannot be held liable for making material false statements under

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the *Real Estate Act*, it is not strictly necessary to consider whether the deemed reliance provided under that Act is rebuttable. The issue is even less germane given the subsequent repeal of the *Real Estate Act*. Nevertheless, as both parties argued the issue on appeal, I will briefly comment on the matter.

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[113] The trial judge found that deemed reliance is not rebuttable. She concluded that the purpose of the *Real Estate Act* was to "protect the investing public" (para. 333). She wrote that it would "undermine the purpose of the legislation" to allow a developer to attempt to rebut the presumption and "direct the focus of the inquiry to what the investor knew rather than what the developer failed to disclose" (*ibid.*). The Court of Appeal came to the opposite conclusion. It found that deemed reliance is rebuttable because the language used in s. 75 did not expressly create a non-rebuttable presumption.

[114] The *Real Estate Act* used the words "*deemed* to have relied". In *St. Peter's Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616, at p. 629, the majority of this Court wrote that "the words 'deemed' or 'deeming' do not always import a conclusive deeming into a statutory scheme" and that "[t]he word must be construed in the entire context of the statute concerned."

[115] Sharbern submits that the broad purpose of the *Real Estate Act* is to protect investors, and that investors are best protected when they do not have to prove reliance. It argues that conclusive deeming strengthens an investor's civil right of

action, particularly when a class action is involved, and makes it more likely that a wronged investor will prosecute his or her claim without having to focus on what was read or understood by the investor or what motivated the investor to invest. Sharbern also contends that textual considerations, like the structure of s. 75, suggest the deemed reliance is not rebuttable.

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[116] I do not accept Sharbern's argument that the purpose of the *Real Estate Act* would be undermined by allowing deemed reliance to be rebutted. The successor legislation to the *Real Estate Act*, the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, allows for the deemed reliance provided in s. 22(3) of that Act to be rebutted under s. 22(5) when it can be proven that "the purchaser had knowledge of the misrepresentation at the time at which the purchaser received the disclosure statement". The related *Securities Act* also provides at s. 131 for rebuttable deemed reliance on misrepresentations in a prospectus. The existence of rebuttable presumptions under this successor and related legislation suggests that such presumptions accord with the investor protection purposes of those Acts.

[117] I acknowledge that the *Real Estate Act*, unlike the successor and related legislation, did not expressly provide for a rebuttable presumption. Nonetheless, as *St. Peter's* indicates, the use of the word "deemed" does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable. The successor and related legislation in this case can assist with interpreting the purpose of deemed

reliance in the *Real Estate Act*. Lord Mansfield explained this principle in *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394, observing that "[w]here there are different statutes in pari materia though made at different times, or even expired, . . . they shall be taken and construed together . . . and as explanatory of each other" (p. 395). Estey J. provided a more modern explanation of this principle, and explained how "sometimes assistance in determining the meaning of [a] statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere" (*Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437, at p. 448).

[118] As I have discussed above, disclosure is a matter of legislative policy that involves "[b]alancing the needs of the investor community against the burden imposed on issuers" (*Kerr*, at para. 5). A non-rebuttable presumption could interfere with this balancing and would not serve the statutory purpose behind legislated disclosure obligations. For example, a non-rebuttable presumption would allow an investor to claim reliance on a misrepresentation, even if the investor was fully informed and had complete knowledge of all the facts. In doing so, the issuer would be held liable for a misrepresentation of which the investor was fully aware. This would be an absurd and unjust result, which would place issuers into the position of having to guarantee the losses of fully informed investors. The purpose of the disclosure obligation is to balance the amount of disclosure made, not to place VAC into the role of insurer for Sharbern and the other Hilton Owners.

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[119] Given that similar statutes expressly allow deemed reliance to be rebutted, the legislature does not view rebuttable presumptions to be contrary to investor protection. Further, a non-rebuttable presumption could be contrary to the legislative balancing that underlies the disclosure requirements in the *Real Estate Act* and would result in absurd and unjust results. I would therefore conclude that the presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

D. *Common Law Negligent Misrepresentation*

[120] In addition to its claim under s. 75 of the *Real Estate Act*, Sharbern alleges that VAC is liable for the tort of negligent misrepresentation. The trial judge did not distinguish between the common law and statutory causes of action in her reasons, and they were not distinguished in the list of common issues on liability. Nonetheless, I proceed on the basis that when the trial judge found that "VAC negligently misrepresented" (paras. 322 and 473) the Compensation Differences, this finding applied to both the statutory and common law causes of action.

[121] I am of the opinion that the trial judge's findings pertaining to the common law of negligent misrepresentation cannot stand because she did not

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consider all of the elements necessary to establish the tort. As set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87:

> The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. [p. 110]

[122] The requirements set out in *Cognos* were not included in the list of common liability issues. Nor was the framework discussed or utilized by the trial judge in her reasons. While she clearly dealt with the duty of care, and it might be inferred that her misrepresentation analysis dealt with whether the Compensation Differences were untrue, inaccurate or misleading (though this was not done so expressly), the trial judge did not consider the third *Cognos* requirement. She also did not consider the fourth requirement of reasonable reliance and fifth requirement of resulting damages. However, reasonable reliance and damages would likely be dealt with in the class action proceeding through future common or individual trials.

[123] The third *Cognos* requirement obligated Sharbern to prove that VAC had "acted negligently in making [the] misrepresentation". This requirement is concerned with the standard of care, and was described by Iacobucci J. in *Cognos*:

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> The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading . . . . [Emphasis added; p. 121.]

[124] In considering the standard of care, the trial judge would have had to address whether, on an objective basis, VAC had taken such reasonable care as the circumstances required to ensure that the representations made in the Hilton Disclosure Statement were accurate and not misleading. She made no such finding. Instead, she summarily concluded that VAC "negligently misrepresented" the Compensation Differences, without having addressed the standard of care.

[125] Sharbern submits that the trial judge's conclusion that VAC's representations were negligent is "sound" (A.F., at para. 47). In oral argument, counsel for Sharbern conceded that the trial judge's "reasoning is sparse on her conclusion as to negligence" but insisted that her conclusion was "obvious in the circumstances" (transcript, at pp. 8-9).

[126] I am unable to agree. I do not think it appropriate to collapse the *Cognos* requirement into a bare assertion of obviousness. Failure to demonstrate how VAC breached the standard of care is fatal to Sharbern's common law claim. Sharbern, as plaintiff, bears the burden of proving its allegations. Sharbern does not point to evidence that could support a finding that the standard of care was breached. Nor

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does it explain how such a conclusion could have been reached based on the trial judge's "sparse" reasoning.

[127] Rather, Sharbern asserts that it was not required to adduce expert evidence as to what a developer ought to disclose. It argues that the case is about an experienced businessman (Mr. Lalji) who, while aware of the undisclosed incentive, defends his failure to disclose it by assuring us he would not put his own interests first. Sharbern contends that VAC's evidence of its reliance upon industry and expert evidence and upon the advice of its solicitors in respect of its disclosure obligations did not establish that VAC did not breach the standard of care.

[128] Nonetheless, in the circumstances of this case, a bare assertion that something is obvious, without more, cannot establish the applicable standard of care. In the face of considerable evidence before the trial court as to why the Compensation Differences or the potential conflict of interest they created would not have been material to the decision of investors, Sharbern did not provide the court with any evidence to counter VAC's position. For this reason, Sharbern's common law claim of negligent misrepresentation must fail.

[129] I would add one observation on the fourth *Cognos* requirement — reasonable reliance. In this case, Sharbern did not adduce evidence of actual reliance. Instead it relied upon the statutory deeming provision in the *Real Estate Act*. While the trial judge appears to have contemplated the necessity of individual trials on the

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issue of reliance at the outset of this litigation, her failure to differentiate between the common law and statutory claims in her reasons conveys the impression that the statutory deeming provision can establish common law reliance, removing the need for further trials. This approach would be problematic. I do not think a plaintiff may dip into a statutory cause of action for a helpful element in order to establish the "actual reliance" required to maintain a common law claim for negligent misrepresentation.

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[130] For these reasons I conclude that VAC cannot be held liable for negligent misrepresentation at common law.

E. *Breach of Fiduciary Duty*

[131] The final issues to be determined in this appeal are whether a fiduciary duty existed between VAC and Sharbern and, if so, whether VAC breached that fiduciary duty. The breach issue can be broken down into two aspects: (i) whether VAC breached its fiduciary duty to Sharbern by failing to disclose the alleged conflict of interest created by the Compensation Differences; and (ii) whether VAC breached its fiduciary duty to Sharbern when it implemented the non-competition policy between the Hilton, the Richmond Inn and the Marriott. I will deal with these issues and sub-issues in turn.

(1) Lower Court Treatment of the Fiduciary Duty Issues

[132] Wedge J. described the content of VAC's fiduciary duties to Sharbern and other Hilton Owners in the following terms:

> . . . I find that VAC did not owe a fiduciary duty to not work for other principals competing in the same hotel market as the Hilton. I also find that VAC did not owe a duty to the Hilton Owners to disclose information that it had received from its other principals. Rather, the Hilton Owners consented to VAC acting for other principals competing in the same market, and could expect VAC to keep all information it received from each of its principals confidential.
>
> . . .
>
> I find that VAC owes the following fiduciary duties to the Hilton Owners:
>
> 1. A fiduciary duty to not act for other principals competing in the same market and with respect to whom VAC has a personal interest in favouring.
>
> 2. A fiduciary duty to not act as agent for the Hilton Owners and any third party contracting with them without first making complete disclosure to them and obtaining their consent. [paras. 425 and 429]

[133] The trial judge went on to find that, as a result of the Compensation Differences, VAC had a personal interest in favouring the Marriott over the Hilton. She concluded that

> VAC's personal interest in favouring the Marriott over the Hilton conflicts with its fiduciary duty to the Hilton Owners. Unless VAC disclosed this conflict of interest, and obtained fully informed consent from the Hilton Owners to act in those circumstances, it would be in breach of its fiduciary duty by continuing to act. [para. 439]

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[134] Wedge J. then confirmed that whether the common management of the Hilton and the Marriott had affected the operation of the Hilton to its detriment had not been quantified on the evidence, and did not need to be quantified at that stage in the proceedings. However, she found that there was some evidence "that the Hilton has been disadvantaged by the common management" (para. 447). By this she was referring to a non-competition policy VAC implemented between the Hilton, the Richmond Inn and the Marriott. Since the Hilton brand was proving weaker than the Marriott, senior management at the Hilton tried to lure away corporate clients from the Marriott by undercutting the Marriott's room rates. When the Marriott complained that this was eroding business and causing both hotels to lose money, sales staff proposed that the Hilton, Marriott and Richmond Inn agree not to pursue the top ten corporate preferred accounts of each by offering lower rates. However, other forms of inducement were permitted. The non-competition policy was implemented in 2002.

[135] Wedge J. considered this arrangement to be an agreement between the Hilton and the Marriott with VAC acting as agent for both. Irrespective of the merits of the contract, she found it to be a breach of VAC's equitable obligation to the Hilton Owners to commit them to a contract with another party for whom VAC was also acting as agent, without obtaining the Hilton Owners' informed consent.

[136] The Court of Appeal found that there was no breach of fiduciary duty. Chiasson J.A. interpreted the trial judge's reasoning to mean that VAC was in breach

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of its fiduciary duty as soon as it contracted with the Hilton Owners because of its agreement with the Marriott Owners. However, having previously concluded that VAC did not misrepresent its arrangements with the Marriott Owners, he found that VAC was not in breach of fiduciary duty on entering into the contract with the Hilton Owners. In his view, the issues were interrelated. He reconfirmed that "in this case, the relationship between VAC and the Marriott Hotel unit owners was disclosed" and that the question of whether VAC was in breach of its fiduciary duty because of its failure to disclose the Compensation Differences "depends on whether that information was material" (para. 98). Chiasson J.A. concluded that "in the circumstances of this case, the information objectively was not material" (para. 99).

[137] Chiasson J.A. also held that "the consent given to VAC to act for competing hotels is an answer to any contention the implementation of the price competition policy was *per se* a breach of fiduciary duty" (para. 104). The issue again turned on whether VAC had been required to disclose the Compensation Differences, and in his view, it was not.

(2) A Fiduciary Relationship Existed

[138] VAC argues that the trial judge erred in finding that VAC's relationship with Sharbern was fiduciary in nature. VAC says that the trial judge's "decision to characterize VAC as a fiduciary was not based on a careful consideration of the individual relationship between the parties" but was instead based on a "simplistic

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categorical analysis" in which "[s]he held that VAC was in some respects [Sharbern's] agent, and that the principal-agent relationship was a classic fiduciary relationship" (R.F., at para. 112). VAC submits that the parties were simply dealing in an arm's-length commercial relationship characterized by self interest.

[139] I cannot agree with VAC's position. In my opinion, the trial judge did not conduct a "simplistic categorical analysis". She made a comprehensive review of the jurisprudence and observed that "[f]iduciary duties will not necessarily exist in all agency relationships" (para. 398). She then carefully considered the relationship that existed under the Hotel Asset Management Agreement before concluding that the relationship was fiduciary. She noted that VAC was given discretion as a manager, that it had the ability to unilaterally affect the hotel owners' legal or practical interests, and that the hotel owners were especially vulnerable in that regard. It is clear that she evaluated the relationship created under the Hotel Asset Management Agreement in light of the typical characteristics of fiduciary relationships set out by Wilson J. in her well-known dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136.

[140] In my opinion, there is no basis upon which to differ with the conclusion of the trial judge that while acting as manager of the Hilton, VAC owed fiduciary obligations to the Hilton Owners, including Sharbern.

[141] That said, the nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. As noted by

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Cromwell J., for a unanimous Court, in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 75: ". . . what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her". He also stated that "[i]n cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue" and that "[t]he fiduciary's undertaking may be the result of . . . the express or implied terms of an agreement" (para. 77). While an express undertaking can be found in the terms of a contract for an agency relationship, an implied undertaking can be found with regard to "the particular circumstances of the parties' relationship" which could include "professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty" (para. 79).

[142] In this case, purchasers in the Hilton strata lots knew that they would be entering into the Hotel Asset Management Agreement giving VAC exclusive management of the hotel for at least 20 years. In exchange, VAC contracted to, among other things, use commercially reasonable efforts to rent out the strata units, maximize each owner's proportionate share of monies available for distribution, and faithfully perform its duties and responsibilities and supervise and direct hotel operations. The Hilton Disclosure Statement explained to investors that the success or failure of the rental pool would depend in part on the managerial abilities of the manager. It also contained the reassurance that VAC's related companies had experience in concurrently owning or managing competing hotels. Investors

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undoubtedly counted on VAC to provide managerial experience and expertise. However, they did so understanding and consenting to VAC receiving a management fee, and acting as the manager of the competing Marriott hotel. Disclosure of that conflict position was coupled with the warning that this "could impact upon its ability to perform its obligations under the [Hotel Asset Management Agreement]" (art. 4.9(i)).

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[143] While Sharbern was in a fiduciary relationship with VAC, and VAC owed a duty to use its discretionary powers as manager to act in the interests of Sharbern, this relationship was entered into with the knowledge that there would be common management of the Hilton and Marriott, and that VAC's related companies had a history of concurrent ownership or management of competing hotels. The fiduciary relationship in this case must therefore be circumscribed by the contractual bargain and the knowledge that VAC would be simultaneously balancing fiduciary obligations owed to the Hilton Owners and owners of a competitor: *Galambos*, at para. 79.

(3) Distinguishing the Misrepresentation and Fiduciary Duty Claims

[144] When VAC issued the Hilton Disclosure Statement, it was acting in its role as a developer/issuer, and was not an agent of Sharbern. As issuer, its relationship with Sharbern was not fiduciary in nature. An issuer and investor in

these circumstances deal with each other in an arm's-length commercial relationship characterized by self interest.

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[145] However, when VAC began acting as Sharbern's agent under the Hotel Asset Management Agreement, a fiduciary relationship arose.

[146] It is important to recognize that these are two distinct relationships that happen to be between the same parties: a non-fiduciary issuer-investor relationship, and a fiduciary principal-agent relationship. Therefore, although the underlying factual basis of the issuer-investor misrepresentation issue and the principal-agent fiduciary duty issue are largely the same, the two issues constitute distinct causes of action arising at different *times*. The misrepresentation claim is related to VAC's disclosures made when it was the developer of the Hilton hotel and issuer of the Hilton Disclosure Statement. The breach of fiduciary duty claim is related to VAC's activities when it began acting as an agent and managed the Hilton hotel.

(4) Disclosing the Compensation Differences

[147] The question to be answered here is whether VAC breached its fiduciary duty to Sharbern and the other Hilton Owners while acting as their hotel asset manager, by failing to disclose the Compensation Differences and obtaining the informed consent of the Hilton Owners.

[148] A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity "forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations. . . . [T]hat is, in a situation where a conflict of interest and duty might occur" (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 914). As M. Ng writes, in *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (loose-leaf), at p. 2-10:

> Where fiduciaries put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they will be required to disclose all material information regarding the transaction in order to obtain their principal's informed consent as to their acting despite the conflict.

[149] Sharbern submits that the question of whether VAC breached its fiduciary duty to avoid undisclosed conflicts of interest was "one of consent" (A.F., at para. 54). That is, Sharbern argues that the Court must ask whether VAC "made sufficient disclosure, in the [Hilton Disclosure Statement], of the facts pertaining to its conflict of interest that investors purchasing under the [Hilton Disclosure Statement] must be taken to have consented to the conflict" (*ibid.*). Sharbern's position is premised upon the assumption that the Compensation Differences constituted a material fact or information beyond what had already been disclosed. If that were true, then the onus would fall on VAC, as fiduciary, to prove that it had

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received the informed consent of the Hilton Owners with respect to the Compensation Differences: *McGuire v. Graham* (1908), 11 O.W.R. 999 (C.A.), at pp. 999-1000.

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[150] However, the materiality of the Compensation Differences must first be established. This is because "[n]ot every self-interested act by a fiduciary conflicts with his fiduciary duties; otherwise, he could never do anything for his own benefit" (*Waters'*, at p. 914). As stated by F. M. B. Reynolds in *Bowstead and Reynolds on Agency* (17th ed. 2001), at para. 6-057, "[t]he duty does not completely prohibit the adoption of a position or the entering into of transactions in which such a conflict might occur; it rather prohibits doing so without disclosure of all material facts to the principal so as to obtain his consent" (emphasis added). Here, the principal had consented to the agent's conflict of interest — to act for other principals competing in the same market — and knew that the agent would be simultaneously acting in the interests of the principal and competitors. The first question that Wedge J. ought to have asked, therefore, was whether the Compensation Differences constituted a material fact or information beyond what had already been disclosed, such as to impose a fiduciary duty upon VAC to disclose their particulars.

[151] The standard for identifying when a conflict of interest exists in a fiduciary context was discussed by this Court in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631. There, Binnie J. dealt with conflicts of interest arising out of the solicitor-client fiduciary relationship. He set out the following standard for identifying when a lawyer is in a position of conflict of interest:

> I adopt, in this respect, the notion of a "conflict" in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person". [Emphasis added; para. 31.]

[152] The essential first step was for the court to determine if the Compensation Differences constituted material facts or information beyond what had already been disclosed, thereby giving rise to a fiduciary duty for VAC to disclose them and obtain consent. In this regard, VAC submits that "[a]ll of the evidence on the issue of materiality that [it] adduced, and that the trial judge disregarded, was therefore as relevant to determining the existence of a conflict of interest as it was to determining whether [it] had made a misrepresentation in the [Hilton Disclosure Statement]" (R.F., at para. 106).

[153] This is essentially correct, except for one qualification. It must be remembered that the fiduciary duty issue is distinct from the misrepresentation issue. The materiality evidence and analysis carried out with respect to Sharbern's claim that VAC made material false statements attracting statutory liability under the *Real Estate Act* related to the time period during which the Hilton strata units were marketed and sold. VAC's disclosure obligations under its fiduciary duty related to matters existing or arising during its role as manager of the Hilton hotel. This requires a consideration of the time period following the Hilton Disclosure Statement and also the time period covering the later stages of the fiduciary relationship.

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[154] The Hilton Disclosure Statement was issued in February 1998, and the hotel opened for business in June 1999. VAC had disclosed in the Hilton Disclosure Statement its management of the Marriott hotel and the similar and additional agreements it had with that hotel, "all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements" (art. 4.9(i)). I place no significance on VAC's description of itself as "Developer" instead of "manager" in this context, as the former would have been the term by which it was defined in the Hilton Disclosure Statement. As found by the trial judge, "the Hilton Owners consented to VAC acting for other principals competing in the same market" (para. 425). I agree with Chiasson J.A.'s observation that the question is invariably reduced to whether the Compensation Differences were material, thereby obliging VAC to disclose them and obtain the Hilton Owners' consent to those details. It is also necessary to inquire whether circumstances changed during the course of the fiduciary relationship such as to require VAC to make additional disclosures and obtain renewed consent.

[155] The materiality of the Compensation Differences when the investors were making their decision to invest has been dealt with in detail in the discussion of VAC's alleged statutory liability under the *Real Estate Act*. However, I would add that the disclosure obligations with respect to VAC's fiduciary duty are different from the disclosure obligations under the *Real Estate Act*. As a fiduciary, VAC was obligated to disclose any material facts or information, such as if there was a substantial risk that VAC's fiduciary relationship with the Hilton Owners would be

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materially and adversely affected by VAC's own interests or by VAC's duties to another (*Neil*, at para. 31). VAC's statutory duty was simply to disclose to investors certain prescribed information, without making material false statements. Nonetheless, in that regard, much of the evidence about the materiality of the Compensation Differences as it related to VAC's alleged statutory liability under the *Real Estate Act* would also have been relevant to the question of materiality under the fiduciary duty analysis.

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[156] VAC submitted extensive evidence in support of its position that its lack of disclosure of the Compensation Differences in the Hilton Disclosure Statement did not constitute a material false statement under the legislation. There is no need to repeat that evidence here, which has been discussed in detail above. However, I would add that, in the context of proving or disproving the alleged breach of fiduciary duty, the parties are not precluded from bringing evidence that did not form part of the total mix of information available to investors at the time of their investment decisions, or evidence that would not have been available through the Hilton Disclosure Statement.

[157] For example, the evidence with respect to an industry practice of common management of competing hotels that was considered in relation to VAC's statutory defence is, in my view, also relevant to the question of whether the Compensation Differences were material in the context of the claim of breach of fiduciary duty. After all, the fiduciary relationship arose in the context of a disclosed

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conflict of interest of common management, and a reported practice of common management of competing hotels by VAC's related companies. Beyond the testimony of VAC's witnesses that common management of competing hotels took place without disclosure of the contractual terms to the different owners, it seems highly unlikely that management agreements negotiated between different parties at different times would have identical terms. This case yields one example, where the guaranteed rate of return offered to Marriott Owners apparently could not be offered in the Hilton Disclosure Statement a year later because of changes in securities laws. The fact that common management was nonetheless an accepted industry practice for different hotel chains in the same market suggests that industry players did not treat differing management compensation arrangements as material to the efficient operation or profitability of the hotels. Such evidence would have been relevant to the trial judge's consideration of the materiality of the Compensation Differences.

[158] In contrast to the evidence adduced by VAC, Sharbern did not provide any evidence as to the materiality of the Compensation Differences in this context. Nor did the trial judge consider all the evidence submitted by VAC in her assessment of the materiality of the financial incentives. Although the misrepresentation issue is distinct, the error seen in relation to that analysis applies equally to the analysis of the issue of whether VAC was liable for breach of fiduciary duty. The party seeking to establish the materiality of the undisclosed facts or information did not provide evidence upon which a finding of materiality could reasonably have been made.

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[159] The fiduciary relationship also existed during the later period of time, during which VAC was managing the Hilton hotel. The Hilton hotel opened in June 1999. VAC disclosed the existence of the guarantee in favour of Marriott Owners in a meeting with Hilton Owners on June 14, 2000. The timing of the disclosure of the differential in management fee is not clear. At some point, when the economy deteriorated and occupancy rates plummeted, the Compensation Differences potentially became more germane. So too would VAC's retention of the 24 strata lots in the Hilton hotel, at least in the eyes of Marriott Owners. VAC could then have had a renewed obligation to disclose what had arguably developed into a material conflict of interest, assuming a rejection of VAC's arguments that it lacked the practical means and incentive to act upon the Compensation Differences. How did the timing of these events compare to the timing of the June 2000 disclosure of the guaranteed rate of return to Marriott Owners? Did the conduct of the Hilton Owners subsequent to disclosure constitute consent, at least until the filing of the plaintiff's statement of claim in June 2003 or perhaps when they sought legal advice in the fall of 2002? Evidence on these considerations is not before us, and did not form part of the record before the trial judge.

[160] In sum, not only did the trial judge not consider all the evidence relevant to the issue of materiality, there was a failure on the part of the plaintiff to adduce evidence on the issue of the materiality of the Compensation Differences, either at the time of the Hilton Disclosure Statement or during the later stages of the fiduciary relationship. I am of the opinion that Sharbern failed to demonstrate that the

Compensation Differences constituted a material fact or information beyond what had already been disclosed by VAC. Also, as found in the analysis of the misrepresentation issue, the trial judge's conclusions on the issue of breach of fiduciary duty were tainted by an expectation that VAC must disprove, rather than Sharbern satisfy its onus of proving, the materiality of the Compensation Differences. These problems loom large over the consideration of whether to remit the matter to the trial judge for a determination on the issue of the materiality of the Compensation Differences for the purpose of assessing VAC's liability for breach of fiduciary duty.

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(5) The Non-Competition Agreement

[161] Apart from the non-disclosure of the Compensation Differences, Sharbern submits that it was a breach of VAC's fiduciary duty for VAC to direct its staff at the Hilton not to engage in price competition with the Marriott.

[162] The trial judge observed that VAC implemented a "non-competitive pricing policy which prevented the [Hilton, Marriott and Richmond Inn] from undercutting each other's room rates" with respect to the top ten corporate preferred accounts of each hotel (para. 161). The policy was implemented shortly after the Hilton's 2002 budget was put in place. She found that "[u]nder the policy, both the Hilton and the Marriott were constrained, but the *status quo* favoured the Marriott" as the Hilton was "trying to close the gap" (para. 454) that the Marriott had obtained because of a "year's head start by the time the Hilton opened" (para. 448).

[163] Irrespective of the merits of the contract, the trial judge held that it was a breach of fiduciary duty for VAC to commit the Hilton Owners to a price competition agreement with the Marriott Owners in the absence of the former's consent.

[164] VAC argues that the evidence at trial established that the price competition policy was not a manifestation of a conflict of interest as a matter of fiduciary law. It says that the policy was in the best interests of both the Hilton and the Marriott Owners. For example, the general manager of the Marriott hotel, James Nesbitt, testified that the Marriott would have matched prices with the Hilton if necessary to retain any business that the Hilton hotel might have attempted to poach by underbidding. He observed that undercutting on price was "not a strategy that works at all" (R.R., vol. 11, at p. 2102). When asked about his experience with customers threatening to move hotels because of lower rates, Nesbitt testified that "in all cases - - because it's much easier to retain an existing customer, than spend a lot to go out and find a new customer, in every case you would match that rate to make sure you kept the business" (*ibid.*, at p. 2104).

[165] First, I cannot agree with the trial judge's conclusion that it was a breach of fiduciary duty for VAC to enter into agreements with the Marriott Owners on behalf of the Hilton Owners without prior consent. With three hotels located on the same property, connected by a shopping concourse, and managed through common management, agreements entered into by VAC on behalf of and between Hilton Owners and Marriott Owners would have been part of the ordinary course of

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business, as day-to-day matters that could not feasibly require prior consent of all Hilton Owners. Agreements to effect the sharing of common resources and expenses mentioned earlier would be one example. Significantly, the Hilton Disclosure Statement provided that VAC had the right to enter into such agreements. As stated at art. 4.4(b):

> . . . the Asset Manager shall have the right to enter into such agreements and contracts, and to do such acts and things, as the Asset Manager, in its discretion, considers necessary or desirable, including without limitation entering into affiliation, management, reservation, marketing agreements or licensing or franchise agreements with a hotel chain.

[166] Second, the trial judge erred by failing to consider evidence which was relevant to the materiality of the non-competition agreement, such as evidence of other effects of common management and their impact on the Hilton Owners. Wedge J. simply saw the non-competition agreement as proof of the potential conflict of interest created by common management, commenting that "[t]he highly competitive hotel industry does not embrace the notion of even-handedness" (para. 303). She ignored other evidence to the effect that the three hotels also shared business with each other. VAC's evidence indicated that the Marriott referred business to the Hilton or the Richmond Inn when it did not have the capacity or did not wish to accommodate the lower room rate requested by the client. When the Marriott did not have the capacity to accommodate all the Cathay Pacific air crews, it negotiated a contract which gave a portion of the Cathay Pacific business to the Hilton. In my view, the trial judge erred in assessing the materiality of the non-competition

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agreement to Hilton Owners without determining, on the totality of evidence, whether it was part of an overall practice of cooperation that was to the ultimate benefit of the three hotels.

[167] In sum, without proof that the non-competition agreement constituted a material fact or information beyond what had already been disclosed by VAC, I cannot accept that the non-competition agreement constituted a breach of fiduciary duty.

VI. Summary and Conclusions

[168] In view of the length of these reasons, it will be useful to summarize my conclusions at this point.

[169] As to VAC's liability for material false statements under the *Real Estate Act*:

1. The key question for liability under s. 75(2) of the *Real Estate Act* was to determine if the Compensation Differences were material. Except in cases where materiality can reasonably be established through common sense inferences, materiality must be proven through evidence, and is a fact-specific inquiry, determined on a case-by-case basis. Investors do not have to prove that the undisclosed information would have changed their decision to invest.

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However, they must prove a substantial likelihood that it would be considered important by a reasonable investor in making an investment decision. That is, there must be a substantial likelihood that a reasonable investor would consider the fact as having significantly altered the total mix of available information.

2. The trial judge made three errors in her materiality assessment. First, she treated the conflict of interest as inherently material; second, she reversed the onus of proof of materiality; and, third, she did not consider all of the evidence available to her on the issue of materiality.

3. The onus was on Sharbern to prove that the Compensation Differences were material. It did not adduce any evidence which could reasonably do so.

4. Even if VAC were found to have made a "material false statement", the statutory defence found in s. 75(2)(b)(viii) of the *Real Estate Act* would have availed to its benefit. The trial judge erred by not considering this defence. The statutory defence was established. VAC led evidence to show that it subjectively believed and had reasonable grounds for believing that the Compensation Differences were not material. Sharbern did not direct this Court to any evidence to the contrary.

5. The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had

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knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

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[170] As to VAC's liability for negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there was no evidence capable of supporting a finding of breach of standard of care, VAC cannot be held liable for negligent misrepresentation.

[171] As to VAC's liability for breach of fiduciary duties:

1. When VAC began acting as manager under the Hotel Asset Management Agreement, a fiduciary relationship arose between VAC and Sharbern (and the other Hilton Owners).

2. VAC had already disclosed, and the Hilton Owners had consented to, VAC's common management of the Hilton and the Marriott hotels. Therefore, that conflict of interest was not a breach of VAC's fiduciary duty. VAC was only obliged to disclose the Compensation Differences if they constituted material facts or information beyond what had already been disclosed. Sharbern did not adduce evidence to establish the materiality of the Compensation Differences. Additionally, the trial judge erred by reversing the onus of proof of materiality and by not considering all the evidence adduced by VAC relevant to the issue of materiality.

3. The trial judge erred by not assessing the materiality of the non-competition agreement, and Sharbern did not adduce evidence to establish its materiality.

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[172] I am mindful of the time and resources expended by the parties in the eight years since this litigation commenced. It cannot be in the interests of justice or the parties to prolong the matter further than necessary.

[173] Had I not found that Sharbern had failed to adduce any evidence to establish the materiality of the Compensation Differences or that VAC could claim the benefit of the statutory defence under s. 75(2)(b)(viii) of the *Real Estate Act*, I would have considered remitting the matter to Wedge J. for a determination of the issues in consideration of all the relevant evidence and in accordance with these reasons. However, she would be placed in the position of reassessing the issues upon a consideration of a wider swath of evidence, all in support of only VAC, without any evidence to support the position of Sharbern. The same dilemma arises if she is directed to reconsider whether VAC breached its fiduciary duty to the Hilton Owners by failing to disclose the Compensation Differences during the course of its management of the Hilton hotel.

[174] Cases such as *Hollis v. Dow Corning Corp.* have discussed the circumstances under which it is appropriate for an appellate court to make a fresh assessment of the evidence on the record. Whether the appellate court should do so will depend upon what is in the interests of justice, and whether a fresh assessment is

feasible on a practical level. Feasibility often depends upon the extent to which the credibility of witnesses is at issue as opposed to a consideration of documentary evidence. I am mindful that this case involved a two-month trial, which included much *viva voce* evidence. However, none of the findings of fact by the trial judge appear to be predicated upon her assessment of the credibility of witnesses.

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[175] It has been a recurring finding throughout my consideration of the issues in this case that Sharbern failed to adduce evidence to support key aspects of its claims. As plaintiff, Sharbern had the burden of proving all the necessary elements of its claims, on a balance of probabilities. Sharbern was given the opportunity of a two-month trial to produce such evidence. Nonetheless, it failed to lead sufficient evidence to discharge its onus with respect to establishing the requisite breach of the standard of care necessary to its claim of negligent misrepresentation.

[176] It also failed to produce evidence in support of the materiality of the Compensation Differences, both with respect to whether a failure to disclose them resulted in (i) a material false statement attracting liability under the *Real Estate Act*, or (ii) a breach of its fiduciary duty to the Hilton Owners as the manager of the Hilton hotel. The first may have been due to its position argued in this Court that "there is no need for a plaintiff to tender industry or expert evidence as to what would influence a reasonable investor because the question of materiality of conflicts of interest in a prospectus is uniquely for the court" (A.F., at para. 40). As I said previously, this position misapprehended the fact-based inquiry that is required in

order to establish materiality, as well as the onus on a plaintiff to adduce evidence in support of materiality. Sharbern's failure to adduce evidence of materiality in the context of the claim of breach of fiduciary duty may similarly stem from a misapprehension of the principle that there is only a duty to disclose material facts or information.

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[177] This Court is in the same position as was the Court of Appeal, which signalled throughout its reasons for judgment that the plaintiff had failed to adduce objective evidence to support its claims. In my opinion, the evidence before the trial court could not support a finding that VAC was liable under the *Real Estate Act*, for negligent misrepresentation or for a breach of fiduciary duty either for failing to disclose the Compensation Differences or in implementing the non-competition policy.

[178] I would dismiss the appeal. Leave to appeal in this matter was granted with costs in the cause. Section 37 of the British Columbia *Class Proceedings Act* establishes a no costs regime in the trial court and the Court of Appeal. However, that statute does not apply to this Court. The respondents are entitled to their costs in this Court.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Nathanson, Schachter & Thompson, Vancouver.*

*Solicitors for the respondents: Heenan Blaikie, Vancouver; Lakhani & Company, Vancouver.*

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# Tab 18

**Sun-Rype Products Ltd. and Wendy Weberg** *Appellants/Respondents on cross-appeal*

*v.*

**Archer Daniels Midland Company, Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., ADM Agri-Industries Company, Cargill Limited, Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America** *Respondents/Appellants on cross-appeal*

and

**Attorney General of Canada and Canadian Chamber of Commerce** *Interveners*

**Sun-Rype Products Ltd. et Wendy Weberg** *Appelantes/Intimées au pourvoi incident*

*c.*

**Archer Daniels Midland Company, Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc., auparavant connue sous le nom de CPC International, Inc., ADM Agri-Industries Company, Cargill Limitée, Casco Inc. et Unilever PLC faisant affaire sous la dénomination d'Unilever Bestfoods North America** *Intimées/Appelantes au pourvoi incident*

et

**Procureur général du Canada et Chambre de commerce du Canada** *Intervenants*

**Indexed as: Sun-Rype Products Ltd. *v.* Archer Daniels Midland Company**

**2013 SCC 58**

File No.: 34283.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Répertorié : Sun-Rype Products Ltd. *c.* Archer Daniels Midland Company**

**2013 CSC 58**

N° du greffe : 34283.

2012 : 17 octobre; 2013 : 31 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Civil procedure — Class actions — Certification — Direct and indirect purchasers — Plaintiffs allege that defendants fixed price of high-fructose corn syrup and overcharged direct purchasers and overcharge was passed on to indirect purchasers — Whether indirect purchasers have right to bring action against alleged overcharger — Whether inclusion of indirect and direct*

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Procédure civile — Recours collectifs — Certification — Acheteurs directs et indirects — Allégations des demanderesses selon lesquelles le prix du sirop de maïs à haute teneur en fructose aurait été fixé par les défenderesses, qui auraient vendu cet édulcorant aux acheteurs directs à un prix majoré, et la majoration aurait été transférée aux acheteurs indirects — Les*

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*purchasers in proposed class warrants dismissing action — Whether case meets certification requirement of having an identifiable class of indirect purchasers — Whether direct purchasers have cause of action in constructive trust — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).*

The appellants, direct and indirect purchasers, brought a class action alleging that the respondents engaged in an illegal conspiracy to fix the price of high-fructose corn syrup ("HFCS") resulting in harm to manufacturers, wholesalers, retailers and consumers. HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. On the application for certification, it was determined that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. The action was certified. On appeal, the majority of the court allowed the appeal with respect to the indirect purchasers and held that it was "plain and obvious" that indirect purchasers did not have a cause of action. The appeal with respect to direct purchasers was dismissed. The matter was remitted to the British Columbia Supreme Court to reconsider the certification of the action of the direct purchasers alone. In this Court, the appellants challenge the decision that the indirect purchasers have no cause of action. On cross-appeal, the respondents request dismissal of the direct purchasers' claim in constructive trust.

*Held* (Cromwell and Karakatsanis JJ. dissenting on the appeal): The appeal should be dismissed and the cross-appeal allowed.

*Per* McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ.: Having decided in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. The inclusion of indirect and direct purchasers in the proposed class does not

*acheteurs indirects ont-ils un droit de recours contre l'auteur présumé de la majoration? — La composition du groupe proposé, formé à la fois d'acheteurs directs et d'acheteurs indirects, justifie-t-elle le rejet du recours? — Est-il satisfait en l'espèce au critère de certification relatif à l'existence d'un groupe identifiable d'acheteurs indirects? — Les acheteurs directs ont-ils un droit de recours en imposition d'une fiducie par interprétation? — Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1).*

Les appelantes, des acheteurs directs et indirects, ont intenté un recours collectif, faisant valoir que les intimées ont participé à un complot illégal pour fixer le prix du sirop de maïs à haute teneur en fructose (« SMHTF »), ce qui a porté préjudice à des fabricants, grossistes, détaillants et consommateurs. Cet édulcorant entre dans la confection de diverses denrées alimentaires, dont les boissons gazeuses et les produits de boulangerie. Les intimées sont les principaux fabricants de SMHTF en Amérique du Nord. Il a été décidé à l'instruction de la demande de certification que les actes de procédure révèlent des causes d'action, pour les acheteurs directs, en imposition d'une fiducie par interprétation, et, pour les acheteurs indirects, en vertu de l'art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution. Le recours collectif a été certifié. Les juges majoritaires de la Cour d'appel ont accueilli l'appel en ce qui concerne les acheteurs indirects et conclu qu'il était « manifeste » que ces derniers n'avaient aucune cause d'action. L'appel a été rejeté en ce qui concerne les acheteurs directs. L'affaire a été renvoyée à la Cour suprême de la Colombie-Britannique pour qu'elle réexamine seulement la certification du recours collectif des acheteurs directs. Les appelantes contestent en l'espèce la décision de ne reconnaître aux acheteurs indirects aucune cause d'action. Dans l'appel incident, les intimées sollicitent le rejet de la demande des acheteurs directs visant l'imposition d'une fiducie par interprétation.

*Arrêt* (les juges Cromwell et Karakatsanis sont dissidents quant au pourvoi) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

*La* juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Moldaver et Wagner : Puisque la Cour a décidé dans *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, que les acheteurs indirects ont le droit de se pourvoir en justice, la question à trancher est celle de savoir si les défis supplémentaires que pose un groupe composé à la fois d'acheteurs indirects et d'acheteurs directs sont suffisants pour justifier le rejet du recours. Ce n'est pas le cas.

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produce difficulties that would warrant dismissing the action. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. The court also possesses the power to modify settlement and damage awards in accordance with awards already received in other jurisdictions if the respondents are able to satisfy it that double recovery may occur.

Assuming all facts pleaded to be true, a plaintiff satisfies the requirement that the pleadings disclose a cause of action unless it is plain and obvious that the claim cannot succeed. In relation to the causes of action in restitution for the indirect purchasers, the requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. Case law does not appear to necessarily foreclose a claim where the relationship between the parties is indirect. It is not plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone. As to the recognition of passed-on losses — the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. No insurmountable problem is created by allowing the claims in restitution to be brought. Nor is it plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed and this cause of action should therefore not be struck out.

A court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. The difficulty lies where there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered a loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs who have suffered harm but for whom it would be impractical or unaffordable to bring a claim individually. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have not introduced evidence to establish some basis in fact that at least two class members could prove they purchased a product actually containing HFCS during the

Lorsque le groupe est composé d'acheteurs indirects et directs et que la preuve des experts lors de l'examen au fond des questions communes permet d'établir le montant global de la majoration, il n'y a pas de recouvrement double ou multiple. En outre, les tribunaux disposent du pouvoir de modifier un règlement et les dommages-intérêts octroyés en fonction de ceux déjà obtenus dans d'autres ressorts si les intimés réussissent à les convaincre qu'il y a risque de recouvrement double.

À supposer que tous les faits invoqués soient vrais, il est satisfait à l'exigence selon laquelle les actes de procédure doivent révéler une cause d'action à moins qu'il ne soit manifeste que la demande ne peut être accueillie. Quant aux causes d'action en restitution des acheteurs indirects, il n'est pas établi qu'un lien direct entre le défendeur et le demandeur constitue une condition préalable à une action pour enrichissement injustifié. La jurisprudence ne semble pas exclure nécessairement une action opposant des parties unies par un lien indirect. Il n'est pas manifeste qu'une action pour enrichissement injustifié doit être rejetée à l'étape de la certification pour ce seul motif. Quant au transfert de la perte, le préjudice subi par les acheteurs indirects est reconnu en droit, tout comme leur droit d'exercer des recours pour recouvrer le montant de ces pertes. Le fait de permettre la présentation de la demande en restitution ne pose aucun obstacle insurmontable. Il n'est pas manifeste non plus que la cause d'action des acheteurs indirects fondée sur l'art. 36 de la *Loi sur la concurrence* est vouée à l'échec et, par conséquent, elle ne doit pas être radiée.

Le tribunal doit certifier qu'il s'agit d'un recours collectif s'il existe, notamment, un groupe identifiable de deux personnes ou plus. Or, lorsque la preuve ne permet pas de conclure qu'un certain fondement factuel établit qu'au moins deux personnes sauront si elles appartiennent ou non au groupe, c'est là où le bât blesse. Certifier un recours collectif sans connaître au moins deux personnes qui seront en mesure de prouver les pertes que leur ont fait subir les auteurs présumés de la majoration contrecarre l'objectif des recours collectifs, qui est d'offrir une voie de recours plus efficace aux demandeurs ayant subi un préjudice mais pour qui il serait irréaliste d'exercer un recours individuel ou qui n'ont pas les moyens de le faire. En espèce, aucun fondement factuel ne permet d'établir qu'un seul des membres du groupe proposé dispose des renseignements nécessaires pour déterminer s'il appartient ou non au groupe. Les appelantes n'ont pas établi qu'un certain fondement factuel permet de conclure qu'au moins deux

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class period and were therefore identifiable members of the class. The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. The foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here. In the end, given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified.

With respect to the one cause of action remaining to the direct purchasers, it is determined that the cause of action in constructive trust should fail. Neither the requirement of a proprietary nexus nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case and as such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding.

*Per* Cromwell and Karakatsanis JJ. (dissenting on the appeal): In this case, there is some basis in fact to find an identifiable class of two or more persons that includes indirect purchasers.

The requirement that the class be identifiable does not include the requirement that individual members be capable of proving individual loss. The *Class Proceedings Act* ("*CPA*") is designed to permit a means of recovery for the benefit of the class as a whole, without proof of individual loss, even where it is difficult to establish class membership. Thus, if no individual seeks an individual remedy, it will not be necessary to prove individual loss. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhanced access to justice and judicial economy, but also the broader purpose of behaviour modification. Further, the aggregate damages provisions in the *CPA* are tools which are intended to permit access to justice and behaviour modification in cases where liability to the class has been proven but individual membership in the class is difficult or impossible to determine. The legislation explicitly contemplates difficulties or, in some cases, impossibility in self-identification. Such difficulties have not been

membres pourraient démontrer l'achat au cours de la période visée par le recours d'un produit contenant bel et bien du SMHTF, et par le fait même leur appartenance à un groupe identifiable. Le problème en l'espèce tient au fait que les acheteurs indirects ne seront pas en mesure de savoir si l'article qu'ils ont acheté contenait ou non du SMHTF même s'ils connaissent le nom des produits en cause. Bien que la fixation des prix reprochée ait peut-être porté préjudice à des acheteurs indirects, ils ne peuvent démontrer qu'ils font partie du groupe à la lumière de la définition proposée. Le fondement sur lequel reposerait le recours individuel doit pouvoir se transposer au recours collectif. Or, ce fondement fait défaut en l'espèce. En définitive, puisqu'il est conclu à l'impossibilité d'établir l'existence d'un groupe identifiable composé des acheteurs indirects, le recours collectif dans leur cas ne peut être certifié.

Quant aux acheteurs directs, la seule cause d'action qui leur est reconnue, en imposition d'une fiducie par interprétation, doit être rejetée. Il n'est pas satisfait en l'espèce à la condition d'un lien avec un bien, ni à celle voulant que la fiducie par interprétation soit imposée uniquement si une réparation pécuniaire est jugée inadéquate. Il est donc manifeste que la demande des acheteurs directs visant l'imposition de ce type de fiducie est vouée à l'échec.

*Les* juges Cromwell et Karakatsanis (dissidents quant au pourvoi) : En l'espèce, un certain fondement factuel permet de conclure à l'existence d'un groupe identifiable de deux personnes ou plus auquel appartiennent les acheteurs indirects.

Pour qu'il y ait un groupe identifiable, il ne faut pas que chacun des membres du groupe soit en mesure d'établir une perte individuelle. La *Class Proceedings Act* (la « *CPA* ») est conçue de manière à donner un recours au groupe dans son ensemble, sans qu'il soit nécessaire de prouver une perte individuelle, même s'il est difficile d'établir l'appartenance au groupe. En conséquence, si personne ne cherche à obtenir une réparation individuelle, il ne sera pas nécessaire de prouver une perte individuelle. De tels recours collectifs permettent la restitution de gains provenant d'activités illégales et répondent non seulement aux objectifs d'accès à la justice et d'économie des ressources judiciaires, mais aussi à l'objectif général de modification des comportements. En outre, les dispositions autorisant l'octroi de dommages-intérêts globaux prévues à la *CPA* favorisent l'accès à la justice et la modification des comportements dans les cas où la responsabilité envers le groupe a été démontrée, mais où l'appartenance au groupe est difficile ou impossible

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considered fatal to authorizations under the *CPA* provided that there is some basis in fact that the class exists. The criteria for membership must be clearly defined — not the ability of a given individual to prove that they meet the criteria. Whether claimants can prove their claim for an individual remedy is a separate issue that need not be resolved at the certification stage.

Here, the record contained an evidentiary basis to establish the existence of the class and to show that the members of the class suffered harm. It may never be necessary or legally required to identify individual class members. The *CPA*, while primarily a procedural statute, also creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual members' damages is impractical, and that is available even if those who are not members of the class can benefit. The statute should be construed generously to give life to its purpose of encouraging judicial economy and access to justice and modifying the behaviour of wrongdoers.

Even though it is not necessary at the certification stage to show that individual class members could stand alone as plaintiffs, this record contains a sufficient evidentiary basis to establish the existence of an identifiable class of two or more persons. Direct purchasers of HFCS used it extensively in products that were sold widely to retailers and to consumers. Given the nature of a price-fixing case, loss flows directly from the purchase of HFCS, or in the case of indirect purchasers, products containing HFCS. Claimants will not have to prove definitively that they purchased a particular product that contained HFCS. It will be sufficient if the trial judge is satisfied, upon expert or other evidence, that an individual claimant probably purchased a product containing it. The requirement that there be an evidentiary foundation — or some basis in fact — to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will prove these claims. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. The appellants in this case have tendered evidence which establishes some basis in fact to show that the proposed class is identifiable and that individual class members may be able to establish individual loss on a balance of

à établir. La loi prévoit expressément la possibilité qu'il soit difficile, voire impossible, pour certaines personnes de s'estimer visées. De telles difficultés n'ont pas été jugées fatales à la certification sous le régime de la *CPA* dans la mesure où l'existence d'un groupe repose sur un certain fondement factuel. Les critères d'appartenance au groupe doivent être clairement définis — et non la faculté d'une personne donnée de prouver qu'elle y satisfait. Que les demandeurs puissent ou non établir le bien-fondé de leur demande de réparation individuelle est une question distincte n'ayant pas à être tranchée à l'étape de la certification.

Le dossier permet de conclure que le groupe existe et que les membres du groupe ont subi un préjudice. Il ne sera peut-être jamais nécessaire ni impératif en droit que les membres individuels du groupe soient connus. La *CPA*, une loi à caractère principalement procédural, crée également une réparation qui reconnaît que les préjudices causés au groupe dans son ensemble peuvent être prouvés, même si la preuve des préjudices individuels est irréaliste, et qui peut être ordonnée même si elle est susceptible de profiter à des non-membres. Cette loi doit être interprétée libéralement pour donner effet à l'objectif du législateur, à savoir favoriser l'économie des ressources judiciaires, l'accès à la justice et la modification du comportement des malfaiteurs.

Même s'il n'est pas nécessaire à l'étape de la certification d'établir que chacun des membres du groupe aurait la capacité pour agir seul, le dossier en l'espèce étaye suffisamment l'existence d'un groupe identifiable de deux personnes ou plus. Les acheteurs directs de SMHTF ont utilisé largement cet édulcorant dans la confection de produits qui ont été vendus à grande échelle aux détaillants et consommateurs. En matière de fixation des prix, la perte découle directement de l'achat du SMHTF, ou dans le cas des acheteurs indirects, de produits en contenant. Les demandeurs n'auront pas à démontrer, preuves à l'appui, avoir acheté un certain produit contenant du SMHTF. Il suffira que le juge de première instance soit convaincu, à la lumière de la preuve, notamment d'expert, qu'un demandeur donné a probablement acheté un produit contenant l'édulcorant en question. L'exigence que chacun des critères de certification repose sur un certain fondement factuel n'emporte pas d'examen sommaire au fond du recours et n'exige pas l'énumération des éléments à l'appui de la demande. La question à cette étape n'est pas s'il est vraisemblable que la demande aboutisse, mais s'il convient de procéder par recours collectif. En l'espèce, les appelantes ont établi un certain fondement factuel permettant de conclure que le groupe

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probabilities. Individual claimants, including indirect purchasers, would be able to self-identify as potential plaintiffs based on knowledge of the products in which HFCS is known to have been commonly used.

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By Rothstein J.

**Applied:** *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, rev'g 2011 BCCA 186, 304 B.C.A.C. 90; **referred to:** *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), aff'd 2013 SCC 59, [2013] 3 S.C.R. 600; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Tracy (Guardian ad litem of) v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351; *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379.

By Karakatsanis J. (dissenting on the appeal)

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proposé est identifiable et que chacun des membres du groupe pourrait être en mesure d'établir, suivant la prépondérance des probabilités, une perte individuelle. Des demandeurs, dont des acheteurs indirects, pourraient s'estimer membres éventuels s'ils savaient les produits dans la composition desquels il a été reconnu qu'entrait régulièrement du SMHTF.

**Jurisprudence**

Citée par le juge Rothstein

**Arrêt appliqué :** *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, inf. 2011 BCCA 186, 304 B.C.A.C. 90; **arrêts mentionnés :** *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Option consommateurs c. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), conf. par 2013 CSC 59, [2013] 3 R.C.S. 600; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959; *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; *Tracy (Guardian ad litem of) c. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577; *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269; *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572; *VitaPharm Canada Ltd. c. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351; *Fairhurst c. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45; *British Columbia c. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263; *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534; *Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774; *Taub c. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379.

Citée par la juge Karakatsanis (dissidente quant au pourvoi)

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*J. J. Camp*, *Q.C.*, *Reidar Mogerman*, *Melina Buckley* and *Michael Sobkin*, for the appellants/respondents on cross-appeal.

*D. Michael Brown*, *Gregory J. Nash* and *David K. Yule*, for the respondents/appellants on cross-appeal Archer Daniels Midland Company and ADM Agri-Industries Company.

*J. Kenneth McEwan*, *Q.C.*, and *Eileen M. Patel*, for the respondents/appellants on cross-appeal Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited.

38 C.P.C. (6th) 373; *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774; *Gilbert c. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35; *Cassano c. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543; *Ford c. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758; *Alfresh Beverages Canada Corp. c. Hoechst AG* (2002), 16 C.P.C. (5th) 301; *MacKinnon c. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214.

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*J. J. Camp*, *c.r.*, *Reidar Mogerman*, *Melina Buckley* et *Michael Sobkin*, pour les appelantes/intimées au pourvoi incident.

*D. Michael Brown*, *Gregory J. Nash* et *David K. Yule*, pour les intimées/appelantes au pourvoi incident Archer Daniels Midland Company et ADM Agri-Industries Company.

*J. Kenneth McEwan*, *c.r.*, et *Eileen M. Patel*, pour les intimées/appelantes au pourvoi incident Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company et Cargill Limitée.

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*Stephen R. Schachter*, *Q.C.*, *Geoffrey B. Gomery*, *Q.C.*, and *Peter R. Senkpiel*, for the respondents/appellants on cross-appeal Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America.

*John S. Tyhurst*, for the intervener the Attorney General of Canada.

*Davit D. Akman* and *Adam Fanaki,* for the intervener the Canadian Chamber of Commerce.

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*John S. Tyhurst*, pour l'intervenant le procureur général du Canada.

*Davit D. Akman* et *Adam Fanaki*, pour l'intervenante la Chambre de commerce du Canada.

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APPENDIX: Common Issues Certified by Rice J.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] In price-fixing cases, indirect purchasers are customers who did not purchase a product directly from the alleged price-fixers/overchargers but who purchased it indirectly from a party further down the chain of distribution. Those who say indirect purchasers should not be able to bring actions against their alleged overchargers cite complexities in tracing the overcharge, risks of

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ANNEXE : Questions communes certifiées par le juge Rice

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Abella, Rothstein, Moldaver et Wagner rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Dans les affaires de fixation des prix, l'acheteur indirect est celui qui s'est procuré un produit, non pas directement auprès de la personne à qui on reproche d'en avoir fixé le prix (l'auteur de la majoration), mais auprès d'une partie intervenant à une autre étape de la chaîne de distribution. Les personnes qui préconisent l'irrecevabilité au Canada des recours des acheteurs indirects contre l'auteur

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double or multiple recovery and failure to deter anti-competitive behaviour as reasons why they should not be permitted in Canada. These were some of the issues before the Court in the companion case of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Pro-Sys*"). In that case, a proposed indirect purchaser class action, those arguments were found to be insufficient bases upon which to deny indirect purchasers the right to bring an action against the alleged overcharger.

de la majoration invoquent la difficulté de suivre la majoration d'un maillon à l'autre de cette chaîne, le risque de recouvrement double ou multiple et l'omission de décourager le comportement anticoncurrentiel comme autant de raisons justifiant leur argument. Il s'agit de certaines des questions dont est saisie la Cour dans l'affaire connexe *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477 (« *Pro-Sys* »). Dans cette dernière, un recours collectif projeté formé par des acheteurs indirects, les arguments mentionnés précédemment ont été jugés insuffisants pour refuser à ces acheteurs le droit de poursuivre en justice l'auteur présumé de la majoration.

[2] In this case, both the indirect and direct purchasers are class members. Having decided in *Pro-Sys* that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. If the Court finds that the action may proceed, it must then consider whether the class action should have been certified by the applications judge.

[2] En l'espèce, le groupe est formé à la fois des acheteurs indirects et des acheteurs directs. Puisque la Cour a décidé dans *Pro-Sys* que les acheteurs indirects ont le droit de se pourvoir en justice, la question à trancher est celle de savoir si les défis supplémentaires que pose un groupe composé à la fois d'acheteurs indirects et d'acheteurs directs sont suffisants pour justifier le rejet du recours. Si la Cour conclut que le recours collectif peut suivre son cours, elle doit alors se demander si le juge saisi de la demande aurait dû le certifier ou non.

[3] For the reasons that follow, I would find that the inclusion of indirect and direct purchasers in the proposed class does not produce difficulties that would warrant dismissing the action. However, I find this case cannot meet the certification requirements because there is not an identifiable class of indirect purchasers as required for certification under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"). I would dismiss the appeal on that basis. The case of the direct purchasers, which is restricted to constructive trust, is dismissed as I find there is no cause of action. The cross-appeal is therefore allowed.

[3] Pour les motifs exposés ci-après, j'estime que la composition du groupe projeté — formé d'acheteurs indirects et directs — n'engendre pas de difficultés justifiant le rejet du recours collectif. Par contre, je conclus que la présente instance ne respecte pas les critères de certification prévus à la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (la « *CPA* »), de la Colombie-Britannique, vu l'absence de groupe identifiable d'acheteurs indirects. Je suis d'avis de rejeter le pourvoi pour cette raison. L'unique action des acheteurs directs, en imposition d'une fiducie par interprétation, est rejetée, faute de cause d'action. Par conséquent, l'appel incident est accueilli.

## II. Background

[4] Sun-Rype Products Ltd., a juice manufacturer, is the direct purchaser representative plaintiff and Wendy Bredin (formerly Wendy Weberg) is the indirect purchaser representative plaintiff in

## II. Contexte

[4] Sun-Rype Products Ltd., un fabricant de jus, est la demanderesse-représentante des acheteurs directs, et Wendy Bredin (auparavant Weberg) remplit le même rôle au nom des acheteurs indirects en

this action. The representative plaintiffs (referred to collectively as the "appellants"), brought the class action pursuant to the *CPA*. They allege that Archer Daniels Midland Company and ADM Agri-Industries Company (the "ADM respondents"), Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company, and Cargill Limited (the "Cargill respondents"), and Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America (the "Casco respondents") (collectively, the "respondents"), engaged in an illegal conspiracy to fix the price of high-fructose corn syrup ("HFCS") resulting in harm to manufacturers, wholesalers, retailers and consumers.

[5] HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. The appellants claim that between January 1, 1988 and June 30, 1995, the respondents engaged in an "intentional, secret and illegal conspiracy to fix the price of HFCS", which allowed them to charge the class members more for HFCS than they would have charged but for the alleged illegal conduct (A.F., at paras. 9 and 11).

## III. Summary of the Proceedings Below

### A. *Commencement of the Action*

[6] The appellants commenced this class action in June 2005 on behalf of "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the [respondents] (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (2010 BCSC 922 (CanLII), at para. 2). It alleged the following causes of action (*ibid.*, at para. 27):

l'espèce. Les demanderesses-représentantes (collectivement les « appelantes ») ont intenté le recours collectif en vertu de la *CPA*. Selon elles, Archer Daniels Midland Company et ADM Agri-Industries Company (les « intimées ADM »), Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company et Cargill Limitée (les « intimées Cargill ») ainsi que Corn Products International, Inc., Bestfoods, Inc., auparavant connue sous le nom de CPC International, Inc., Casco Inc. et Unilever PLC, faisant affaire sous la dénomination d'Unilever Bestfoods North America (les « intimées Casco ») (collectivement les « intimées »), ont participé à un complot illégal pour fixer le prix du sirop de maïs à haute teneur en fructose (« SMHTF »), ce qui a porté préjudice à des fabricants, grossistes, détaillants et consommateurs.

[5] Le SMHTF est un édulcorant utilisé dans la fabrication de diverses denrées alimentaires, dont les boissons gazeuses et les produits de boulangerie. Les intimées sont les principaux fabricants de SMHTF en Amérique du Nord. Les appelantes prétendent que, du 1er janvier 1988 au 30 juin 1995, les intimées ont participé à un [TRADUCTION] « complot intentionnel, secret et illégal en vue de fixer le prix du SMHTF », ce qui leur a permis de faire payer aux membres du groupe un prix plus élevé pour le SMHTF que celui qu'elles auraient établi, n'eussent été les actes illégaux qu'on leur reproche (m.a., par. 9 et 11).

## III. Résumé des instances devant les juridictions inférieures

### A. *Genèse de l'instance*

[6] Les appelantes ont intenté le recours collectif en juin 2005 au nom de [TRADUCTION] « tous les résidants de la Colombie-Britannique et d'ailleurs au Canada qui ont acheté du SMHTF fabriqué par les [intimées] ou des produits en contenant (collectivement le "groupe") entre le 1er janvier 1988 et le 30 juin 1995 (la "période visée par le recours") » (2010 BCSC 922 (CanLII), par. 2). Le groupe a fait valoir les causes d'action suivantes (*ibid.*, par. 27) :

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a) contravention of s. 45(1) of Part VI of the *Competition Act* giving rise to a right of damages under s. 36(1) of that Act;

b) tortious conspiracy and intentional interference with economic interests;

c) unjust enrichment, waiver of tort and constructive trust; and

d) punitive damages.

B. *Pre-certification Motion to Strike*

[7] The respondents brought a pre-certification motion to strike the appellants' claims on the basis that they were statute-barred. In an order dated May 10, 2007, the motions judge only allowed the claim for a remedial constructive trust because it was subject to a longer (10-year) limitation period than the other claims (2007 BCSC 640, 72 B.C.L.R. (4th) 163). The respondents appealed the order to the British Columbia Court of Appeal ("B.C.C.A.") and the appellants cross-appealed (2008 BCCA 278, 81 B.C.L.R. (4th) 199). The result was that the B.C.C.A. found that the direct purchaser representative plaintiff, Sun-Rype, could maintain only its cause of action in remedial constructive trust and that all of its claims for damages, including damages under the *Competition Act*, R.S.C. 1985, c. C-34, were statute-barred. As to the indirect purchaser representative plaintiff, Wendy Bredin, the B.C.C.A. found that she could maintain all of her causes of action because the limitation period on her claims did not begin until "she received the telephone call from her lawyer advising her of the proposed class action" (para. 138).

a) infraction au par. 45(1) de la partie VI de la *Loi sur la concurrence* ouvrant droit à des dommages-intérêts au titre du par. 36(1) de cette loi;

b) délit civil de complot et atteinte intentionnelle à des intérêts financiers;

c) enrichissement injustifié, renonciation à un recours délictuel et fiducie par interprétation;

d) dommages-intérêts punitifs.

B. *Requête en radiation présentée avant la certification du recours collectif*

[7] Avant la certification du recours collectif, les intimées ont présenté une requête en radiation des demandes des appelantes pour cause de prescription. Par ordonnance datée du 10 mai 2007, le juge des requêtes a accueilli uniquement la demande relative à l'imposition d'une fiducie par interprétation à titre de réparation parce qu'elle était assujettie à un délai de prescription plus long (10 ans) que les autres (2007 BCSC 640, 72 B.C.L.R. (4th) 163). Les intimées ont interjeté appel de l'ordonnance à la Cour d'appel de la Colombie-Britannique (« C.A.C.-B. »), et les appelantes ont formé un appel incident (2008 BCCA 278, 81 B.C.L.R. (4th) 199). La Cour d'appel a conclu que la demanderesse-représentante des acheteurs directs, Sun-Rype, pouvait maintenir uniquement sa demande en imposition d'une fiducie par interprétation à titre de réparation, et que ses demandes en dommages-intérêts, notamment celles présentées en vertu de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, étaient prescrites. Quant à la demanderesse-représentante des acheteurs indirects, Wendy Bredin, la Cour d'appel a conclu qu'elle pouvait continuer à faire valoir toutes ses causes d'action parce que le délai de prescription applicable à ses demandes n'avait commencé à courir qu'au moment où [TRADUCTION] « elle a reçu l'appel de son avocat qui l'a avisée de l'existence du recours collectif projeté » (par. 138).

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C. *Certification Proceedings in the British Columbia Supreme Court, 2010 BCSC 922 (CanLII)*

[8] The British Columbia Supreme Court ("B.C.S.C.") dealt with the appellants' application for certification by its decision dated June 30, 2010. As to the issue of whether indirect purchasers could bring actions against their alleged overchargers, Rice J. found that it was "not plain and obvious" that indirect purchaser claims were unavailable as a matter of law in Canada (para. 58).

[9] Rice J. then addressed the requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action. Excluding the portions of the claim struck by the pre-certification decision on the limitation periods, Rice J. found that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. Rice J. also found that the remaining certification requirements, namely (i) whether there were common issues; (ii) whether there was an identifiable class; (iii) whether the class action was the preferable procedure; and (iv) whether Sun-Rype and Wendy Bredin could adequately represent the class, were met. He certified the action identifying common issues relating to the indirect purchasers' claims seeking statutory, common law and equitable damages and restitution based on allegations that the respondents engaged in an international and unlawful conspiracy to fix the price of HFCS during the class period. The common issues certified by Rice J. are listed in the appendix to these reasons.

D. *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 187, 305 B.C.A.C. 55*

[10] The majority of the B.C.C.A. (*per* Lowry J.A., Frankel J.A. concurring) held that it was "plain and obvious" that indirect purchasers did not have

C. *Procédure de certification devant la Cour suprême de la Colombie-Britannique, 2010 BCSC 922 (CanLII)*

[8] La Cour suprême de la Colombie-Britannique (« C.S.C.-B. ») tranche la demande des appelantes visant la certification d'un recours collectif le 30 juin 2010. Pour ce qui est de savoir si les acheteurs indirects peuvent poursuivre l'auteur présumé de la majoration, le juge Rice conclut qu'il [TRADUCTION] « n'est pas manifeste » que les demandes d'acheteurs indirects sont irrecevables en droit au Canada (par. 58).

[9] Le juge Rice analyse ensuite la condition prévue à l'al. 4(1)(a) de la *CPA* voulant que les actes de procédure révèlent une cause d'action. Faisant fi des éléments de l'action radiés par suite de la décision sur les délais de prescription rendue avant la certification du recours collectif, le juge Rice arrive à la conclusion que les actes de procédure révèlent des causes d'action, pour les acheteurs directs, en imposition d'une fiducie par interprétation, et pour les acheteurs indirects, en vertu de l'art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution. Selon lui, les autres conditions de certification d'un recours collectif sont réunies, à savoir i) l'existence d'une question commune; ii) l'existence d'un groupe identifiable; iii) le recours collectif est la meilleure procédure; iv) Sun-Rype et Wendy Bredin peuvent représenter le groupe de manière appropriée. Il certifie le recours collectif, sur la foi d'allégations de complot international et illégal par les intimées en vue de fixer le prix du SMHTF au cours de la période visée par le recours, et détermine les questions communes des acheteurs indirects intéressant leurs demandes en restitution et en dommages-intérêts légaux, de common law et d'equity. Les questions communes certifiées par le juge Rice sont énumérées à l'annexe.

D. *Appel de la certification à la Cour d'appel de la Colombie-Britannique, 2011 BCCA 187, 305 B.C.A.C. 55*

[10] Les juges majoritaires de la C.A.C.-B. (le juge Lowry, avec l'accord du juge Frankel) concluent qu'il est [TRADUCTION] « manifeste » que les

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a cause of action (para. 97). The majority reached this conclusion for the same reasons as in its decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2011 BCCA 186, 304 B.C.A.C. 90: it held that the rejection of the passing-on defence in Canada carried as its necessary corollary a corresponding rejection of the offensive use of passing on in the form of an indirect purchaser action. The majority found Canadian law "to be consistent with American federal law as established by the Supreme Court of the United States in *Hanover Shoe* . . . and *Illinois Brick*" (*Pro-Sys* (C.A.), at para. 74).

[11] With respect to the indirect purchasers, the majority allowed the appeal and found that the pleadings did not disclose a cause of action on their part (para. 98). However, with respect to direct purchasers, the majority found that the appeal should be dismissed (para. 74). The B.C.C.A. set aside the certification order of Rice J. and remitted the matter to the B.C.S.C. to reconsider the certification of the action of the direct purchasers alone.

[12] Donald J.A., dissenting, as he did in *Pro-Sys*, would have found that indirect purchaser actions were permitted as a matter of law in Canada and would have certified the action for both direct and indirect purchasers, finding that all of the requirements in s. 4(1) of the *CPA* were met.

IV. Analysis

[13] This appeal was brought concurrently with the appeal in the companion case of *Pro-Sys*. Counsel for the appellants are the same in both cases, and the appellants in this case rely heavily on the appellants' submissions in *Pro-Sys* to support their arguments. In view of the significant overlap in issues, these reasons will frequently refer to the reasons in *Pro-Sys*.

[14] In this Court, the three groups of respondents filed separate factums. However, each adopts the pleadings of the others in the appeal and the cross-appeal. In the appeal, the respondents argue first

acheteurs indirects n'ont aucune cause d'action (par. 97). Ils parviennent à cette conclusion pour les mêmes motifs que dans leur arrêt *Pro-Sys Consultants Ltd. c. Microsoft Corp.*, 2011 BCCA 186, 304 B.C.A.C. 90 : selon eux, le rejet de la défense de transfert de la perte au Canada emporte nécessairement le rejet du transfert de la perte comme cause d'action, c'est-à-dire de l'action intentée par les acheteurs indirects. Les juges majoritaires estiment que le droit canadien [TRADUCTION] « s'accorde avec le droit fédéral américain, tel qu'il a été établi par la Cour suprême des États-Unis dans *Hanover Shoe* [. . .] et *Illinois Brick* » (*Pro-Sys* (C.A.), par. 74).

[11] Quant aux acheteurs indirects, les juges majoritaires accueillent l'appel et concluent que les actes de procédure ne révèlent aucune cause d'action (par. 98). Quant aux acheteurs directs cependant, les juges majoritaires sont d'avis de rejeter l'appel (par. 74). Ils annulent l'ordonnance de certification du juge Rice et renvoient l'affaire à la C.S.C.-B. pour qu'elle réexamine seulement la certification du recours collectif des acheteurs directs.

[12] Le juge Donald, dissident en l'espèce tout comme il l'est dans *Pro-Sys*, estime que les recours des acheteurs indirects sont recevables en droit au Canada, et il est d'avis de certifier le recours collectif des acheteurs directs et des acheteurs indirects, estimant que toutes les conditions prévues au par. 4(1) de la *CPA* sont réunies.

IV. Analyse

[13] Le présent pourvoi a été interjeté en même temps que celui dans l'affaire connexe *Pro-Sys*. Les avocats des appelants sont les mêmes dans ces deux dossiers, et les appelantes en l'espèce fondent en bonne partie leurs arguments sur ceux des appelants dans *Pro-Sys*. Vu l'important chevauchement des questions, les présents motifs renvoient souvent à ceux de l'arrêt *Pro-Sys*.

[14] Les trois groupes d'intimées ont déposé des mémoires distincts à la Cour, mais chacun de ces groupes fait siens les actes de procédure des autres dans l'appel et l'appel incident. En appel,

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and foremost that indirect purchasers do not have a cause of action. They also argue that the class action should be decertified in respect of the indirect purchasers because the class is not identifiable as required by s. 4(1)(b) of the *CPA*. On the cross-appeal, the respondents request dismissal of the direct purchasers' claim in constructive trust on the grounds that the elements required to establish a constructive trust are not present. They also seek decertification of the class action on the basis that Rice J. applied the wrong standard of proof in his analysis of the certification requirements.

les intimées soutiennent d'abord et avant tout que les acheteurs indirects sont dépourvus de cause d'action. Elles ajoutent qu'il faut annuler la certification du recours collectif à l'égard des acheteurs indirects parce qu'ils ne forment pas un groupe identifiable, comme l'exige l'al. 4(1)(b) de la *CPA*. Dans l'appel incident, elles sollicitent le rejet de la demande des acheteurs directs visant l'imposition d'une fiducie par interprétation, plaidant l'absence des éléments requis pour l'établir. Elles sollicitent également l'annulation de la certification du recours collectif parce que le juge Rice aurait appliqué la mauvaise norme de preuve dans son analyse des conditions de certification.

[15] As indicated, I am unable to find an identifiable class as it relates to the indirect purchasers and would dismiss the appeal on that basis. Nonetheless, for completeness, the various arguments presented in this case are assessed below. I turn first to the indirect purchaser question and then consider the arguments pertaining to the certification of the class action.

[15] Comme je le mentionne précédemment, selon moi les acheteurs indirects ne forment pas un groupe identifiable, et je suis d'avis de rejeter le pourvoi pour cette raison. Néanmoins, par souci d'exhaustivité, j'analyse les divers arguments avancés dans la présente affaire. Je me penche sur la question des acheteurs indirects avant d'examiner les arguments relatifs à la certification du recours collectif.

A. *Indirect Purchaser Actions (the "Passing On" Issue)*

A. *Recours collectif intenté par les acheteurs indirects (la question du « transfert de la perte »)*

[16] The appellants largely adopt the submissions of Pro-Sys Consultants Ltd. on the passing-on issue. As the offensive use of passing on has been analysed in the reasons in *Pro-Sys*, it is unnecessary to repeat it in its entirety here. I add only the following to address the differences that arise with regard to passing on where indirect purchasers and direct purchasers are part of the same class.

[16] Les appelantes souscrivent en bonne partie aux arguments de Pro-Sys Consultants Ltd. sur la question du transfert de la perte. Vu que le transfert de la perte comme cause d'action a été analysé dans les motifs de l'arrêt *Pro-Sys*, point n'est besoin de refaire toute cette analyse. Je n'ajoute les remarques suivantes que dans la mesure où elles sont nécessaires pour traiter des distinctions engendrées lorsque le groupe est composé à la fois d'acheteurs indirects et directs.

(1) Double or Multiple Recovery as Between Indirect and Direct Purchasers

(1) Recouvrement double ou multiple par les acheteurs indirects et les acheteurs directs

[17] The respondents argue that the "fundamental difficulty with the case of the indirect purchasers is that they seek recovery of amounts to which the direct purchasers have a valid claim, such that,

[17] Les intimées font valoir que la [TRADUCTION] « difficulté fondamentale que présente le dossier des acheteurs indirects tient à ce qu'ils cherchent à obtenir le recouvrement de sommes d'argent que

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to recognize the claim of the indirect purchasers would be to recognize an overlapping claim to the same amount and the prospect of double recovery" (Cargill factum, at para. 54). They argue that, because the passing-on defence has been rejected in Canada, the direct purchasers are entitled to 100 percent of the amount of the overcharge. Consequently they say that indirect purchasers "make a duplicative and overlapping claim to an overcharge to which the direct purchasers are entitled based on settled principles" (para. 61).

[18] For the reasons given in the *Pro-Sys* appeal, this argument is insufficient to deny indirect purchasers the right to be included in the class action. I agree with Rice J. that, by including both direct and indirect purchasers in the class and by using economic methodologies to ascertain the aggregate amount of the loss, there will be no over-recovery from the respondents (B.C.S.C., at para. 53).

[19] In this case, the appellants seek recovery of a defined sum equal to the aggregate of the overcharge. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. Recovery is limited to that aggregate amount, no matter how it is ultimately shared by the direct and indirect purchasers. This was the view of the B.C.C.A. in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 78, and of the Quebec Court of Appeal in *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), at para. 114. The appeal of the latter decision was heard together with *Pro-Sys* and this case. See *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600.

les acheteurs directs peuvent valablement réclamer. Ainsi, en reconnaissant le droit d'action des acheteurs indirects, on reconnaît un autre droit d'action sur une somme d'argent unique et la possibilité d'un recouvrement double » (mémoire de Cargill, par. 54). Selon elles, comme la défense de transfert de la perte a été écartée au Canada, les acheteurs directs ont le droit de recouvrer la totalité de la majoration. Elles disent donc que la demande des acheteurs indirects en recouvrement du montant de la majoration « télescope celle des acheteurs directs, qui y ont droit en vertu de principes établis » (par. 61).

[18] Pour les motifs exposés dans *Pro-Sys*, cet argument ne suffit pas à refuser aux acheteurs indirects le droit de participer au recours collectif. Je conviens avec le juge Rice que si le groupe est formé des acheteurs directs et des acheteurs indirects et si des méthodes économiques servent à établir le montant global de la perte, les intimées ne seront pas tenues de verser une indemnité supérieure au montant global de la majoration (C.S.C.-B., par. 53).

[19] Dans la présente affaire, les appelantes demandent le recouvrement d'une somme précise équivalente au montant global de la majoration. Lorsque le groupe est composé d'acheteurs indirects et directs et que le témoignage des experts lors de l'examen au procès des questions communes permet d'établir le montant global de la majoration, il n'y a pas de recouvrement double ou multiple. Le recouvrement intégral est limité à cette somme, peu importe comment elle sera finalement répartie entre les acheteurs directs et les acheteurs indirects. C'est l'avis exprimé par la C.A.C.-B. dans *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (« *Infineon* »), par. 78, et par la Cour d'appel du Québec dans *Option consommateurs c. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), par. 114. L'appel dans cette dernière affaire a été entendu en même temps que celui dans l'affaire *Pro-Sys* et le présent pourvoi. Voir *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600.

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[20] To the extent that there is conflict between the class members as to how the aggregate amount is to be distributed upon the awarding of a settlement or upon a successful action, this is not a concern of the respondents and is not a basis for denying indirect purchasers the right to be included in the class action.

(2) Over-Recovery as Between Jurisdictions

[21] In addition to concern of double recovery as between indirect and direct purchasers, the respondents also express concerns of over-recovery arising from actions in the U.S. Specifically, the respondents state that in the U.S., direct purchasers of HFCS have already reached a settlement with the respondents for the entire overcharge. They claim that if the rights of the indirect purchasers to bring an action are recognized in Canada, this will create "overlapping claims to the same loss between direct purchasers in the U.S. and indirect purchasers in British Columbia" (Cargill factum, at para. 71). As stated in the *Pro-Sys* reasons, the court is equipped to deal with these risks. The court possesses the power to modify settlement and damage awards in accordance with awards already received by plaintiffs in other jurisdictions if the respondents are able to satisfy it that double recovery may occur. If the respondents adduce relevant evidence, the court will be able to ensure that double recovery does not occur.

(3) Restitutionary Law Principles

[22] The majority of the B.C.C.A. rejected the offensive use of passing on based on the theory that once the passing-on *defence* is rejected, the direct purchasers would be entitled to the whole amount by which they were overcharged:

. . . I am unable to see why the [direct purchasers] would not as a matter of law be entitled to the whole of the amount they overpaid regardless of any amount that may

[20] Même si les membres du groupe ne s'entendaient pas sur la répartition de la somme globale dans l'éventualité d'un règlement ou d'un gain de cause, ce problème ne regarde pas les intimées et ne justifie pas que l'on refuse aux acheteurs indirects le droit de participer au recours collectif.

(2) Trop-perçu découlant de recours exercés dans plusieurs ressorts

[21] En plus du recouvrement double par les acheteurs indirects d'une part et les acheteurs directs d'autre part, les intimées disent craindre un trop-perçu résultant de la combinaison du présent recours et de ceux exercés aux États-Unis. Plus précisément, les intimées affirment que les acheteurs directs américains ont déjà conclu un règlement avec elles à propos du montant intégral de la majoration. Elles prétendent que, si le droit des acheteurs indirects d'exercer un recours est reconnu au Canada, [TRADUCTION] « les demandes des acheteurs indirects de la Colombie-Britannique télescoperont celles des acheteurs directs américains à l'égard de la même perte » (mémoire de Cargill, par. 71). Comme il est mentionné dans les motifs de l'arrêt *Pro-Sys*, les tribunaux peuvent gérer ces risques. Ils disposent du pouvoir de modifier un règlement et les dommages-intérêts octroyés en fonction de ceux déjà obtenus par les demandeurs dans d'autres ressorts si les intimés réussissent à leur prouver qu'il y a risque de recouvrement double. Si les intimés présentent des éléments de preuve pertinents à cet égard, le tribunal sera en mesure de leur éviter pareille situation.

(3) Principes du droit de la restitution

[22] Les juges majoritaires de la C.A.C.-B. ont refusé le transfert de la perte comme cause d'action suivant le principe que dès lors que cette *défense* est rejetée, les acheteurs directs ont droit au recouvrement intégral du montant de la majoration :

[TRADUCTION] . . . je n'arrive pas à voir pourquoi en droit les [acheteurs directs] ne pourraient pas recouvrer l'intégralité du montant de la majoration, peu importe

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have been passed on to the [indirect purchasers] in the same way they would if they were the only plaintiffs in the action. Anything less would serve to disadvantage them because of the nature of the proceedings such that they would be deprived of what they would legally be entitled to recover. [para. 84]

[23] I would agree that absent an action by indirect purchasers or absent the inclusion of indirect purchasers in the action, the direct purchasers would be able to recover the entire amount of the overcharge because the overcharger would be unable to invoke the passing-on defence. However, this is not the same as saying the direct purchasers are *entitled* to the entire amount of the overcharge. The disgorgement of amounts obtained through wrongdoing is one of the fundamental principles of restitutionary law (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), vol. I, at p. 3-1). Restitutionary law is "a tool of corrective justice" that seeks to take money away from the party who has unjustly taken it and return it to the party who unjustly lost it (*Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at paras. 32 and 47). While a defendant cannot invoke the passing-on defence, the direct purchasers cannot deny that they have passed on the overcharge to the indirect purchasers. Where indirect purchasers are able to demonstrate that overcharges were passed on to them, they are entitled to claim those overcharges.

(4) Deterrence and Compensation

[24] As part of their argument that indirect purchaser actions should not be allowed, the respondents make much of the fact that in many other price-fixing cases in Canada, awards to indirect purchasers have been disbursed in the form of *cy-près* payments because the amounts in question were so small as to make identification of and distribution to each individual class member impractical. They claim that *cy-près* distributions do not advance the deterrence objective of the Canadian competition laws because any deterrence function could be achieved to an equal extent by a claim made solely by direct purchasers. They also argue

le surcoût potentiellement transféré aux [acheteurs indirects], comme s'ils étaient les seuls demandeurs. Leur accorder moins les défavoriserait compte tenu de la nature de l'instance, de sorte qu'ils seraient privés de ce qu'ils sont en droit de recouvrer. [par. 84]

[23] Je conviens que, si les acheteurs indirects n'exercent aucun recours, seuls ou avec les acheteurs directs, ces derniers seraient à même de recouvrer le montant intégral de la majoration vu l'impossibilité pour l'auteur de cette dernière d'invoquer le transfert de la perte en défense. Or, cela ne revient pas à dire que les acheteurs directs ont *droit* à l'intégralité de cette somme d'argent. La remise des biens mal acquis constitue l'une des pierres angulaires du droit de la restitution (P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (éd. à feuilles mobiles), vol. I, p. 3-1). Le droit de la restitution constitue « un outil de la justice corrective » qui cherche à reprendre à la partie qui a acquis injustement des fonds pour les rendre à celle qui les a perdus injustement (*Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, par. 32 et 47). Si un défendeur ne peut invoquer le transfert de la perte en défense, les acheteurs directs ne peuvent nier avoir refilé la majoration aux acheteurs indirects. Dans les cas où les acheteurs indirects peuvent le démontrer, ils ont le droit de demander le remboursement du montant de la majoration.

(4) Dissuasion et indemnisation

[24] À l'appui de leur argument selon lequel le recours des acheteurs indirects doit être rejeté, les intimées font tout particulièrement valoir que, dans nombre d'autres affaires de fixation des prix au Canada, l'indemnité accordée à ce type d'acheteurs a été versée suivant le principe de l'aussi-près (*cy-près doctrine*) parce que le montant de l'indemnité individuelle adjugée était si faible qu'il aurait été irréaliste de dénicher tous les membres du groupe pour la leur verser. Toujours selon les intimées, une indemnité versée suivant ce principe ne sert pas l'objectif de dissuasion des lois canadiennes sur la concurrence parce qu'une

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that because the award would be distributed to a not-for-profit entity in place of the class members, the compensation goal of the Canadian competition laws is also frustrated.

[25] There is merit to these arguments; however, the precedent for *cy-près* distribution is well established (see M. A. Eizenga et al., *Class Actions Law and Practice* (loose-leaf), at § 9.19). While *cy-près* distributions may not appeal to some on a policy basis, this method of distributing settlement proceeds or damage awards is contemplated by the *CPA*, at s. 34(1):

**34** (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

[26] It is also a method the courts have used in indirect purchaser price-fixing cases, as demonstrated by the respondents' summary of nine cases in which distribution of the settlement funds was made on a *cy-près* basis. And, while its very name, meaning "as near as possible", implies that it is not the ideal mode of distribution, it allows the court to disburse the money to an appropriate substitute for the class members themselves (see D. Blynn, "Cy Pres Distributions: Ethics & Reform" (2012), 25 *Geo. J. Legal Ethics* 435, at p. 435).

[27] As such, while the compensation objective is not furthered by a *cy-près* distribution, it cannot be said that deterrence is reduced by the possibility that a settlement will eventually be distributed in that manner. These factors do not preclude indirect purchasers from bringing an action or from being included in the class.

demande présentée uniquement par les acheteurs directs serait tout aussi dissuasive. Elles ajoutent qu'elle ne sert pas non plus l'objectif d'indemnisation, car elle serait versée à un organisme à but non lucratif plutôt qu'aux membres du groupe.

[25] Ces arguments sont valables, mais la jurisprudence en matière de versement suivant le principe de l'aussi-près est bien établie (voir M. A. Eizenga et autres, *Class Actions Law and Practice* (feuilles mobiles), § 9.19). Bien qu'il puisse ne pas plaire à certains pour des raisons de principe, ce mode de distribution de l'indemnité accordée par suite d'un règlement ou des dommages-intérêts adjugés est prévu au par. 34(1) de la *CPA* :

[TRADUCTION]

**34** (1) Le tribunal peut ordonner que la totalité ou une partie du montant adjugé en vertu de la présente section qui n'a pas été répartie dans le délai qu'il a fixé soit affectée d'une façon dont il est raisonnable de s'attendre qu'elle profite aux membres du groupe ou du sous-groupe même si l'ordonnance ne prévoit pas de mesures de redressement pécuniaire pour les membres du groupe ou du sous-groupe.

[26] Ce mode de distribution a également été employé par les tribunaux dans les affaires de fixation des prix intéressant des acheteurs indirects, comme le démontre le résumé que les intimées ont présenté de neuf affaires où il avait été ordonné. Et, bien qu'il ressorte de son propre nom, dérivé de l'expression [TRADUCTION] « aussi près que possible », qu'il ne s'agit pas du mode de distribution idéal, il permet au tribunal de verser l'argent à un substitut convenable du groupe (voir D. Blynn, « Cy Pres Distributions : Ethics & Reform » (2012), 25 *Geo. J. Legal Ethics* 435, p. 435).

[27] Par conséquent, même si le versement suivant le principe de l'aussi-près de l'indemnité accordée par suite d'un règlement ne sert pas l'objectif d'indemnisation, on ne saurait dire qu'il desserve l'objectif de dissuasion. Ces considérations n'empêchent pas les acheteurs indirects d'exercer un recours ou de faire partie du groupe.

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B. *The Certification of the Class Action*

[28] Having determined that indirect purchasers may pursue actions against their alleged overchargers, the issue is now whether this action should be certified. The analysis of the certification requirements was carried out by the applications judge, Rice J., but was not addressed by the majority of the B.C.C.A. The majority of the B.C.C.A. disposed of the action based solely on its finding that passing on could not be used offensively to allow indirect purchasers to bring an action.

[29] The requirements for certification under the *CPA* are set forth in s. 4(1):

**4** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff 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

B. *La certification du recours collectif*

[28] Ayant conclu que les acheteurs indirects ont un droit de recours contre l'auteur présumé de la majoration, je dois maintenant décider s'il y a lieu de certifier le présent recours collectif. Les conditions de certification ont été analysées par le juge saisi de la demande, le juge Rice, mais les juges majoritaires de la C.A.C.-B. n'en ont pas traité. Ils ont tranché le recours uniquement sur le fondement de leur conclusion que le transfert de la perte ne constitue pas une cause d'action, de sorte que les acheteurs indirects se trouvent privés de recours.

[29] Les conditions de certification prévues à la *CPA* sont énoncées en son par. 4(1) :

[TRADUCTION]

**4** (1) Le tribunal saisi d'une demande visée à l'article 2 ou 3 certifie une instance à titre de recours collectif lorsque les conditions suivantes sont réunies :

(a) les actes de procédure révèlent une cause d'action;

(b) il existe un groupe identifiable de 2 personnes ou plus;

(c) les demandes des membres du groupe soulèvent une question commune, que celle-ci l'emporte ou non sur les questions qui touchent uniquement les membres individuels;

(d) le recours collectif serait la meilleure procédure pour régler la question commune de manière juste et efficace;

(e) un demandeur-représentant :

(i) défendrait de manière juste et appropriée les intérêts du groupe,

(ii) a présenté, pour le recours collectif, un plan qui établit une méthode praticable de faire progresser l'instance au nom du groupe et d'aviser les membres du groupe de l'existence du recours collectif,

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(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[30] The respondents contest only three of the certification criteria. The first is whether the pleadings disclose a cause of action as required under s. 4(1)(a). They argue that the remaining cause of action of the direct purchasers in constructive trust should be struck and that the indirect purchaser causes of action in restitution and under s. 36 of the *Competition Act* should fail. They do not contest the indirect purchasers' causes of action in tort. Second, they say that the requirement under s. 4(1)(c) that the claims raise common issues is not met. Third, they argue that the class is not identifiable as it relates to the indirect purchasers as required under s. 4(1)(b).

(1) Do the Pleadings Disclose a Cause of Action?

[31] Section 4(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. This requirement is judged on the standard of proof applied in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, namely that a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[32] I first consider the respondents' arguments in relation to the causes of action in restitution for both the indirect and direct purchasers (remedial constructive trust) and then turn to the arguments against the cause of action of the indirect purchasers under s. 36 of the *Competition Act*.

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les questions communes.

[30] Les intimées font valoir qu'il n'est pas satisfait à trois des conditions de certification. Premièrement, les actes de procédure révèlent-ils une cause d'action, comme l'exige l'al. 4(1)(a)? Elles soutiennent qu'il faut radier la cause d'action restante des acheteurs directs en imposition d'une fiducie par interprétation et rejeter la cause d'action des acheteurs indirects en restitution et celle fondée sur l'art. 36 de la *Loi sur la concurrence*. Elles ne contestent pas les causes d'action des acheteurs indirects en responsabilité délictuelle. Deuxièmement, elles affirment qu'il n'est pas satisfait à la condition prévue à l'al. 4(1)(c) voulant que les demandes soulèvent une question commune. Troisièmement, elles font valoir que le groupe n'est pas identifiable au sens où il faut l'entendre pour l'application de l'al. 4(1)(b) dans la mesure où il est formé d'acheteurs indirects.

(1) Les actes de procédure révèlent-ils une cause d'action?

[31] L'alinéa 4(1)(a) de la *CPA* exige que les actes de procédure révèlent une cause d'action. Cette analyse s'effectue selon la norme de preuve appliquée dans *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980, à savoir que le demandeur répond à l'exigence à moins qu'il ne soit manifeste que sa demande ne peut être accueillie, à supposer que tous les faits invoqués soient vrais (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261 (« *Alberta Elders* »), par. 20; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25).

[32] Je vais d'abord examiner les arguments des intimées relatifs aux causes d'action en restitution des acheteurs indirects et des acheteurs directs (imposition d'une fiducie par interprétation à titre de réparation) avant de me pencher sur les arguments qu'elles invoquent à l'encontre de la cause d'action des acheteurs indirects fondée sur l'art. 36 de la *Loi sur la concurrence.*

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(a) *Restitution — Indirect Purchasers*

[33] In the alternative, the appellants claim that the respondents have been unjustly enriched as a result of the alleged overcharge on the sale of HFCS and that the class members have suffered a deprivation in the amount of the overcharge attributable to the sale of HFCS in B.C. and in Canada. They plead that this overcharge resulted from wrongful or unlawful acts and that there can thus be no juristic reasons for the enrichment. The appellants seek the disgorgement of the alleged overcharge paid to the respondents by the class members.

[34] The respondents argue that "both the benefit conferred and deprivation (or loss) suffered was that of the direct purchasers alone" and as such, it is the direct purchasers alone who can bring a claim for restitution for wrongful conduct. They submit that no benefit was conferred directly by the indirect purchaser to the overcharger and that the deprivation in question was suffered by the direct purchasers and *not* the indirect purchasers, because the passing on of losses is not recognized at law (Cargill factum, at para. 30).

[35] I understand the respondents to be making two separate points: one, that a direct relationship between a plaintiff and a defendant is needed to ground a claim in unjust enrichment; and two, that because indirect purchasers cannot base a claim on passed-on losses, they have no cause of action in unjust enrichment. Both of these arguments have been addressed in the reasons in *Pro-Sys*.

[36] The requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. As indicated in the *Pro-Sys* reasons, *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, states only that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant" (p. 797 (emphasis added)). *Peel* requires only that a claim in unjust enrichment must

a) *Restitution — Acheteurs indirects*

[33] Subsidiairement, les appelantes prétendent que les intimées se sont injustement enrichies, car elles auraient majoré le prix du SMHTF, et que les membres du groupe ont subi un appauvrissement correspondant au montant du surcoût découlant de la vente du SMHTF en C.-B. et ailleurs au Canada. Selon elles, cette majoration est imputable à des actes fautifs ou illicites et aucun motif juridique ne saurait donc justifier l'enrichissement. Les appelantes réclament la restitution du surcoût que les membres du groupe auraient payé aux intimées.

[34] Les intimées affirment que [TRADUCTION] « tant l'avantage conféré que l'appauvrissement subi (la perte) touche exclusivement les acheteurs directs » et ainsi ils sont les seuls à pouvoir présenter une demande en restitution pour des actes fautifs. Elles prétendent que l'acheteur indirect n'a conféré directement aucun avantage à l'auteur de la majoration et que l'appauvrissement en question a été subi par les acheteurs directs, et *non* par les acheteurs indirects, vu que le transfert de la perte n'est pas reconnu en droit (mémoire de Cargill, par. 30).

[35] Je crois comprendre que les intimées avancent deux arguments distincts : premièrement, pour fonder une action pour enrichissement injustifié, il doit y avoir un lien direct entre le demandeur et le défendeur; deuxièmement, puisque les acheteurs indirects ne peuvent invoquer le transfert de la perte en demande, ils n'ont aucune cause d'action pour enrichissement injustifié. Ces deux arguments sont examinés dans les motifs de l'arrêt *Pro-Sys*.

[36] Il n'est pas établi qu'un lien direct entre le défendeur et le demandeur constitue une condition préalable à une action pour enrichissement injustifié. Comme il est indiqué dans les motifs de l'arrêt *Pro-Sys*, la Cour affirme seulement dans *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, que « [l]es affaires dans lesquelles l'enrichissement sans cause a été établi concernent généralement des avantages conférés directement et expressément au défendeur » (p. 797 (je souligne)).

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be based on "more than an incidental blow-by" and that "[a] secondary collateral benefit will not suffice" (p. 797). These words would appear not to necessarily foreclose a claim where the relationship between the parties is indirect. However, as in *Pro-Sys*, this does not resolve the issue. First, it is not apparent here that the benefit received by the respondents was mere "incidental blow-by" or "collateral benefit". Second, the appellants in *Pro-Sys* argue that *Alberta Elders* is an example of a case where an unjust enrichment was found absent a direct relationship, calling the requirement into question. Accordingly, it cannot be said that it is plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone.

*Peel* vient établir uniquement que le fondement d'une action pour enrichissement sans cause ne doit pas revêtir « qu'un caractère purement incident » et qu'« [u]n avantage secondaire et accessoire ne suffit pas » (p. 797). Ces propos ne semblent pas exclure nécessairement une action opposant des parties unies par un lien indirect. Toutefois, tout comme dans l'affaire *Pro-Sys*, cela ne règle pas la question. Premièrement, il n'est pas évident en l'espèce que l'avantage obtenu par les intimées ne revêtait qu'un « caractère purement incident » ou n'était que « secondaire ». Deuxièmement, les appelants dans l'affaire *Pro-Sys* soutiennent qu'*Alberta Elders* est un exemple d'arrêt où la Cour a conclu à l'enrichissement injustifié malgré l'absence d'un lien direct, ce qui soulève un doute sur le caractère impératif de cette condition. On ne saurait donc dire qu'il est manifeste qu'une action pour enrichissement injustifié doit être rejetée à l'étape de la certification pour ce seul motif.

[37] As to the recognition of passed-on losses, that question has been answered conclusively: the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. For the reasons previously explained, no insurmountable problem is created by allowing the claims in restitution to be brought by a class comprised of both direct and indirect purchasers. Unjustly obtained amounts are recoverable on the basis that they have been extracted at the plaintiffs' expense (Maddaugh and McCamus, at p. 3-9). That is what is alleged to have occurred in this case. The appellants allege that the respondents committed wrongful acts that were directed at both the direct *and the indirect purchasers* and as such both groups should be able to recover their losses.

[37] Quant au transfert de la perte, la Cour répond de façon concluante à cette question : le préjudice subi par les acheteurs indirects est reconnu en droit, tout comme leur droit d'exercer des recours pour recouvrer le montant de ces pertes. Pour les motifs énoncés précédemment, le fait de permettre à un groupe formé à la fois d'acheteurs directs et d'acheteurs indirects de présenter une demande en restitution ne pose aucun obstacle insurmontable. Il est possible de recouvrer les fonds mal acquis parce qu'ils l'ont été au détriment des demandeurs (Maddaugh et McCamus, p. 3-9). C'est ce qui serait arrivé en l'espèce. Les appelantes prétendent que les intimées ont commis des actes fautifs à l'endroit des acheteurs directs *et des acheteurs indirects* et soutiennent que les deux groupes devraient avoir le droit de recouvrer le montant de leurs pertes.

[38] It is true that, absent indirect purchasers, the rejection of the passing-on defence entitles direct purchasers to 100 percent of the amount of the overcharge. However, this entitlement is altered when indirect purchasers are included in the action. As explained above, this does not mean, as the respondents suggest, that to allow indirect purchasers to join the action would be "to admit of the possibility that a plaintiff could recover twice

[38] Certes, s'il est fait abstraction des acheteurs indirects, l'impossibilité d'invoquer en défense le transfert de la perte se traduit pour les acheteurs directs par un droit à la totalité de la majoration. Cependant, la participation d'acheteurs indirects au recours altère ce droit. Comme je l'explique précédemment, cela ne signifie pas, tel que les intimées le laissent entendre, que le fait de permettre aux acheteurs indirects de participer au recours

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— once from the person who is the immediate beneficiary of the payment or benefit . . . and again from the person who reaped an incidental benefit" (Cargill factum, at para. 32, citing *Peel*, at p. 797). Rather, it means that the indirect and direct purchasers will share the aggregate amount recovered in the event that the action is successful. To the extent that there are competing claims among the direct and indirect purchasers, I agree with Rice J. that this may be sorted out at a later stage of the proceeding (B.C.S.C., at para. 195). At this stage, both groups share the common interest of maximizing the amount recoverable from the respondents. The indirect purchasers' cause of action in restitution should therefore not be struck out.

(b) *Constructive Trust — Direct Purchasers*

[39] On cross-appeal, with respect to the one cause of action remaining to the direct purchasers, the respondents argue that the cause of action in constructive trust should fail.

[40] The respondents claim that neither the requirement of a "proprietary nexus" nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case. As such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding (see Casco cross-appeal factum, at para. 28, citing *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577, for the requirements of a constructive trust). I agree.

[41] In *Pro-Sys*, noting that *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, was the relevant controlling authority, I found that the claim in constructive trust must fail because there was no referential property and no explanation by the appellants why a monetary remedy would be inappropriate or insufficient. For the same reasons,

reviendrait à [TRADUCTION] « admettre la possibilité d'un double recouvrement par le demandeur — d'abord, de la personne qui bénéficie immédiatement du paiement ou de l'avantage [. . .] et ensuite, de la personne qui en a tiré un avantage incident » (mémoire de Cargill, par. 32, citant l'arrêt *Peel*, p. 797). Cela signifie plutôt que les acheteurs indirects et les acheteurs directs se partageront la somme globale recouvrée s'ils ont gain de cause. Dans l'éventualité où les acheteurs directs et les acheteurs indirects présentent des demandes concurrentes, je partage l'avis du juge Rice qu'il est possible de régler ce point plus tard au cours de l'instance (C.S.C.-B., par. 195). À ce stade, les deux groupes ont en commun l'intérêt à récupérer la somme d'argent la plus élevée possible auprès des intimées. En conséquence, il ne faut pas radier la cause d'action en restitution des acheteurs indirects.

b) *Fiducie par interprétation — Acheteurs directs*

[39] Dans l'appel incident, les intimées soutiennent que la seule cause d'action reconnue aux acheteurs directs, en imposition d'une fiducie par interprétation, doit être rejetée.

[40] Les intimées prétendent qu'il n'est pas satisfait en l'espèce à la condition d'un [TRADUCTION] « lien avec un bien », ni à celle voulant que la fiducie par interprétation soit imposée uniquement si une réparation pécuniaire est jugée inadéquate. Il est donc manifeste que la demande des acheteurs directs visant l'imposition de ce type de fiducie est vouée à l'échec (voir mémoire d'appel incident de Casco, par. 28, citant *Tracy (Guardian ad litem of) c. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577, à propos des conditions d'une fiducie par interprétation). Je suis d'accord.

[41] Concluant dans l'arrêt *Pro-Sys* que *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269, constitue l'arrêt de principe en la matière, j'estime dans la première que les allégations relatives à l'existence d'une fiducie par interprétation doivent être rejetées étant donné qu'aucun bien n'est en cause et que les appelantes ne précisent pas en quoi une

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I find it plain and obvious that Sun-Rype's claim in constructive trust in this case must fail and should be struck.

(c) *Section 36 of the Competition Act — Indirect Purchasers*

(i) Passed-On Losses Recognized at Law

[42] Section 36 of the *Competition Act* provides a cause of action to "[a]ny person who has suffered loss or damage as a result of (*a*) conduct that is contrary to any provision of Part VI". The respondents, basing their argument on their fundamental position that passed-on losses are not recognized at law, assert that s. 36 was not intended to provide a right of action to indirect purchasers.

[43] For the reasons explained in *Pro-Sys*, this argument is rejected. It is not plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed.

(ii) Jurisdiction Over Extraterritorial Conduct

[44] The respondents argue that "an alleged conspiracy entered into outside Canada, among foreign defendants, to fix prices of products sold to foreign direct purchasers does not constitute an offence under the *Competition Act* giving rise to a right of civil action" (ADM factum, at para. 54). They claim that the jurisdiction of Canadian courts over violations of the *Competition Act* by foreign defendants "will have to be determined by reference to the presumptive connecting factors identified in *Club Resorts*, which determination is beyond the scope of the present appeal" (para. 53) and that conduct cannot be contrary to Part VI of the *Competition Act* "unless there is a real and substantial link between that conduct and Canada" (para. 60).

réparation pécuniaire est inappropriée ou insuffisante. Pour les mêmes motifs, il est manifeste à mon avis que la demande de Sun-Rype visant à faire reconnaître l'existence d'une fiducie par interprétation est vouée à l'échec et doit être radiée.

c) *Article 36 de la Loi sur la concurrence — Acheteurs indirects*

(i) Transfert de la perte reconnu en droit

[42] L'article 36 de la *Loi sur la concurrence* confère une cause d'action à « [t]oute personne qui a subi une perte ou des dommages par suite : *a*) soit d'un comportement allant à l'encontre d'une disposition de la partie VI ». S'appuyant sur leur position fondamentale selon laquelle le transfert de la perte n'est pas reconnu en droit, les intimées affirment que l'objet de l'art. 36 ne saurait être d'accorder un droit d'action aux acheteurs indirects.

[43] Pour les motifs donnés dans *Pro-Sys*, cet argument est rejeté. Il n'est pas manifeste que la cause d'action des acheteurs indirects fondée sur l'art. 36 de la *Loi sur la concurrence* est vouée à l'échec.

(ii) Compétence sur les actes commis à l'étranger

[44] Les intimées soutiennent qu'[TRADUCTION] « un complot prétendument noué à l'extérieur du Canada par des défendeurs étrangers pour fixer le prix de produits vendus à des acheteurs directs étrangers ne constitue pas une infraction prévue par la *Loi sur la concurrence* qui fait naître un droit d'action au civil » (mémoire d'ADM, par. 54). Selon elles, la compétence des tribunaux canadiens à l'égard des infractions à la *Loi sur la concurrence* perpétrées par des défendeurs étrangers « doit être établie à l'aune des facteurs de rattachement créant une présomption qui sont énumérés dans *Club Resorts*, ce qui déborde le cadre du présent pourvoi » (par. 53). Elles font valoir également qu'un comportement ne peut aller à l'encontre de la partie VI de la *Loi sur la concurrence* « à moins qu'il n'existe un lien réel et substantiel entre ce comportement et le Canada » (par. 60).

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[45] I agree with the respondents that the framework proposed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, will need to be applied in establishing whether there is "real and substantial connection" sufficient to find that Canadian courts have jurisdiction in this case. However, I would question the respondents' characterization of the factual situation.

[46] The conduct in question, while perpetrated by foreign defendants, allegedly involved each respondent's Canadian subsidiary acting as its agent. The sales in question were made in Canada, to Canadian customers and Canadian end-consumers. There is at least some suggestion in the case law that where defendants conduct business in Canada, make sales in Canada and conspire to fix prices on products sold in Canada, Canadian courts have jurisdiction (see *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.), at paras. 58, 63-86 and 101-2 ("It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad": para. 58); *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45, at para. 32 (the B.C.C.A. refusing to deny certification of a class action based on the argument that Canadian courts had no jurisdiction over *Competition Act* violations occurring outside of Canada); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263, at paras. 32-45 ("A conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the 'wrongful conduct' occurred. On that basis, the court has jurisdiction over the *ex juris* defendants who are alleged to be parties to the conspiracy": para. 41)).

[47] The respondents have not demonstrated that it is plain and obvious that Canadian courts have no jurisdiction over the alleged anti-competitive acts committed in this case. The cause of action under s. 36 of the *Competition Act* should not be struck out.

[45] Je partage l'opinion des intimées qu'il faut appliquer le cadre proposé dans *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572, pour déterminer s'il existe un « lien réel et substantiel » suffisant pour conclure à la compétence des tribunaux canadiens en l'espèce. J'ai toutefois des doutes quant à la perspective des intimées quant aux faits.

[46] Bien qu'ils aient été commis par des défendeurs étrangers, les actes reprochés impliquent la filiale canadienne de chacune des intimées agissant à titre de mandataire de ces dernières. Les ventes ont été réalisées au Canada auprès de clients canadiens et, au dernier maillon de la chaîne de distribution, de consommateurs canadiens. Selon un certain courant jurisprudentiel, les tribunaux canadiens sont compétents à l'égard des instances mettant en cause des défendeurs faisant affaire au Canada, y réalisant des ventes et complotant en vue de fixer les prix de produits vendus au Canada (voir *VitaPharm Canada Ltd. c. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (C.S.J. Ont.), par. 58, 63-86 et 101-102 ([TRADUCTION] « Il est possible de soutenir qu'un complot portant préjudice à des Canadiens engage la responsabilité de ses auteurs au Canada même s'il a été ourdi à l'étranger » (par. 58)); *Fairhurst c. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45, par. 32 (la C.A.C.-B. a refusé d'infirmer la certification d'un recours collectif contestée au motif que les infractions à la *Loi sur la concurrence* perpétrées à l'étranger ne ressortissent pas aux tribunaux canadiens); *British Columbia c. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263, par. 32-45 ([TRADUCTION] « Il y a complot en Colombie-Britannique si le préjudice y est subi, quel que soit l'endroit où l'"acte fautif" a été commis. Par conséquent, la cour a compétence à l'égard des défendeurs d'un autre ressort à qui l'on reproche de participer au complot » (par. 41))).

[47] Les intimées n'ont pas démontré qu'il est manifeste que les agissements anticoncurrentiels qui auraient été commis en l'espèce ne sont pas du ressort des tribunaux canadiens. La cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence* ne doit pas être radiée.

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(2) Are There Common Issues?

[48] Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues. The respondents' arguments as to the commonality requirement centre on the standard of proof to be applied to this and the other certification requirements other than the requirement that the pleadings disclose a cause of action. Here, as in *Pro-Sys*, the respondents urge the Court to resolve the remainder of the certification requirements on a balance of probabilities. They say the Court should adopt the U.S. approach of weighing conflicting evidence at the certification stage. For the reasons set out in *Pro-Sys*, the standard to be applied here is "some basis in fact" and not a balance of probabilities.

[49] As to the standard to be applied to the expert evidence, the respondents do not argue that it is insufficient to demonstrate commonality; rather, they submit that Rice J. erred in that he applied the wrong standard of proof to the expert methodologies that he examined.

[50] The reasons in *Pro-Sys* have set out that the standard to be applied to expert evidence is one requiring a credible and plausible methodology capable of proving harm on a class-wide basis.

[51] It is evident that on the certification application, Rice J. analysed the significant amount of expert evidence that was before him and that he applied the correct standard to both the certification requirements ("plain and obvious" for s. 4(1)(a) and "some basis in fact" for s. 4(1)(b) to (e)) and the expert methodology required to establish some basis in fact (whether the expert evidence consisted of a credible and plausible model capable of proving harm on a class-wide basis). There is no basis upon which to interfere with his common issues determination.

(2) Existe-t-il une question commune?

[48] Aux termes de l'al. 4(1)(c) de la *CPA*, les demandes des membres du groupe doivent soulever une question commune. Les arguments des intimées à ce sujet sont axés sur la norme de preuve qu'il convient d'appliquer aux conditions de certification, sauf à celle relative à la cause d'action. Tout comme dans *Pro-Sys*, les intimées en l'espèce exhortent la Cour à statuer sur ces conditions de certification selon la prépondérance des probabilités. Selon elles, la Cour doit suivre l'exemple des tribunaux américains, qui soupèsent les éléments de preuve contradictoires à l'étape de la certification. Pour les motifs exposés dans *Pro-Sys*, la norme de preuve applicable en l'espèce est celle d'un « certain fondement factuel », et non celle de la prépondérance des probabilités.

[49] Quant à la norme applicable à la preuve d'expert, les intimées ne soutiennent pas qu'il ne suffit pas d'établir la communauté. Elles font plutôt valoir que le juge Rice a appliqué la mauvaise norme à la preuve relative aux méthodes d'experts qu'il a examinées.

[50] Dans *Pro-Sys*, il est établi que la norme qui s'applique à la preuve d'expert est celle de la méthode valable et acceptable permettant de prouver le préjudice à l'échelle du groupe.

[51] Il ressort à l'évidence que, lors de l'instruction de la demande visant la certification, le juge Rice a analysé la preuve d'expert volumineuse dont il disposait et qu'il a appliqué la bonne norme tant aux conditions de certification (celle du caractère [TRADUCTION] « manifeste » pour l'al. 4(1)(a) et celle du « certain fondement factuel » pour les al. 4(1)(b) à (e)) qu'à la méthode d'expert employée pour établir l'existence d'un certain fondement factuel (celle de la méthode valable et acceptable permettant de prouver qu'un préjudice a été causé à l'échelle du groupe). Il n'y a aucune raison de modifier sa conclusion sur les questions communes.

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(3) Is There an Identifiable Class?

[52] Section 4(1)(b) of the *CPA* provides that the court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. *Hollick* provides that this certification requirement will be satisfied by demonstrating "some basis in fact" to support it (para. 25).

[53] The class definition proposed by the appellants is "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (B.C.S.C., at para. 2).

[54] The respondents take issue with the inclusion of indirect purchasers in the class. They acknowledge that while impracticability or impossibility in distributing class action proceeds to indirect purchasers does not necessarily preclude finding an "identifiable class", the facts of this particular case are such that the class cannot be found to be "identifiable" to the extent that it includes indirect purchasers (ADM factum, at para. 85). The respondents argue that the inclusion of indirect purchasers in the class in the present case runs contrary to the purpose of the "identifiable class" requirement because indirect purchasers are not able, based on the class definition, to determine if they are members of the class. Relying on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, the respondents argue that the identifiable class requirement should allow for class membership to be determinable.

[55] They argue that the proposed class definition does not allow for indirect purchasers to determine if they are in fact members of the class as defined. Contrary to the *Infineon* and *Pro-Sys* cases where there was evidence that class membership could likely be determined, here "it is simply impossible to make a determination of the presence, or lack of presence, of HFCS in particular products a

(3) Existe-t-il un groupe identifiable?

[52] L'alinéa 4(1)(b) de la *CPA* prévoit l'une des conditions préalables à la certification d'un recours collectif, à savoir l'existence d'un groupe identifiable de deux personnes ou plus. Il ressort de l'arrêt *Hollick* qu'il est satisfait à cette condition dès lors qu'un « certain fondement factuel » est établi (par. 25).

[53] La définition du groupe proposée par les appelantes est la suivante : [TRADUCTION] « . . . tous les résidants de la Colombie-Britannique et d'ailleurs au Canada qui ont acheté du SMHTF fabriqué par les défenderesses ou des produits en contenant (collectivement le "groupe") entre le 1er janvier 1988 et le 30 juin 1995 (la "période visée par le recours") » (C.S.C.-B., par. 2).

[54] Les intimées contestent l'inclusion des acheteurs indirects dans le groupe. Elles reconnaissent que la distribution impossible ou irréaliste aux acheteurs indirects des indemnités accordées à l'issue du recours collectif n'empêche pas nécessairement de conclure à l'existence d'un « groupe identifiable ». Elles estiment toutefois que, vu les faits de l'espèce, le groupe ne peut être jugé « identifiable » dans la mesure où il comprend les acheteurs indirects (mémoire d'ADM, par. 85). Selon elles, l'appartenance de ces acheteurs au groupe en l'espèce ne respecte pas la condition relative à l'existence d'un « groupe identifiable » parce qu'ils ne sont pas en mesure, d'après la définition du groupe, de déterminer s'ils en font partie ou non. Invoquant *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, les intimées soutiennent que, pour qu'il soit satisfait à cette condition, l'appartenance au groupe devrait être déterminable.

[55] De l'avis des intimées, la définition du groupe proposée ne permet pas aux acheteurs indirects d'établir s'ils appartiennent ou non au groupe. À la différence des affaires *Infineon* et *Pro-Sys*, où la preuve montrait que l'appartenance au groupe était vraisemblablement déterminable, la présente affaire est un cas où [TRADUCTION] « il est tout simplement impossible de confirmer la présence ou l'absence de

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consumer in British Columbia may have purchased between 1988 and 1995" (ADM factum, at para. 97). They argue that prominent direct purchasers such as Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in their products. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. They also point out that on cross-examination on her affidavit, the representative plaintiff Wendy Bredin stated that "she did not know whether any product she purchased during the class period actually contained HFCS" (para. 18). They state that "[i]f the proposed representative Plaintiff in this action is unable to say whether any product she bought in the class period contained HFCS, it is difficult to see how any other potential class member could be aware of this fact" (para. 103).

SMHTF dans les produits qu'un consommateur de la Colombie-Britannique aurait achetés entre 1988 et 1995 » (mémoire d'ADM, par. 97). Elles font valoir que des acheteurs directs importants comme Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries et George Weston limitée ont utilisé tantôt du SMHTF tantôt du sucre liquide dans leurs produits. Dans bien des cas, les étiquettes des produits vendus au Canada par ces acheteurs directs n'indiquaient pas l'édulcorant utilisé. Les intimées soulignent également que, lorsqu'elle a été contre-interrogée sur son affidavit, la demanderesse-représentante, Wendy Bredin, a dit « ignorer si elle avait acheté au cours de la période visée par le recours un seul produit contenant du SMHTF » (par. 18). Elles notent que « [s]i la personne disposée à agir à titre de demanderesse-représentante en l'espèce n'est pas en mesure de savoir si elle a acheté un seul produit contenant du SMHTF au cours de cette période, on voit mal comment un autre membre éventuel du groupe le pourrait » (par. 103).

[56] This is not a typical ground on which the "identifiable class" requirement is challenged. Here, there is no question whether the class definition is too narrow or too broad, whether the definition contains subjective criteria or whether the class definition creates a need to consider the merits. However, when the purpose for which there must be a class definition that designates an "identifiable class" is examined, the problems with the appellants' case become evident.

[56] Il ne s'agit pas d'un motif habituellement invoqué pour contester l'existence d'un [TRADUCTION] « groupe identifiable ». Il n'est pas question de déterminer si la définition du groupe est trop étroite ou trop large, si elle repose sur des critères subjectifs ou si elle emporte un examen du bien-fondé du recours. Par contre, les problèmes qui grèvent la cause des appelantes apparaissent clairement dès lors qu'on analyse les objets visés par la condition relative au « groupe identifiable ».

[57] I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), at para. 10; Eizenga et al., at § 3.31). *Dutton* states that "[i]t is necessary . . . that any particular person's claim to membership in the class be determinable by stated, objective criteria" (para. 38).

[57] Je suis d'accord avec les tribunaux qui sont arrivés à la conclusion que la définition du groupe a les objets suivants : i) recenser les personnes susceptibles d'avoir un droit de réparation contre les défendeurs; ii) établir les paramètres de la poursuite afin de circonscrire les personnes liées par son issue; iii) déterminer les personnes ayant le droit d'être avisées de l'existence du recours (*Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (C.S.J. Ont.), par. 26 et 30; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (C.J. Ont. (Div. gén.)), par. 10; Eizenga et autres, § 3.31). Pour citer l'arrêt *Dutton*, « [i]l est [. . .] nécessaire que l'appartenance d'une personne au groupe

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According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§ 3.33).

[58] I do not take issue with the class definition on its face. It uses objective criteria, it does not turn on the merits of the claim, and it cannot be narrowed without excluding members who may have a valid claim. Where the difficulty lies is that there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class.

[59] The appellants claim that the respondents "attempt to use the complexity inherent in claims arising from a large-scale price-fixing conspiracy to deny those injured by the alleged conduct a legal remedy" and that "courts have found that class definitions similar or identical to that proposed in this case were appropriate" (response factum, at paras. 58 and 61). The appellants rely on the instruction in *Dutton*, at para. 38, that "[i]t is not necessary that every class member be named or known." They cite *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (Ont. S.C.J.), in support of the proposition that courts can engage in a "relatively elaborate factual investigation in order to determine class membership" and that "[t]he fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable" (para. 67, citing *Sauer*, at para. 28).

[60] However, in *Sauer* the passage relied upon pertained to the issue of the objectivity of the criteria used in the class definition. In that case, a class action involving cows infected with bovine spongiform encephalopathy ("BSE") or "mad cow disease", the class was defined to include "all cattle farmers in Canada", except Quebec (para. 11). The representative plaintiff adduced evidence of his

puisse être déterminée sur des critères explicites et objectifs » (par. 38). Selon Eizenga et autres, [TRADUCTION] « [l]e principe général veut que le groupe soit tout simplement défini de manière à permettre de déterminer par la suite qui en fait partie » (§ 3.33).

[58] La définition du groupe ne me pose pas problème a priori. Elle repose sur des critères objectifs, n'est pas fonction du bien-fondé de la demande et ne peut être restreinte sans que soient exclus des membres susceptibles d'avoir un droit de recours valable. Or, la preuve ne permet pas de conclure qu'un certain fondement factuel établit que deux personnes ou plus sauront si elles appartiennent ou non au groupe, et c'est là où le bât blesse.

[59] Les appelantes prétendent que les intimées [TRADUCTION] « tentent d'exciper de la complexité inhérente aux demandes résultant d'un complot de fixation des prix à grande échelle pour priver de recours judiciaire les personnes lésées par les actes reprochés » et que « les tribunaux ont jugé adéquates des définitions de groupe semblables ou identiques à celle proposée en l'espèce » (mémoire en réponse, par. 58 et 61). Les appelantes invoquent la directive donnée dans *Dutton* selon laquelle « [i]l n'est pas nécessaire que tous les membres du groupe soient nommés ou connus » (par. 38). Elles citent *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774 (C.S.J. Ont.), qui dit que les tribunaux peuvent se livrer à une [TRADUCTION] « analyse assez approfondie des faits en vue d'établir l'appartenance au groupe » et qu'« [i]l arrive souvent dans un recours collectif que certaines personnes aient du mal à prouver qu'elles satisfont aux conditions d'appartenance, ce qui ne permet pas en soi de conclure que le groupe n'est pas identifiable » (par. 67, citant *Sauer*, par. 28).

[60] Par contre, l'extrait de la décision *Sauer* invoqué par les appelantes porte sur l'objectivité des critères qui figurent dans la définition du groupe. Dans cette affaire, un recours collectif concernant des vaches atteintes d'encéphalopathie spongiforme bovine (« ESB ») ou « maladie de la vache folle », le groupe s'entendait de [TRADUCTION] « tous les éleveurs de bovins au Canada », outre ceux du

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own personal losses as well as those of others in the community as a result of the BSE crisis. The defendants challenged the term "cattle farmers" as being too broad and creating a problem for those farmers seeking to self-identify. Lax J. of the Ontario Superior Court of Justice held that in such situations the court could engage in a factual investigation to determine class membership.

Québec (par. 11). Le demandeur-représentant avait produit la preuve des pertes que lui et des confrères avaient essuyées par suite de la crise de l'ESB. Selon les défendeurs, le terme « éleveurs de bovins » était trop large et posait problème aux agriculteurs cherchant à être reconnus comme membres du groupe. La juge Lax, de la Cour supérieure de justice de l'Ontario, a conclu que dans de telles situations, le tribunal peut examiner les faits pour déterminer l'appartenance au groupe.

[61] That is not the situation in this case. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified. Here, they have not met even this relatively low evidentiary standard.

[61] Or, ce n'est pas le cas en l'espèce. Aucun fondement factuel ne permet d'établir qu'un seul des membres du groupe proposé dispose des renseignements nécessaires pour déterminer s'il appartient ou non au groupe. Les appelantes ont l'obligation, à l'étape de la certification, de démontrer l'existence d'un certain fondement factuel permettant de conclure qu'au moins deux membres pourront être connus. Elles n'ont même pas satisfait à cette norme de preuve relativement peu exigeante.

[62] This is not a case of mere difficulty in proving membership in a defined class. That is what distinguishes this case from *Pro-Sys*. In *Pro-Sys*, even if class membership is not immediately evident to potential class members based on the class definition, records of purchase or the presence of the application software or operating systems that form the subject of the appeal on the computers of the putative class members would serve to identify them as part of the identifiable class. Further, in *Pro-Sys*, Sam Leung, president and director of Pro-Sys Consultants Ltd., one of the representative plaintiffs, offered proof that he had purchased the product in question in the form of the invoice for the purchase of the computer. That evidence demonstrated that class membership was determinable and established some basis in fact that there was an identifiable class.

[62] Il ne s'agit pas en l'espèce d'un cas où il est simplement difficile d'établir l'appartenance à un groupe défini. C'est ce qui différencie la présente affaire de l'affaire *Pro-Sys*. Dans cette dernière, même si l'appartenance au groupe ne paraît pas évidente à première vue aux éventuels membres du groupe à la lumière de la définition de celui-ci, des reçus d'achat ou la présence dans l'ordinateur du membre du groupe proposé du logiciel d'application ou d'un système d'exploitation visé par l'appel permettraient de conclure à l'appartenance au groupe. De plus, dans *Pro-Sys*, Sam Leung, président-directeur de Pro-Sys Consultants Ltd., l'un des demandeurs-représentants, a prouvé qu'il avait acheté le produit en question, en produisant la facture constatant l'achat de l'ordinateur. Cette preuve démontrait qu'il était possible de déterminer l'appartenance au groupe et que l'existence d'un groupe identifiable reposait sur un certain fondement factuel.

[63] Conversely, in this case, the respondents' evidence is that HFCS and liquid sugar had been used interchangeably by direct purchasers during the class period. They also claim that

[63] À l'inverse, dans la présente affaire, la preuve des intimées montre que les acheteurs directs ont utilisé de façon interchangeable le SMHTF et le sucre liquide au cours de la période visée par le recours. En outre, les intimées prétendent que

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Canadian labelling requirements during the class period were such that food and beverage producers were not required to specify which of the two sweeteners was contained in their products. A generic label indicating "sugar/glucose-fructose" could be used for either liquid sugar or HFCS. The result is that a consumer who purchased such a product during the class period would have had no way of determining whether that product contained HFCS, even if they had bothered to check the label. [ADM factum, at para. 100]

[TRADUCTION] les règles canadiennes d'étiquetage en vigueur au cours de la période visée par le recours n'obligeaient pas les fabricants d'aliments et de boissons à indiquer lequel des deux édulcorants entrait dans la composition de leurs produits. Elles permettaient que le terme générique « sucre/glucose-fructose » désigne tantôt le sucre liquide, tantôt le SMHTF sur l'étiquette. Il s'ensuit que le consommateur ayant acheté un tel produit au cours de la période visée par le recours n'aurait pu dire s'il contenait du SMHTF même s'il s'était donné la peine de lire l'étiquette. [mémoire d'ADM, par. 100]

[64] The appellants say only that "hundreds of millions of dollars of HFCS was sold to Canadian direct purchasers during the Class Period" and that this HFCS was used in "products such as soft drinks, baked goods and other food products which are purchased by restaurants, grocery wholesalers, supermarkets, convenience stores, movie theatres and others" (response factum, at para. 69). Their expert offers evidence that the amount of HFCS used and the specific products which contained it are identifiable (para. 69, citing the Leitzinger Report, at paras. 10-11, 18-20 and 27 (A.R., vol. II, at pp. 85-86, 89-91 and 95-96)).

[64] Les appelantes affirment seulement que [TRADUCTION] « les ventes de SMHTF aux acheteurs directs canadiens représentaient des centaines de millions de dollars au cours de la période visée par le recours » et que ce SMHTF entrait dans la fabrication de « denrées alimentaires comme les boissons gazeuses et les produits de boulangerie achetées par des restaurants, grossistes, supermarchés, dépanneurs, cinémas et autres établissements » (mémoire en réponse, par. 69). Selon leur expert, il est possible d'établir la quantité de SMHTF utilisé et de déterminer les produits précis qui en contenaient (par. 69, citant le rapport de M. Leitzinger, par. 10-11, 18-20 et 27 (d.a., vol. II, p. 85-86, 89-91 et 95-96)).

[65] The question, however, is not one of whether the identified products contained HFCS, or even whether the overcharge would have reached the indirect purchaser level (i.e. whether passing on had occurred). The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.

[65] Par contre, il ne s'agit pas de déterminer si certains produits contenaient du SMHTF ou encore si la majoration a été refilée aux acheteurs indirects (autrement dit, s'il y a eu transfert de la perte). Le problème en l'espèce tient au fait que les acheteurs indirects ne seront pas en mesure de savoir si l'article qu'ils ont acheté contenait ou non du SMHTF même s'ils connaissent le nom des produits en cause. Les appelantes n'ont pas fourni de preuve susceptible de remédier au problème relatif à l'appartenance que soulève l'interchangeabilité du SMHTF et du sucre liquide.

[66] Even Ms. Bredin testified that she is unable to state whether the products she purchased contained HFCS. This fact will remain unchanged because, as noted above, liquid sugar and HFCS were used interchangeably and a generic label indicating only "sugar/glucose-fructose" could be used for either type of sweetener. Ms. Bredin presented no evidence to show that there is some basis in fact that she would be able to answer this question. On

[66] M^me^ Bredin elle-même a affirmé ne pas être en mesure de dire si les produits qu'elle avait achetés contenaient du SMHTF. Cet état de fait ne changera pas parce que, répétons-le, le sucre liquide et le SMHTF étaient utilisés de façon interchangeable et qu'une étiquette portant seulement le générique « sucre/glucose-fructose » était susceptible d'indiquer la présence de l'un ou l'autre édulcorant. M^me^ Bredin n'a pas démontré qu'un certain

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the evidence presented on the application for certification, it appears impossible to determine class membership.

[67] The appellants claim that "although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the purchases made by each individual and the quantity of HFCS in the products purchased" (response factum, at para. 71). However, this is no answer to the self-identification problem. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would be impractical or unaffordable to bring a claim individually. In this case, class membership is not determinable.

[68] Built into the class certification framework is the requirement that the class representative present sufficient evidence to support certification and to allow the opposing party to respond with its own evidence (*Hollick*, at para. 22). The goal at the certification stage is to ensure that this is an appropriate matter to proceed as a class proceeding (*Pro-Sys*, at para. 104). And while the certification stage is not a preliminary trial of the merits, "the judge must be satisfied of certain basi[c] facts required by [the *Class Proceedings Act, 1992*, S.O. 1992, c. 6] as the basis for a certification order" (*Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), at p. 381).

fondement factuel permet de conclure qu'elle pourra répondre à cette question. Vu la preuve produite dans le cadre de la demande de certification, il paraît impossible de déterminer l'appartenance au groupe.

[67] La prétention des appelantes que, [TRADUCTION] « même s'il est possible que certains membres ne puissent se reconnaître comme tels, l'appartenance au groupe peut s'établir eu égard à la nature des achats réalisés par chaque personne et à la quantité de SMHTF contenue dans les produits achetés » (mémoire en réponse, par. 71). Or, ce n'est pas une solution au problème qu'éprouveront les membres éventuels à se reconnaître comme tels. Bien que la fixation des prix reprochée ait peut-être porté préjudice à des acheteurs indirects, ils ne peuvent démontrer qu'ils font partie du groupe à la lumière de la définition proposée. Certifier un recours collectif sans connaître au moins deux personnes qui seront en mesure de prouver les pertes que leur ont fait subir les auteurs présumés de la majoration contrecarre l'objectif des recours collectifs, qui est d'offrir une voie de recours plus efficace aux demandeurs *ayant subi un préjudice* mais pour qui il serait irréaliste d'exercer un recours individuel ou qui n'ont pas les moyens de le faire. Il est impossible de déterminer l'appartenance au groupe en l'espèce.

[68] Le cadre de certification des recours collectifs oblige le représentant du groupe à présenter une preuve suffisante à l'appui de la certification et permet à la partie adverse de produire à son tour sa propre preuve (*Hollick*, par. 22). À l'étape de la certification, l'objet consiste à vérifier que le litige se prête bien au recours collectif (*Pro-Sys*, par. 104). Et bien que l'instruction de la demande de certification ne constitue pas un procès préliminaire sur le bien-fondé du recours, [TRADUCTION] « le juge doit être convaincu de l'existence de certains faits élémentaires qui, aux termes de [la *Class Proceedings Act, 1992*, L.O. 1992, ch. 6], constituent le fondement obligatoire d'une ordonnance de certification » (*Taub c. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Div. gén.), p. 381).

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[69] In this case, the appellants argue that denying that there is an identifiable class is to confuse the ability to identify a class with the ability to identify each individual member of that class (response factum, at para. 72). I agree that it is not necessary for each individual class member to be identified at the outset of the litigation in order for the class to be certified. However, as set out in the legislation, the matter will only be certified if, *inter alia*, "there is an identifiable class of 2 or more persons" (s. 4(1)(b)). In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.

[69] En l'espèce, selon les appelantes, refuser de reconnaître l'existence d'un groupe identifiable c'est confondre la possibilité de déterminer le groupe et la possibilité d'en déterminer chacun des membres (mémoire en réponse, par. 72). Je conviens qu'il n'est pas nécessaire que chaque membre soit connu au début de l'instance pour que le recours puisse être certifié. Toutefois, aux termes de la Loi, le tribunal ne certifie le recours que s'il [TRADUCTION] « existe un groupe identifiable de 2 personnes ou plus » (al. 4(1)(b)), entre autres conditions. En l'espèce, le problème est le suivant. La représentante des acheteurs indirects n'a produit aucune preuve qu'un certain fondement factuel sous-tend l'hypothèse selon laquelle deux personnes ou plus pourraient démontrer l'achat au cours de la période visée par le recours d'un produit contenant bel et bien du SMHTF, et démontrer ainsi leur appartenance à un groupe identifiable.

[70] Justice Karakatsanis says that there is some basis in fact to conclude that some indirect purchasers could prove that they probably purchased products containing HFCS (para. 115). With respect, no evidence was provided to establish some basis in fact that any individual indirect purchasers could do so. Allowing the class to be certified in such circumstances would be to lower the evidentiary standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.

[70] La juge Karakatsanis est d'avis qu'un certain fondement factuel permet de conclure que des acheteurs indirects pourraient prouver avoir probablement acquis des produits contenant du SMHTF (par. 115). Malgré tout le respect que je porte à ma collègue, je constate qu'aucun fondement factuel ne démontre qu'un seul des acheteurs indirects le pourrait. Permettre la certification du recours dans de telles circonstances équivaudrait à substituer à la norme de preuve applicable aux critères de certification, c'est-à-dire celle d'un certain fondement factuel, celle des simples conjectures.

[71] Justice Karakatsanis also states that "expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis" (para. 108). However, even if expert evidence satisfies the certification judge that the class as a whole was harmed, that does not obviate the need for the certification judge to be satisfied that there is some basis in fact indicating that at least two persons can prove they incurred a loss.

[71] Pour reprendre les propos de ma collègue, « la preuve d'expert peut présenter une méthode valable et acceptable offrant une possibilité réaliste d'établir la perte pour l'ensemble du groupe » (par. 108). Cependant, même si le juge saisi de la demande de certification est convaincu, à la lumière de la preuve d'expert, que le groupe en entier a subi le préjudice, cela n'empêche pas qu'il doive être convaincu de même qu'un certain fondement factuel établit qu'au moins deux personnes sont en mesure de prouver la perte.

[72] A key component in any class action is that two or more persons fit within the class definition.

[72] Un élément essentiel de tout recours collectif est la nécessité pour deux personnes ou

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If, as in this case, there is no basis in fact to show that at least someone can prove they fit within the class definition, the class cannot be certified because the criteria of "an identifiable class of 2 or more persons" is not met. No amount of expert evidence establishing that the defendants have harmed the class as a whole does away with this requirement.

[73] This is not to say that an identifiable class could never be found in similar circumstances as appear in this case. An identifiable class could be found if evidence was presented that provided some basis in fact that at least two persons could prove they had suffered individual harm. The problem in this case is that no such evidence was tendered.

[74] Justice Karakatsanis writes that "if no individual seeks an individual remedy, it will not be necessary to prove individual loss" (para. 97), and that the aggregate damages provisions of the *CPA* allow class actions to proceed "where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine" (para. 102 (emphasis in original)).

[75] As I understand it, Justice Karakatsanis's point is that where liability to the class has been proven, there is no requirement to prove that any person is a member of a class or that any person has suffered individual damage. The necessary implication is that class proceeding legislation alters existing causes of action. For example, s. 36 of the *Competition Act* creates a cause of action for "[a]ny person who has suffered loss or damage". My colleague's approach would suggest a class action claim could proceed under s. 36 of the *Competition Act* without any person establishing that they had suffered loss or damage. However, the *CPA* neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants

plus d'être visées par la définition. Si, comme en l'espèce, aucun fondement factuel ne permet de démontrer que c'est le cas, le recours ne peut être certifié puisqu'il n'est pas satisfait au critère relatif à l'existence d'[TRADUCTION] « un groupe identifiable de 2 personnes ou plus ». Aucune preuve d'expert établissant le préjudice causé par les défenderesses au groupe en entier, si abondante soit-elle, ne pourrait faire disparaître cette exigence.

[73] Il ne s'ensuit pas qu'il sera toujours impossible de conclure à l'existence d'un groupe identifiable dans des circonstances semblables à celles de la présente affaire. Un tribunal pourrait déterminer qu'il existe un groupe identifiable au vu de preuves établissant qu'un certain fondement factuel permet de croire qu'au moins deux personnes pourraient démontrer avoir subi un préjudice individuel. Ce qui pose problème en l'espèce, c'est l'absence d'une telle preuve.

[74] Selon ma collègue, « si personne ne cherche à obtenir une réparation individuelle, il ne sera pas nécessaire de prouver une perte individuelle » (par. 97) et les dispositions de la *CPA* autorisant l'octroi de dommages-intérêts globaux permettent que soit intenté un recours collectif dans le cas « où la *responsabilité envers le groupe* a été démontrée, mais où l'appartenance au groupe est difficile ou impossible à établir » (par. 102 (en italique dans l'original)).

[75] Si je comprends bien l'argument de ma collègue, dès lors que la responsabilité envers le groupe est démontrée, il n'est pas nécessaire de démontrer que quiconque appartient au groupe ou a subi un préjudice individuel. Il découlerait nécessairement de ce qui précède que la législation régissant les recours collectifs agit sur la cause d'action. Par exemple, l'art. 36 de la *Loi sur la concurrence* donne un droit de recours à « [t]oute personne qui a subi une perte ou des dommages ». Suivant la thèse de ma collègue, il pourrait y avoir recours collectif fondé sur l'art. 36 sans que qui que ce soit n'établisse avoir subi une perte ou des dommages. Or, la *CPA* n'a pas pour effet de modifier le fondement d'une cause d'action ni d'en créer de nouvelles; elle

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with causes of action to unite and pursue their claims as a class.

[76] The aggregate damages provisions of the *CPA* allow the court to dispense with the need to calculate the quantum of damages for each individual class member and permits distribution of the proceeds on a *cy-près* basis rather than to individual members of the class. However, where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss. Establishing that the class as a whole has suffered loss does not obviate this requirement.

(4) Conclusion on Identifiable Class

[77] The goal of the certification stage, as indicated by McLachlin C.J. in *Hollick*, is to determine if, procedurally, the action is best brought in the form of a class action (para. 16). In this case, given that the appellants did not show that there was some basis in fact to believe that at least two persons can establish they are members of the class, I am unable to answer that question in the affirmative.

[78] An advantage of a class proceeding is that it serves judicial economy by allowing similar individual actions to be aggregated (*Hollick*, at para. 15; *Dutton*, at para. 27). In my view, implicit in this objective is that the foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here.

[79] I do not disagree with Justice Karakatsanis that behaviour modification can be an objective of class proceedings. However, the circumstances here demonstrate that class proceedings are not always the appropriate means of addressing behaviour modification. In cases in which loss or damage due to price-fixing cannot be proven, the appropriate

habilite les demandeurs ayant en commun une cause d'action à s'unir pour la faire valoir collectivement.

[76] Les dispositions de la *CPA* autorisant l'octroi de dommages-intérêts globaux évitent au tribunal le calcul des dommages-intérêts individuels et en permettent le versement suivant le principe de l'aussi-près, plutôt qu'aux membres du groupe. Cependant, dans les cas où les causes d'action proposées assujettissent la preuve de la responsabilité notamment à celle de la perte, le juge saisi de la demande de certification doit être convaincu qu'il existe un certain fondement factuel pour dire qu'au moins deux personnes sont en mesure de démontrer avoir essuyé une perte. Démontrer que le groupe en entier a subi le préjudice ne permet pas d'éliminer pareille exigence.

(4) Conclusion sur la question du groupe identifiable

[77] Comme le mentionne la juge en chef McLachlin dans *Hollick*, l'étape de la certification vise à déterminer si, sur le plan de la forme, il vaut mieux procéder par recours collectif (par. 16). En l'espèce, étant donné que les appelantes n'ont pas établi qu'un certain fondement factuel permettait de croire qu'au moins deux personnes peuvent démontrer qu'elles sont membres du groupe, j'estime ne pas pouvoir répondre à cette question par l'affirmative.

[78] L'un des avantages du recours collectif est qu'il favorise l'économie des ressources judiciaires par le regroupement d'actions individuelles semblables (*Hollick*, par. 15; *Dutton*, par. 27). À mon sens, cet objectif implique que le fondement sur lequel reposerait le recours individuel doit pouvoir se transposer au recours collectif. Or, ce fondement fait défaut en l'espèce.

[79] Je ne suis pas en désaccord avec la juge Karakatsanis selon qui la modification des comportements peut constituer un objectif des recours collectifs. Or, la présente situation démontre qu'il ne convient pas toujours de procéder par recours collectif pour obtenir un tel résultat. S'il se révèle impossible d'établir la perte ou les dommages

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recourse may be for the Commissioner of Competition to charge the defendants under the *Competition Act*. A process commenced by the Commissioner requires only proof of price-fixing. There is no need to prove passing on or that any particular consumer overpaid for a particular product. Whether the Competition Bureau intends to prosecute the respondents in this case is not known. Regardless, it does not change the fact that in a case such as this, where certification criteria cannot be met, such prosecutions may have to be considered if behaviour modification is the objective.

V. Conclusion

[80] Given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified. I would dismiss the appeal with costs. Given the finding that the pleadings do not disclose a cause of action in constructive trust, the claim of the direct purchasers cannot succeed and should be dismissed. The class action as it relates to the direct purchasers cannot be certified. The cross-appeal is allowed with costs.

The reasons of Cromwell and Karakatsanis JJ. were delivered by

Karakatsanis J. (dissenting on the appeal) —

I. Overview

[81] I disagree with my colleague's conclusion that the claim by the indirect purchasers fails to meet the certification requirement under s. 4(1)(b) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*). In my view, there is "some basis in fact" to find "an identifiable class of 2 or more persons". Accordingly, I would allow the appeal and remit the matter to the British Columbia Supreme Court for trial.

attribuables à la fixation des prix, il peut être opportun pour le commissaire de la concurrence de porter des accusations contre les défendeurs en vertu de sa loi habilitante. Lorsqu'il intente une poursuite, le commissaire n'a qu'à établir la fixation des prix. Point n'est besoin de démontrer le transfert de la perte ou de prouver qu'un consommateur donné a payé trop cher un certain produit. On ne sait pas si le Bureau de la concurrence poursuivra les intimées en l'espèce. Quoi qu'il en soit, cela ne change rien au fait que, dans un cas comme celui qui nous occupe, où il n'est pas satisfait aux critères de certification, il pourrait falloir envisager de telles poursuites si l'objectif recherché est la modification des comportements.

V. Conclusion

[80] Puisqu'il est conclu à l'impossibilité d'établir l'existence d'un groupe identifiable composé des acheteurs indirects, le recours collectif dans leur cas ne peut être certifié. Je suis d'avis de rejeter le pourvoi avec dépens. Vu ma conclusion que les actes de procédure ne révèlent pas de cause d'action relative à la reconnaissance d'une fiducie par interprétation, la demande des acheteurs directs est vouée à l'échec et doit être rejetée. Le recours collectif, quant aux acheteurs directs, ne peut être certifié. L'appel incident est accueilli avec dépens.

Version française des motifs des juges Cromwell et Karakatsanis rendus par

La juge Karakatsanis (dissidente quant au pourvoi) —

I. Aperçu

[81] Je ne souscris pas à la conclusion de mon collègue selon laquelle le recours des acheteurs indirects ne satisfait pas à la condition de certification prévue à l'al. 4(1)(b) de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (*CPA*). Selon moi, un « certain fondement factuel » permet de conclure à l'existence d'un [traduction] « groupe identifiable de 2 personnes ou plus ». Je suis donc d'avis d'accueillir le pourvoi et de renvoyer l'affaire à la Cour suprême de la Colombie-Britannique pour instruction.

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[82] The appellants' proposed class definition includes "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (2010 BCSC 922 (CanLII), at para. 2).

[83] This class includes both the direct and indirect purchasers of high-fructose corn syrup (HFCS) — the subject of alleged price fixing. At issue is the identification of a class which would include indirect purchasers — the retailers and consumers — who purchased products containing HFCS.

[84] Justice Rothstein notes that this definition of the class appears to satisfy the requirements of an identifiable class on its face. It uses objective criteria; it does not turn on the merits of the claim; and it cannot be narrowed without excluding members who may have a valid claim (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38). However, the class of indirect purchasers is challenged on the basis that individuals will be unable to determine whether they purchased a product containing HFCS and thus whether they are a member of the class. The issue of the appropriateness of the representative plaintiff is not before the Court.

[85] Justice Rothstein concludes that there is no basis in fact to identify a class because there is no or insufficient evidence that class members can be identified or can self-identify (paras. 58 and 65-67). He concludes that it is impossible for the indirect purchasers to prove they purchased a product containing HFCS and thus suffered loss.

[86] I have two objections to this conclusion. First, I am not persuaded that the requirement that the class be identifiable includes the requirement that individual members of the class be capable of proving individual loss. Indeed, as discussed below, the *CPA* provides for remedies when the *class* has

[82] La définition du groupe proposée par les appelantes comprend [TRADUCTION] « tous les résidants de la Colombie-Britannique et d'ailleurs au Canada qui ont acheté du SMHTF fabriqué par les défenderesses ou des produits en contenant (collectivement le "groupe") entre le 1er janvier 1988 et le 30 juin 1995 (la "période visée par le recours") » (2010 BCSC 922 (CanLII), par. 2).

[83] Ce groupe comprend à la fois les acheteurs directs et les acheteurs indirects du sirop de maïs à haute teneur en fructose (SMHTF) dont on aurait fixé le prix. Il faut se demander en l'espèce si un groupe qui comprendrait les acheteurs indirects, à savoir les détaillants et les consommateurs ayant acquis des produits contenant du SMHTF, peut être reconnu comme étant identifiable.

[84] Le juge Rothstein fait remarquer que cette définition du groupe semble a priori satisfaire aux exigences d'un groupe identifiable. Elle repose sur des critères objectifs, n'est pas fonction du bien-fondé du recours et ne peut être restreinte sans que soient exclus des membres susceptibles d'avoir un droit de recours valable (*Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, par. 38). Cependant, un groupe incluant les acheteurs indirects est contesté au motif qu'il ne sera possible pour aucun d'eux de déterminer s'il a acheté un produit contenant du SMHTF et s'il est donc membre du groupe. La Cour n'est pas appelée à trancher la question de savoir si le choix de la représentante des demandeurs est convenable.

[85] Selon le juge Rothstein, aucun fondement factuel ne permet de reconnaître l'existence du groupe, parce que la preuve ne montre guère que les membres du groupe pourront être déterminés ou se reconnaître comme tels (par. 58 et 65-67). Il conclut qu'il est impossible pour les acheteurs indirects de prouver qu'ils ont acheté un produit contenant du SMHTF et qu'ils ont donc subi une perte.

[86] Je ne souscris pas à cette conclusion pour deux motifs. Premièrement, je ne suis pas convaincue que pour qu'il y ait un groupe identifiable, il faut que chacun des membres du groupe soit en mesure d'établir une perte individuelle. En fait, comme nous le verrons, la *CPA* prévoit que des mesures de

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suffered harm that are available without proof of individual loss. Such an approach best serves the purposes of class proceedings, which are designed not only to provide enhanced access to justice and judicial economy, but also to motivate behaviour modification.

[87] Second, even if proof of individual loss is necessary to establish an identifiable class under the *CPA*, I do not agree that, on this record, it will be impossible to determine whether an individual is a member of the class.

[88] The application judge, Rice J., held that the appellants satisfied the requirement that there is an identifiable class. The Court of Appeal did not address this issue (2011 BCCA 187, 305 B.C.A.C. 55). For the reasons that follow, I conclude that there is no basis to set aside the decision of the application judge.

II. Class Requirements — General Principles

[89] Section 4(1)(b) of the *CPA* requires that there be "an identifiable class of 2 or more persons".

[90] In *Dutton*, this Court addressed the specific certification requirement that there be an identifiable class (para. 38):

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria . . . .

réparation peuvent être accordées lorsque le *groupe* a subi un préjudice, sans qu'il soit nécessaire d'établir une perte individuelle. C'est là l'approche qui répond le mieux aux objectifs des recours collectifs, lesquels visent à favoriser non seulement l'accès à la justice et l'économie des ressources judiciaires, mais aussi la modification des comportements.

[87] Deuxièmement, même si la preuve d'une perte individuelle était nécessaire pour que soit établie l'existence d'un groupe identifiable sous le régime de la *CPA*, je ne crois pas, au vu du dossier, qu'il sera impossible de déterminer l'appartenance d'une personne donnée au groupe.

[88] Le juge saisi de la demande, le juge Rice, a conclu que les appelantes avaient satisfait à l'exigence relative à l'existence d'un groupe identifiable. La Cour d'appel n'a pas examiné cette question (2011 BCCA 187, 305 B.C.A.C. 55). Pour les motifs qui suivent, j'estime que rien ne permet d'annuler la décision du premier.

II. Conditions préalables à la reconnaissance du groupe — principes généraux

[89] Aux termes de l'al. 4(1)(b) de la *CPA*, il doit y avoir [TRADUCTION] « un groupe identifiable de 2 personnes ou plus ».

[90] Dans l'arrêt *Dutton*, la Cour examine la condition de certification relative à l'existence d'un groupe identifiable (par. 38) :

> Premièrement, le groupe doit pouvoir être clairement défini. La définition du groupe est essentielle parce qu'elle précise qui a droit aux avis, qui a droit à la réparation (si une réparation est accordée), et qui est lié par le jugement. Il est donc primordial que le groupe puisse être clairement défini au début du litige. La définition devrait énoncer des critères objectifs permettant d'identifier les membres du groupe. Les critères devraient avoir un rapport rationnel avec les revendications communes à tous les membres du groupe mais ne devraient pas dépendre de l'issue du litige. Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. Il est toutefois nécessaire que l'appartenance d'une personne au groupe puisse être déterminée sur des critères explicites et objectifs . . .

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[91] Obviously, it is not sufficient to make a bald assertion that a class exists. The record must contain a sufficient evidentiary basis to establish the existence of the class (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at para. 23). But the evidentiary standard at the certification stage is not onerous: the applicant must establish that there is "some basis in fact" for each of the requirements (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25). This standard falls below the standard used in the United States and purposefully avoids a trial on the merits at the certification stage. See *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 102.

III. Application to This Case

A. *The Record and Position of the Parties*

[92] The respondents led evidence establishing that prominent direct purchasers such as Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in their products. At the time, the relevant laws permitted the use of a generic label indicating "sugar/glucose-fructose" for either type of sweetener. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. Indeed, the representative plaintiff stated on cross-examination that she did not know whether any product she purchased during the class period actually contained HFCS.

[93] HFCS was used in "products such as soft drinks, baked goods and other food products which [were] purchased by restaurants, grocery wholesalers, supermarkets, convenience stores, movie theatres and others" (appellants' response factum, at para. 69). The appellants filed expert evidence and proposed methodology to show that the amount of HFCS used and the specific products which contained it are identifiable (*ibid.*, citing the Leitzinger Report, at paras. 10-11, 18-20 and 27). The expert evidence also provides specific industry research confirming that the use of HFCS in the soft-drink

[91] De toute évidence, il ne suffit pas de simplement affirmer qu'un groupe existe. Le dossier doit étayer suffisamment la déclaration (*Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (C.S.J. Ont.), par. 23). La norme de preuve applicable à l'étape de la certification n'est toutefois pas exigeante : le demandeur doit établir qu'« un certain fondement factuel » sous-tend chacune des conditions (*Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25). Cette norme est moins rigoureuse que celle qui s'applique aux États-Unis, et vise expressément à éviter un examen au fond à l'étape de la certification. Voir *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, par. 102.

III. Application à la présente affaire

A. *Le dossier et la position des parties*

[92] Les intimées ont produit une preuve établissant que d'importants acheteurs directs comme Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries et George Weston limitée ont utilisé tantôt du SMHTF tantôt du sucre liquide dans la confection de leurs produits. À l'époque, les lois applicables permettaient que le terme générique « sucre/glucose-fructose » désigne l'un ou l'autre édulcorant sur l'étiquette. Dans bien des cas, l'étiquette de produits vendus au Canada par ces acheteurs directs n'indiquait pas lequel des deux ingrédients avait été utilisé. En fait, en contre-interrogatoire, la demanderesse-représentante a dit ignorer si elle avait acheté un seul produit qui contenait bel et bien du SMHTF au cours de la période visée par le recours.

[93] Le SMHTF entrait dans la fabrication de [TRADUCTION] « denrées alimentaires comme les boissons gazeuses et les produits de boulangerie achetées par des restaurants, grossistes, supermarchés, dépanneurs, cinémas et autres établissements » (mémoire en réponse des appelantes, par. 69). Les appelantes ont déposé une preuve d'expert et proposé une méthode pour démontrer qu'il est possible d'établir la quantité de SMHTF utilisée et de déterminer les produits précis qui en contenaient (*ibid.*, citant le rapport de M. Leitzinger, par. 10-11, 18-20 et 27). La preuve

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industry was more prevalent as time went on, and largely had replaced liquid sugar as early as two years into the class period (A.R., vol. II, at p. 94; Leitzinger Report, at para. 24).

[94] The respondents' position is that because HFCS was used interchangeably with liquid sugar, and because labeling requirements during the class period did not require food and beverage producers to specify which of the two sweeteners was contained in their products, indirect purchasers (retailers and consumers) would have had no way of determining whether the product contained HFCS, even if they had checked the label (factum of Archer Daniels Midland Company and ADM Agri-Industries Company, at paras. 99-100).

[95] The appellants submit that "although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the purchases made by each individual and the quantity of HFCS in the products purchased" (response factum, at para. 71). Indeed, the industry research data suggests that such information may be more readily available for indirect purchasers who are commercial retailers with more consistent recording practices.

B. *Class Identification Does Not Require That Individual Class Members Can Prove Individual Loss*

[96] Justice Rothstein accepts that the class definition complies on its face with the *Dutton* criteria. However, he concludes that there is insufficient evidence to show that any persons will be able to determine if they bought a product containing HFCS and thus if they are a member of the class. My colleague says that if individuals cannot show they have suffered individual loss, this "subverts the purpose of class proceedings,

d'expert fait également état de travaux de recherche portant sur l'industrie des boissons gazeuses, lesquels confirment que l'utilisation du SMHTF était à la hausse depuis quelques années et que, deux ans après le début de la période visée par le recours, cette substance avait déjà largement remplacé le sucre liquide (d.a., vol. II, p. 94; rapport de M. Leitzinger, par. 24).

[94] Parce que le SMHTF et le sucre liquide étaient utilisés de façon interchangeable et que les règles d'étiquetage en vigueur au cours de la période visée par le recours n'obligeaient pas les fabricants d'aliments et de boissons à indiquer lequel des deux édulcorants entrait dans la confection de leurs produits, les intimées font valoir que les acheteurs indirects (détaillants et consommateurs) n'auraient pu dire s'ils avaient acheté un produit contenant du SMHTF, même s'ils avaient vérifié l'étiquette (mémoire d'Archer Daniels Midland Company et d'ADM Agri-Industries Company, par. 99-100).

[95] Les appelantes soutiennent que [TRADUCTION] « même s'il est possible que certains membres ne puissent se reconnaître comme tels, l'appartenance au groupe peut s'établir eu égard à la nature des achats réalisés par chaque personne et à la quantité de SMHTF contenue dans les produits achetés » (mémoire en réponse, par. 71). En fait, selon des recherches sur cette industrie, ce genre de renseignements pourrait s'obtenir plus facilement pour les acheteurs indirects qui sont des commerçants au détail, habitués de ce fait à une tenue de livres rigoureuse, que pour les autres.

B. *La détermination de l'appartenance au groupe n'exige pas que chacun des membres soit en mesure d'établir une perte individuelle*

[96] Le juge Rothstein reconnaît que la définition du groupe satisfait a priori aux critères établis dans *Dutton*. Il conclut toutefois que la preuve ne suffit pas à démontrer qu'il sera possible pour quiconque de savoir s'il a acheté un produit contenant du SMHTF et s'il appartient donc au groupe. De l'avis de mon collègue, l'impossibilité pour des membres du groupe d'établir une perte individuelle « contrecarre l'objectif des recours collectifs, qui

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which is to provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would be impractical or unaffordable to bring a claim individually" (para. 67 (emphasis in original)).

[97] This is not the only purpose of class actions. Behaviour modification is an important goal, especially in price-fixing cases. While class proceedings are clearly intended to create a more efficient means of recovery for plaintiffs who have suffered harm, there are strong reasons to conclude that class proceedings are not limited to such actions. As I detail below, the *CPA* is designed to permit a means of recovery for the benefit of the class as a whole, without proof of individual loss, even where it is difficult to establish class membership. Thus, if no individual seeks an individual remedy, it will not be necessary to prove individual loss. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhanced access to justice and judicial economy, but also the broader purpose of behaviour modification. Therefore, I am not persuaded that it is a prerequisite that individual members of the class can ultimately prove individual harm. See, for example, *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271.

[98] An identifiable class serves to give individual members notice so that they can exercise their willingness to be a member and to claim relief. Nonetheless, there will often be circumstances where it is difficult for class members to self-identify based on the class definition.

[99] In *Dutton*, at para. 38, McLachlin C.J. held: "It is not necessary that every class member be named or known." In *Risorto v. State Farm Mutual Automobile Insurance Co*. (2007), 38 C.P.C. (6th) 373 (Ont. S.C.J.), Cullity J. held, at para. 31: "The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and

est d'offrir une voie de recours plus efficace aux demandeurs *ayant subi un préjudice* mais pour qui il serait irréaliste d'exercer un recours individuel ou qui n'ont pas les moyens de le faire » (par. 67 (en italique dans l'original)).

[97] Il ne s'agit pas là du seul objectif des recours collectifs. La modification des comportements en constitue un objet important, tout particulièrement en matière de fixation des prix. Si ce type d'action vise manifestement à offrir une voie de recours plus efficace aux demandeurs ayant subi un préjudice, il y a des raisons sérieuses de conclure que les recours collectifs ne se limitent pas à de tels effets. Comme nous le verrons en détail, la *CPA* est conçue de manière à donner un recours au groupe dans son ensemble, sans qu'il soit nécessaire de prouver une perte individuelle, même s'il est difficile d'établir l'appartenance au groupe. En conséquence, si personne ne cherche à obtenir une réparation individuelle, il ne sera pas nécessaire de prouver une perte individuelle. De tels recours collectifs permettent la restitution de gains provenant d'activités illégales et répondent non seulement aux objectifs d'accès à la justice et d'économie des ressources judiciaires, mais aussi à l'objectif général de modification des comportements. Je ne suis donc pas convaincue qu'il faut que chaque membre du groupe puisse, à terme, prouver un préjudice individuel. Voir, par exemple, *Steele c. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271.

[98] La condition relative au groupe identifiable a pour objet d'informer les membres éventuels et ainsi leur permettre d'exprimer leur volonté d'appartenir au groupe et de demander réparation. Quoi qu'il en soit, il sera souvent difficile pour certaines personnes de s'estimer membres du groupe à la lumière de cette définition.

[99] Dans l'arrêt *Dutton*, la juge en chef McLachlin tient les propos suivants, au par. 38 : « Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. » Dans *Risorto c. State Farm Mutual Automobile Insurance Co*. (2007), 38 C.P.C. (6th) 373 (C.S.J. Ont.), le juge Cullity s'est exprimé en ces termes, au par. 31 : [TRADUCTION] « Il arrive souvent dans un recours collectif que

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is not, by itself, a reason for a finding that the class is not identifiable." See also *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (Ont. S.C.J.), at para. 28.

[100] As already noted, the statute provides for aggregate damages and *cy-près* awards that permit recovery and disgorgement of ill-gotten gains, without proof of individual loss and even where individual members cannot be identified. Section 29 of the *CPA* permits "an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members", upon certain conditions, including when:

> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Section 31(1) of the *CPA* provides:

> **31** (1) If the court makes an order under section 29 [for an aggregate monetary award], the court may further order that all or a part of the aggregate money award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if
>
> (a) it would be impractical or inefficient to
>
> (i) identify the class or subclass members entitled to share in the award . . .

certaines personnes aient du mal à prouver qu'elles satisfont aux conditions d'appartenance et cela ne permet pas en soi de conclure que le groupe n'est pas identifiable. » Voir aussi *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774 (C.S.J. Ont.), par. 28.

[100] Comme nous l'avons vu, la Loi prévoit la possibilité d'accorder des dommages-intérêts globaux et de verser une indemnité suivant le principe de l'aussi-près (*cy-près doctrine*), qui permettent le recouvrement et la restitution de gains mal acquis, sans qu'il soit nécessaire de prouver une perte individuelle et même lorsque l'identité de certains membres ne peut être connue. En effet, suivant l'art. 29 de la *CPA*, [TRADUCTION] « [l]e tribunal peut fixer par ordonnance le montant global des dommages-intérêts quant à la totalité ou à une partie de la responsabilité pécuniaire d'un défendeur envers les membres du groupe, et rendre jugement en conséquence » si certaines conditions sont remplies, et notamment si :

[TRADUCTION]

> (c) la totalité ou une partie de la responsabilité du défendeur envers tous les membres du groupe ou certains d'entre eux peut raisonnablement être établie sans que des membres n'aient à en faire la preuve individuellement.

Le paragraphe 31(1) de la *CPA* prévoit :

[TRADUCTION]

> **31** (1) S'il rend une ordonnance en vertu de l'article 29 [ordonnance fixant le montant global des dommages-intérêts], le tribunal peut également ordonner que la totalité ou une partie du montant global des dommages-intérêts soit affectée de façon que tous les membres du groupe ou du sous-groupe ou certains d'entre eux se partagent les dommages-intérêts selon la règle de la moyenne ou selon celle de la proportionnalité s'il estime à la fois
>
> (a) qu'il serait irréaliste ou inefficace
>
> (i) soit d'identifier les membres du groupe ou du sous-groupe qui ont droit à une part du montant global des dommages-intérêts adjugés . . .

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And s. 34 of the *CPA* provides:

**34** . . .

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit

(a) persons who are not class or subclass members . . .

[101] Section 34 has been interpreted to authorize *cy-près* awards — awards made to charities in situations where some class members cannot be identified. Interpreting the equivalent Ontario provision, s. 26 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Winkler J. remarked that this vision of the class determination permitted "a settlement that is entirely *Cy pres*" (*Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (Ont. S.C.J.), at para. 15 (emphasis added)). See also *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.), at paras. 15 and 17.

[102] And, while aggregate damages provisions are tools which are intended to be resorted to only upon an antecedent finding of liability (see *Pro-Sys*, at para. 131), they nonetheless permit access to justice and behaviour modification in cases where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine. The aggregate assessment of damages is an important common issue at the heart of the behaviour modification goal of class actions. It is a powerful tool for class actions.

Et l'art. 34 de la *CPA* prévoit :

[TRADUCTION]

**34** . . .

(3) Le tribunal peut rendre une ordonnance en vertu du paragraphe (1), que tous les membres du groupe ou du sous-groupe soient identifiables ou non, ou que la part de chacun d'eux puisse être ou non établie exactement.

(4) Le tribunal peut rendre une ordonnance en vertu du paragraphe (1), même si cette ordonnance profiterait

(a) à des personnes qui ne sont pas membres du groupe ou du sous-groupe . . .

[101] Selon l'interprétation qui en a été donnée, l'art. 34 autorise le versement selon le principe de l'aussi-près — c'est-à-dire à des organismes de bienfaisance dans les situations où certains membres du groupe ne peuvent être connus. Le juge Winkler fait remarquer à propos de l'art. 26 de la *Class Proceedings Act, 1992*, L.O. 1992, ch. 6, la disposition équivalente en Ontario, que cette conception du groupe permettait que soit ordonné [TRADUCTION] « un règlement par versement suivant le principe de l'aussi-près exclusivement » (*Gilbert c. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (C.S.J. Ont.), par. 15 (je souligne)). Voir aussi *Cassano c. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (C.S.J.), par. 15 et 17.

[102] Et, bien que leur application soit subordonnée à une conclusion préalable de responsabilité (voir *Pro-Sys*, par. 131), les dispositions autorisant l'octroi de dommages-intérêts globaux favorisent néanmoins l'accès à la justice et la modification des comportements dans les cas où la *responsabilité envers le groupe* a été démontrée, mais où l'appartenance au groupe est difficile ou impossible à établir. L'évaluation globale des dommages-intérêts constitue une question commune importante qui touche directement à l'objectif de modification des comportements des recours collectifs. Il s'agit d'un outil puissant en la matière.

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[103] Thus, the legislation explicitly contemplates difficulties or, in some cases, impossibility in self-identification in the class procedural vehicle. Such difficulties have not been considered fatal to authorization under the *CPA* (in B.C. and in its equivalent in Ontario) provided that there is "some basis in fact" that the class exists and there is a rational connection between the class and the common issues. See, for example, *Lau*, at paras. 21-22, and *Steele*.

[104] This Court noted in *Dutton* that "any particular person's claim to membership in the class [should] be determinable by stated, objective criteria" (para. 38). This requirement speaks to the need to clearly define the criteria for membership — not to the ability of a given individual to prove that they meet the criteria. Whether the claimants can prove their claim for an individual remedy is a separate issue that need not be resolved at the certification stage.

[105] Here, the record contains a sufficient evidentiary basis to establish the *existence* of the class (*Lau*, at para. 23). Direct purchasers of HFCS used it extensively in products that were sold widely to retailers and to consumers. Given the nature of a price-fixing case, loss flows directly from the purchase of HFCS, or, in the case of indirect purchasers, products containing HFCS. An individual who purchased such a product during the relevant time period would have the foundation for an individual suit. All indirect purchasers share the same basis for establishing harm. There is a rational connection between the class as defined and the asserted common issues. See *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.), at paras. 22-23; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.), at para. 11.

[106] Nor is it seriously disputed that there is some basis in fact to show that indirect purchasers as a class were harmed by the alleged price fixing

[103] En conséquence, la loi prévoit expressément la possibilité qu'il soit difficile, voire impossible, pour certaines personnes de s'estimer visées par le mécanisme procédural du recours collectif. De telles difficultés n'ont pas été jugées fatales à la certification sous le régime de la *CPA* (en C.-B. et en Ontario), dans la mesure où l'existence d'un groupe repose sur un « certain fondement factuel » et où un lien rationnel entre le groupe et les questions communes est établi. Voir, par exemple, *Lau*, par. 21-22, et *Steele*.

[104] La Cour souligne dans *Dutton* que « l'appartenance d'une personne au groupe [devrait pouvoir] être déterminée sur des critères explicites et objectifs » (par. 38). Cette exigence a trait à la nécessité de définir clairement les critères d'appartenance au groupe — et non à la capacité d'une personne donnée de prouver qu'elle y satisfait. Que les demandeurs puissent ou non établir le bien-fondé de leur demande de réparation individuelle est une question distincte n'ayant pas à être tranchée à l'étape de la certification.

[105] Le dossier en l'espèce étaye suffisamment l'*existence* du groupe (*Lau*, par. 23). Les acheteurs directs de SMHTF ont utilisé largement cet édulcorant dans la confection de produits qui ont été vendus à grande échelle aux détaillants et consommateurs. En matière de fixation des prix, la perte découle directement de l'achat du SMHTF, ou, dans le cas des acheteurs indirects, de produits en contenant. La personne ayant acheté un tel produit durant la période pertinente serait fondée à intenter une poursuite en son propre nom. Les acheteurs indirects ont en commun ce fondement pour établir le préjudice. Il existe un lien rationnel entre le groupe tel qu'il est défini et les questions communes énoncées. Voir *Ford c. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (C.S.J.), par. 22-23; *Alfresh Beverages Canada Corp. c. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (C.S.J. Ont.), par. 11.

[106] Il n'est pas non plus contesté sérieusement qu'un certain fondement factuel permet de conclure que la fixation des prix reprochée a porté préjudice

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and thus the members of the class suffered harm. The methodology proposed to establish the harm to the class members purports to ascertain an aggregate amount by which the class members were overcharged. Indeed, as Justice Rothstein finds, it has some basis in fact and there is a high probability that any award stemming from these proceedings would be distributed on a *cy-près* basis. This means that it may never be necessary or legally required to identify individual members of the class.

[107] For these reasons, I am not persuaded that the issue of whether an individual can prove individual loss is a necessary enquiry at certification. In sum, while class actions are a procedural vehicle, they are not *merely* procedural. They make possible claims that are very complex or could not be prosecuted individually, not only because it would be inefficient or unaffordable, but also because it may be extremely difficult to prove individual claims. The *CPA* does have substantive implications: it creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual members' damages is impractical, and that is available even if those who are not members of the class can benefit.

[108] I agree with Justice Rothstein that the aggregate damages provisions relate to the assessment of damages and cannot be used to establish liability. However, where proof of loss or detriment is essential to a finding of liability, for example in a cause of action under s. 36 of the *Competition Act*, or in tort, expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis. See *Pro-Sys*, at paras. 120 and 140. While these provisions do not create new causes of action, they permit individual members of the class to obtain remedies that may not be available to them on an individual suit because of difficulties of proving the extent of their individual loss. The aggregate damage

aux acheteurs indirects collectivement et donc que les membres du groupe ont subi un dommage. La méthode proposée pour démontrer le préjudice causé aux membres du groupe vise à établir le montant global du surcoût. En fait, comme le conclut le juge Rothstein, cette méthode repose sur un certain fondement factuel, et il est fort probable que le versement de toute indemnité ordonnée à l'issue de la présente instance sera effectué suivant le principe de l'aussi-près. Ainsi, il ne sera peut-être jamais nécessaire ni impératif en droit que les membres individuels du groupe soient connus.

[107] Pour ces motifs, je ne suis pas convaincue qu'il faut à l'étape de la certification se demander s'il sera possible de prouver une perte individuelle. En somme, bien qu'ils constituent un mécanisme procédural, les recours collectifs ne ressortissent pas *simplement* à la procédure. Ils rendent possibles des réclamations très complexes ou hors de portée d'un justiciable seul, non seulement parce qu'une telle procédure se révélerait inefficace ou inabordable, mais aussi parce qu'il peut être extrêmement difficile de prouver les réclamations individuelles. La *CPA* a bel et bien des répercussions sur le fond : elle crée une réparation qui reconnaît que les préjudices causés au groupe dans son ensemble peuvent être prouvés, même si la preuve des préjudices individuels est irréaliste, et qui peut être ordonnée même si elle est susceptible de profiter à des non-membres.

[108] Je suis d'accord avec le juge Rothstein pour dire que les dispositions autorisant l'octroi de dommages-intérêts globaux se rapportent à l'évaluation de la réparation et ne peuvent servir à établir la responsabilité. Cependant, lorsque celle-ci est subordonnée à la preuve de la perte ou des dommages, par exemple dans une action fondée sur l'art. 36 de la *Loi sur la concurrence* ou une action en responsabilité délictuelle, la preuve d'expert peut présenter une méthode valable et acceptable offrant une possibilité réaliste d'établir la perte pour l'ensemble du groupe. Voir *Pro-Sys*, par. 120 et 140. Bien qu'elles ne créent pas de nouvelles causes d'action, ces dispositions permettent à chaque membre du groupe d'obtenir des

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provision and *cy-près* awards promote behaviour modification and provide access to justice where it otherwise may be difficult to achieve.

[109] This Court cautioned in *Hollick* that class proceedings legislation should be construed generously and not narrowly to give life to the statute's purpose, namely to encourage judicial economy and access to justice, and to modify the behaviour of wrongdoers (paras. 14-15).[1]

C. *Some Basis in Fact to Show That Individuals Could Prove Personal Loss/Class Members Are Identifiable*

[110] Justice Rothstein accepts the respondents' position and concludes that the appellants fail to provide evidence that would overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably during the class period and that labeling at the time did not differentiate between them. He concludes that it appears impossible to show that an indirect purchaser had, in fact, bought a particular product that contained HFCS (para. 66). He found this failure fatal to the certification application.

[111] In my view, the record does not lead to the conclusion that it will be impossible to prove an individual is a member of the class — or that individual members of the group could not stand alone as plaintiffs. As I have explained, I do not agree that this is a necessary inquiry at the certification stage. Even so, I agree with the judge of

1 Although the Court considered Ontario legislation in *Hollick*, similar reasoning has been adopted for British Columbian class action legislation (see, e.g., *MacKinnon v. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214, at para. 16).

réparations qui lui seraient éventuellement refusées à l'issue d'une poursuite individuelle en raison des difficultés qu'il aurait à prouver l'étendue de sa propre perte. Les dispositions autorisant l'octroi de dommages-intérêts globaux et les versements suivant le principe de l'aussi-près favorisent la modification des comportements et l'accès à la justice dans les cas où ces objectifs pourraient par ailleurs se révéler difficiles à atteindre.

[109] La Cour souligne dans l'arrêt *Hollick* que les lois sur les recours collectifs doivent être interprétées libéralement, et non restrictivement, pour donner effet à l'objectif du législateur, à savoir favoriser l'économie des ressources judiciaires, l'accès à la justice et la modification du comportement des malfaiteurs (par. 14-15)[1].

C. *Un certain fondement factuel permet d'établir que chacun des membres pourrait prouver une perte individuelle et donc que l'appartenance au groupe est déterminable*

[110] Le juge Rothstein accepte la position des intimées et conclut que les appelantes n'ont pas produit de preuve susceptible de remédier au problème relatif à l'appartenance au groupe découlant de l'interchangeabilité des deux édulcorants pendant la période visée par le recours et du fait que les étiquettes à l'époque ne les distinguaient pas. Selon lui, il paraît impossible d'établir qu'un acheteur indirect avait bel et bien acquis un produit donné contenant du SMHTF (par. 66). Il a conclu que ce problème portait un coup fatal à la demande de certification.

[111] Le dossier ne mène pas à mon avis à la conclusion qu'il sera impossible de prouver l'appartenance au groupe — ou l'impossibilité pour les membres du groupe d'agir individuellement à titre de demandeurs. Comme je l'ai expliqué, je ne crois pas qu'il soit nécessaire de répondre à cette question à l'étape de la certification. Cela étant dit, je

1 Bien que la Cour dans *Hollick* se soit penchée sur la loi ontarienne sur les recours collectifs, un raisonnement semblable a été adopté à l'égard de la loi équivalente de la Colombie-Britannique (voir, p. ex., *MacKinnon c. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214, par. 16).

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first instance that there is "some basis in fact" to show that individual loss is capable of being proven.

[112] In effect, Justice Rothstein focuses on the difficulties that individual claimants will have to prove personal loss. Here, he accepts that expert evidence meets the standard of "some basis in fact" and consists of a credible and plausible model capable of proving harm on a class-wide basis. However, he is not satisfied that the evidence provides "some basis in fact" that there will be evidence capable of proving individual loss.

[113] Justice Rothstein's conclusion sets the evidentiary standard too high. In this price-fixing case, personal loss will follow if indirect purchasers can prove that they purchased a product containing HFCS. Even at the merits stage, however, claimants will not have to prove *definitively* that they purchased a *particular* product that contained HFCS. Labeling — if indeed generic labeling was used throughout — is not the only way to prove an individual loss. It will be sufficient if the trial judge is satisfied, upon expert or other evidence, that an individual claimant *probably* purchased a product containing it.

[114] The requirement that there be an evidentiary foundation — or some basis in fact — to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will rely to prove these claims. "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" (see *Hollick*, at paras. 16 and 25).

[115] A claim under s. 36 of the *Competition Act* requires that the fact of loss — rather than the amount of loss — be proven in order to establish liability. As Justice Rothstein accepts, the expert

suis d'accord avec le juge de première instance pour dire qu'[TRADUCTION] « un certain fondement factuel » permet d'établir qu'une perte individuelle peut être prouvée.

[112] En fait, le juge Rothstein met l'accent sur les difficultés qu'auront les demandeurs à faire la preuve d'une perte individuelle. Il convient que la preuve d'expert en l'espèce satisfait à la norme du « certain fondement factuel » et propose une méthode valable et acceptable d'établir qu'un préjudice a été causé à l'échelle du groupe. Il n'est toutefois pas convaincu qu'« un certain fondement factuel » permet d'établir qu'une perte individuelle pourra être prouvée.

[113] Le juge Rothstein établit une norme de preuve trop exigeante. Dans la présente affaire, la perte individuelle sera démontrée si les acheteurs indirects sont en mesure de prouver avoir acquis un produit contenant du SMHTF. Néanmoins, même à l'étape de l'examen au fond, les demandeurs n'auront pas à démontrer, *preuves à l'appui*, avoir acheté un *certain* produit contenant du SMHTF. L'étiquette — si effectivement le terme générique figurait sur l'étiquette au cours de toute la période — n'est pas le seul moyen de prouver qu'une perte individuelle a été subie. Il suffira que le juge de première instance soit convaincu, à la lumière de la preuve, notamment d'expert, qu'un demandeur donné a *probablement* acheté un produit contenant l'édulcorant en question.

[114] L'exigence que chacun des critères de certification repose sur un certain fondement factuel n'emporte pas d'examen sommaire au fond du recours et n'exige pas l'énumération des éléments que les demandeurs présenteront à l'appui de la demande. « La question à cette étape n'est pas s'il est vraisemblable que la demande aboutisse, mais s'il convient de procéder par recours collectif » (voir *Hollick*, par. 16 et 25).

[115] Une demande fondée sur l'art. 36 de la *Loi sur la concurrence* exige la preuve de la perte — et non celle du montant de la perte — pour l'établissement de la responsabilité. Le juge Rothstein

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evidence in this case is capable of proving the fact of loss to the class. Here, the appellants have provided evidence and a framework capable of proving — on a balance of probabilities — that products containing HFCS were purchased. While it may prove challenging, there is "some basis in fact" to conclude that some indirect purchasers could prove that they *probably* purchased products that contained price-fixed HFCS during the relevant period. Evidence of market practices, the prevalence of the product, and the nature of the purchases may provide a sufficient basis for a trial judge to make the necessary findings.

[116] For example, the expert report tendered by the appellants, authored by Dr. Leitzinger, included the following information. The respondents jointly controlled the "vast majority of production" of HFCS and therefore likely possessed monopoly power (A.R., vol. II, at p. 81; Leitzinger Report, at para. 6). Soft drink manufacturers are the leading purchasers of HFCS, and HFCS products are purchased by restaurants, food wholesalers, grocery and convenience stores, cinemas, and others (paras. 10-11). The Canadian soft-drink industry "uses about 20 times as much HFCS as it does sugar as the sweetening agent" (para. 27), and the extent to which HFCS overcharges were passed on to indirect consumers could be analyzed using existing economic modeling techniques (paras. 56-57). Dr. Leitzinger expected that at least some of any overcharge for HFCS would have been passed on to indirect purchasers, and that the extent of the overcharge could be calculated using publicly available information together with discovery data (paras. 58-64 and 75-77).

[117] To take a simple example, since a significant proportion of soft drinks contain HFCS, a trial judge may have no difficulty in finding that wholesalers of soft drinks, grocery stores or even individual persons — all possible indirect purchasers of HFCS — *probably* purchased some products

convient que la preuve d'expert en l'espèce permet d'établir que le groupe a effectivement subi une perte. Les appelantes ont produit des éléments de preuve et un cadre permettant de démontrer — selon la prépondérance des probabilités — l'achat de produits contenant du SMHTF. Bien qu'une telle preuve puisse être difficile à faire, « un certain fondement factuel » permet de conclure que des acheteurs indirects pourraient établir qu'ils ont *probablement* acheté durant la période pertinente des produits contenant du SMHTF dont le prix a été fixé. La preuve des pratiques commerciales, de la forte présence de cet ingrédient et de la nature des achats pourrait suffire au juge de première instance pour tirer les conclusions nécessaires.

[116] À titre d'exemple, le rapport d'expert produit par les appelantes et établi par M. Leitzinger renfermait les renseignements suivants. Les intimées contrôlaient conjointement la [TRADUCTION] « majeure partie de la production » de SMHTF et détenaient donc vraisemblablement un monopole (d.a., vol. II, p. 81; rapport de M. Leitzinger, par. 6). Les fabricants de boissons gazeuses représentent les premiers acheteurs de SMHTF, et les restaurants, grossistes en denrées alimentaires, supermarchés et dépanneurs, cinémas et autres établissements achètent les produits contenant cet édulcorant (par. 10-11). L'industrie canadienne des boissons gazeuses « utilise environ 20 fois plus de SMHTF que de sucre » (par. 27), et la valeur de la majoration du prix du SMHTF transférée aux acheteurs indirects pourrait être évaluée suivant les techniques actuelles de modélisation économique (par. 56-57). Selon M. Leitzinger, au moins une partie de la majoration aura été refilée aux acheteurs indirects, et sa valeur pourrait être calculée à l'aide de données tombées dans le domaine public de même que de celles divulguées à l'enquête préalable (par. 58-64 et 75-77).

[117] Par exemple, puisqu'une proportion appréciable de boissons gazeuses contient du SMHTF, un juge de première instance n'aurait éventuellement aucune difficulté à conclure que des grossistes, des épiceries ou même des particuliers — qui sont tous des acheteurs indirects éventuels de SMHTF — ont

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containing HFCS, and in determining the loss based upon the percentage of the products purchased that contained the substance.

[118] There was debate between the appellants' and the respondents' expert witnesses regarding the existence, extent and determinability of HFCS overcharges and pass-through to indirect consumers. However, the weighing of expert evidence is a matter for the trial on the merits. The point is simply that the appellants have tendered evidence which establishes some basis in fact to show that the proposed class is identifiable and that individual class members may be able to establish individual loss on a balance of probabilities, overcoming the identification problem to which Justice Rothstein refers (para. 65).

[119] And although the representative plaintiff, Wendy Bredin (formerly Weberg), could not state with certainty that she had purchased products containing HFCS, she and other individuals would be able to self-identify as potential plaintiffs based on knowledge of the products in which HFCS is known to have been commonly used. For indirect purchasers, such as wholesalers and grocery stores, the inquiry would likely be simplified, given the likelihood of more extensive record-keeping systems regarding purchases of products that likely contained HFCS.

[120] Thus, in my view, the evidentiary difficulties relied upon by my colleague and the respondents are not fatal to this certification application.

IV. Conclusion

[121] For these reasons, I agree with the application judge, Rice J., that the appellants have established that there is some basis in fact that there is an identifiable class in accordance with s. 4(1)(b) of the *CPA*. As for the other elements of certification discussed by Rothstein J., I agree with the reasons of my colleague.

*probablement* acheté certains produits contenant du SMHTF et à déterminer la perte subie, compte tenu du pourcentage des produits achetés contenant l'édulcorant en question.

[118] Les témoins experts des appelantes et des intimées ont débattu la réalité, la valeur et l'appréciabilité de la majoration du prix du SMHTF et de son transfert aux acheteurs indirects. Cependant, l'évaluation de la preuve d'expert relève du juge chargé de l'instruction sur le fond. Tout simplement, l'important c'est que les appelantes ont établi un certain fondement factuel permettant de conclure que le groupe proposé est identifiable et que chacun des membres du groupe pourrait être en mesure d'établir, suivant la prépondérance des probabilités, une perte individuelle, ce qui remédierait au problème relatif à l'appartenance dont parle le juge Rothstein (par. 65).

[119] Et bien que la demanderesse-représentante, Wendy Bredin (auparavant Weberg), n'était pas certaine d'avoir acheté des produits contenant du SMHTF, elle et d'autres personnes pourront s'estimer membres éventuels si elles savent les produits dans la composition desquels il a été reconnu qu'entrait régulièrement du SMHTF. Pour les acheteurs indirects comme les grossistes et les supermarchés, l'enquête serait sans doute plus simple encore, leurs livres constatant leurs achats de produits contenant vraisemblablement du SMHTF.

[120] À mon avis, les difficultés de preuve invoquées par mon collègue et les intimées ne portent donc pas un coup fatal à la demande de certification en l'espèce.

IV. Conclusion

[121] Pour ces motifs, je conviens avec le juge Rice, saisi de la demande, que les appelantes ont établi que l'existence d'un groupe identifiable, au sens où il faut entendre ce terme pour l'application de l'al. 4(1)(b) de la *CPA*, repose sur un certain fondement factuel. Quant aux autres critères de certification analysés par le juge Rothstein, je souscris aux motifs de ce dernier.

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[122] I would allow the appeal with costs and remit the matter to the British Columbia Supreme Court for trial. I agree with Justice Rothstein's disposition of the cross-appeal.

APPENDIX: Common Issues Certified by Rice J.

Breach of the *Competition Act*

(a) Did the defendants, or any of them, engage in conduct which is contrary to s. 45 of the *Competition Act*? If yes, what was the duration of such conduct?

(b) What damages, if any, are payable by the non-settling defendants to the Class Members pursuant to s. 36 of the *Competition Act*?

(c) Should the non-settling defendants, or any of them, pay the full costs, or any, of the investigation into this matter pursuant to s. 36 of the *Competition Act*?

Conspiracy

(d) Did the defendants, or any of them, conspire to harm the Class Members?

(e) Did the defendants, or any of them, act in furtherance of the conspiracy?

(f) Was the predominant purpose of the conspiracy to harm the Class Members?

(g) Did the conspiracy involve unlawful acts?

(h) Did the defendants, or any of them, know that the conspiracy would likely cause injury to the Class Members?

(i) Did the Class Members suffer economic loss? If yes, what was the duration of such economic loss?

(j) What damages, if any, are payable by the non-settling defendants, or any of them, to the Class Members?

[122] Je suis d'avis d'accueillir le pourvoi avec dépens et de renvoyer l'affaire à la Cour suprême de la Colombie-Britannique pour instruction. Je souscris au dispositif proposé par le juge Rothstein dans l'appel incident.

ANNEXE : Questions communes certifiées par le juge Rice

Violation de la *Loi sur la concurrence*

a) Les défenderesses, ou l'une d'elles, se sont-elles livrées à un comportement allant à l'encontre de l'art. 45 de la *Loi sur la concurrence*? Dans l'affirmative, pendant combien de temps?

b) À combien s'établit le montant des dommages-intérêts que les défenderesses non parties aux règlements doivent verser, s'il y a lieu, aux membres du groupe en vertu de l'art. 36 de la *Loi sur la concurrence*?

c) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues d'assumer le coût en totalité ou en partie de l'enquête relativement à l'affaire aux termes de l'art. 36 de la *Loi sur la concurrence*?

Complot

d) Les défenderesses, ou l'une d'elles, ont-elles participé à un complot visant à causer un préjudice aux membres du groupe?

e) Les défenderesses, ou l'une d'elles, ont-elles agi en vue de la réalisation du complot?

f) Le complot visait-il principalement à causer un préjudice aux membres du groupe?

g) Les auteurs du complot ont-ils eu recours à des actes illégaux?

h) Les défenderesses, ou l'une d'elles, savaient-elles que le complot causerait vraisemblablement un préjudice aux membres du groupe?

i) Les membres du groupe ont-ils subi une perte financière? Dans l'affirmative, pendant combien de temps?

j) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses non parties aux règlements, ou l'une d'elles, aux membres du groupe?

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(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Tortious Interference with Economic Interests

(l) Did the defendants, or any of them, intend to injure the Class Members?

(m) Did the defendants, or any of them, interfere with the economic interests of the Class Members by unlawful or illegal means?

(n) Did the Class Members suffer economic loss as a result of the defendants' interference? If yes, what was the duration of such economic loss?

(o) What damages, if any, are payable by the non-settling defendants, or any of them, to the Class Members?

(p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment, Waiver of Tort and Constructive Trust

(q) Have the non-settling defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of HFCS?

(r) Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of HFCS?

(s) Is there a juridical reason why the non-settling defendants, or any of them, should be entitled to retain the overcharges on the sale of HFCS?

(t) What restitution, if any, is payable by the non-settling defendants, or any of them, to the Class Members based on unjust enrichment?

(u) Should the non-settling defendants, or any of them, be constituted as constructive trustees in favour of the Class Members for all of the overcharges from the sale of HFCS?

(v) What is the quantum of overcharges, if any, that the non-settling defendants, or any of them, hold in trust for the Class Members?

k) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?

Atteinte délictuelle à des intérêts financiers

l) Les défenderesses, ou l'une d'elles, ont-elles eu l'intention de nuire aux membres du groupe?

m) Les défenderesses, ou l'une d'elles, ont-elles porté atteinte aux intérêts financiers des membres du groupe par des moyens illégaux?

n) Les membres du groupe ont-ils subi une perte financière par suite de cette atteinte? Dans l'affirmative, pendant combien de temps?

o) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses non parties aux règlements, ou l'une d'elles, aux membres du groupe?

p) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?

Enrichissement sans cause, renonciation au recours délictuel et fiducie par interprétation

q) Les défenderesses non parties aux règlements, ou l'une d'elles, se sont-elles enrichies sans cause par suite de la majoration du prix du SMHTF?

r) Les membres du groupe se sont-ils appauvris d'un montant égal à celui de la majoration du prix du SMHTF?

s) Une cause juridique justifie-t-elle les défenderesses non parties aux règlements, ou l'une d'elles, de conserver le fruit de la majoration du prix du SMHTF?

t) Quelle somme les défenderesses non parties au règlement, ou l'une d'elles, doivent-elles restituer aux membres du groupe, le cas échéant, sur le fondement de l'enrichissement sans cause?

u) Les défenderesses non parties aux règlements, ou l'une d'elles, doivent-elles être constituées fiduciaires par interprétation au bénéfice des membres du groupe quant à la totalité de la majoration du prix du SMHTF?

v) À combien se monte la majoration, s'il en est, que les défenderesses non parties aux règlements, ou l'une d'elles, détiennent en fiducie pour les membres du groupe?

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(w) What restitution, if any, is payable by the non-settling defendants to the Class Members based on the doctrine of waiver of tort?

(x) Are the non-settling defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained on the sale of HFCS to the Class Members based on the doctrine of waiver of tort?

(y) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

Punitive Damages

(z) Are the non-settling defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, what amount and to whom?

Interest

(aa) What is the liability, if any, of the non-settling defendants, or any of them, for court order interest?

Availability of Pass-Through Defence

(bb) To what extent, if at all, are the non-settling defendants entitled to assert a pass-through defence to any or all of the Class Members' causes of action?

Distribution of Damages and/or Trust Funds

(cc) What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution?

(dd) Are the non-settling defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained on the sale of HFCS to the Class Members based on the doctrine of waiver of tort?

(ee) Can the amount of restitution be determined on an aggregate basis and if so, in what amount? [A.R., vol. I, at pp. 69-71]

w) Quelle somme, s'il en est, les défenderesses non parties aux règlements doivent-elles restituer aux membres du groupe sur le fondement de la renonciation au recours délictuel?

x) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues de comptabiliser à l'intention des membres du groupe les profits illégitimes réalisés par la vente du SMHTF aux membres du groupe sur le fondement de la renonciation au recours délictuel?

y) Le montant de la restitution peut-il être établi globalement et, dans l'affirmative, quel est-il?

Dommages-intérêts punitifs

z) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues de verser des dommages-intérêts punitifs ou exemplaires eu égard à la nature de leur comportement et, dans l'affirmative, quel est ce montant et qui en sont les bénéficiaires?

Intérêts

aa) Quelle obligation, s'il en est, les défenderesses non parties aux règlements, ou l'une d'elles, ont-elles de verser l'intérêt dont le paiement est ordonné par le tribunal?

Possibilité d'invoquer le transfert de la perte en défense

bb) Dans quelle mesure, le cas échéant, les défenderesses non parties aux règlements peuvent-elles opposer le transfert de la perte aux causes d'action des membres du groupe?

Distribution des dommages-intérêts ou des fonds détenus en fiducie

cc) Quel est le bon mode de distribution aux membres du groupe des dommages-intérêts ou des fonds détenus en fiducie et de l'intérêt, et qui doit assumer le coût de cette distribution?

dd) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues de comptabiliser pour les membres du groupe les profits illégitimes réalisés par la vente du SMHTF aux membres du groupe sur le fondement de la renonciation au recours délictuel?

ee) Le montant de la restitution peut-il être établi globalement et, dans l'affirmative, quel est-il? [d.a., vol. I, p. 69-71]

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*Appeal dismissed with costs,* CROMWELL *and* KARAKATSANIS JJ. *dissenting. Cross-appeal allowed with costs.*

*Solicitors for the appellants/respondents on cross-appeal: Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.*

*Solicitors for the respondents/appellants on cross-appeal Archer Daniels Midland Company and ADM Agri-Industries Company: Norton Rose Fulbright, Toronto; Nash & Company, Vancouver.*

*Solicitors for the respondents/appellants on cross-appeal Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited: Hunter Litigation Chambers, Vancouver.*

*Solicitors for the respondents/appellants on cross-appeal Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America: Nathanson, Schachter & Thompson, Vancouver.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.*

*Solicitors for the intervener the Canadian Chamber of Commerce: Davies Ward Phillips & Vineberg, Toronto.*

*Pourvoi rejeté avec dépens, les juges* CROMWELL *et* KARAKATSANIS *sont dissidents. Pourvoi incident accueilli avec dépens.*

*Procureurs des appelantes/intimées au pourvoi incident : Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.*

*Procureurs des intimées/appelantes au pourvoi incident Archer Daniels Midland Company et ADM Agri-Industries Company : Norton Rose Fulbright, Toronto; Nash & Company, Vancouver.*

*Procureurs des intimées/appelantes au pourvoi incident Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company et Cargill Limitée : Hunter Litigation Chambers, Vancouver.*

*Procureurs des intimées/appelantes au pourvoi incident Corn Products International, Inc., Bestfoods, Inc., auparavant connue sous le nom de CPC International, Inc., Casco Inc. et Unilever PLC faisant affaire sous la dénomination d'Unilever Bestfoods North America : Nathanson, Schachter & Thompson, Vancouver.*

*Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.*

*Procureurs de l'intervenante la Chambre de commerce du Canada : Davies Ward Phillips & Vineberg, Toronto.*

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# Tab 19

**Theratechnologies inc.,**
**Yves Rosconi and Paul Pommier** *Appellants*

*v.*

**121851 Canada inc.** *Respondent*

and

**Mouvement d'éducation et de défense des actionnaires** *Intervener*

**Indexed as: Theratechnologies inc. *v.* 121851 Canada inc.**

**2015 SCC 18**

File No.: 35550.

2014: December 1; 2015: April 17.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Securities — Statutory disclosure obligations — Action for damages — Prior judicial authorization — Pharmaceutical company in process of obtaining approval to market new drug — Questions on drug's potential side effects raised as part of approval process — Questions publicized by stock quotation enterprises resulting in drop of pharmaceutical company's share price — Corporate shareholder seeking to institute class action for breach of company's disclosure obligation — Action requiring prior judicial authorization based on whether there is a "reasonable possibility that it will be resolved in plaintiff's favour" — Securities Act, CQLR, c. V-1.1, ss. 5.3, 73, 225.4.*

In the spring of 2010, Theratechnologies inc. (Thera) was awaiting the approval of the United States Food and Drug Administration (FDA) for a new drug to reduce excess abdominal fat among HIV patients. As its application proceeded, Thera regularly updated its shareholders and the Commission des valeurs mobilières du Québec about developments in the FDA process. It also regularly

**Theratechnologies inc.,**
**Yves Rosconi et Paul Pommier** *Appelants*

*c.*

**121851 Canada inc.** *Intimée*

et

**Mouvement d'éducation et de défense des actionnaires** *Intervenant*

**Répertorié : Theratechnologies inc. *c.* 121851 Canada inc.**

**2015 CSC 18**

N° du greffe : 35550.

2014 : 1er décembre; 2015 : 17 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

*Valeurs mobilières — Obligations légales de divulgation — Action en dommages-intérêts — Autorisation judiciaire préalable — Société pharmaceutique en cours d'obtention de l'approbation d'une drogue nouvelle — Questions relatives aux effets secondaires possibles du médicament soulevées dans le cadre du processus d'approbation — Publication des questions par une entreprise de cotation boursière entraînant une chute du prix des actions de la société pharmaceutique — Société actionnaire cherchant à intenter un recours collectif pour manquement à l'obligation de divulgation de la société — Autorisation judiciaire préalable de l'action accordée s'il existe « une possibilité raisonnable que le demandeur ait gain de cause » — Loi sur les valeurs mobilières, RLRQ, c. V-1.1, art. 5.3, 73, 225.4.*

Au printemps 2010, Theratechnologies inc. (Thera) attendait que la Food and Drug Administration (FDA) des États-Unis approuve un nouveau médicament qui réduit l'excès de gras abdominal chez les patients atteints du VIH. Pendant que la demande suivait son cours, Thera a informé régulièrement ses actionnaires et la Commission des valeurs mobilières du Québec de l'évolution du

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informed its shareholders about the results of its clinical trials measuring the safety and efficacy of the drug, including potential side effects. The trials indicated that the benefits of the drug could be "achieved without significant side effects".

As is common during the new drug approval process, the FDA referred a number of questions about this drug to an expert Advisory Committee, including questions about its potential side effects. The FDA also made these questions public as part of a package of briefing materials on its website. Thera believed the briefing documents it had already provided to the FDA and the clinical results it had already made public to its investors offered a comprehensive response to the specific questions the FDA had posed. When the questions were publicized by stock quotation enterprises, the price of the company's shares dropped. 121851 Canada inc., a holding company, sold its shares in Thera during this period. Ultimately, the drug was approved by the FDA and Thera's share price recovered.

121851 sought authorization under s. 225.4 of the *Securities Act* to bring a class action for damages against Thera, claiming that the information about the potential side effects of the drug and the FDA's questions about those side effects amounted to a material change in Thera's business, operations or capital, triggering timely disclosure obligations under s. 73 of the *Securities Act*.

Under s. 225.4, the court is a gatekeeper, and grants authorization "if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff". The Motions Judge concluded that the authorization mechanism in s. 225.4 of the *Securities Act* imposed a higher threshold than art. 1003 of the *Code of Civil Procedure*, which deals with the authorization of class actions generally, but found sufficient evidence to support the conclusion that 121851's action had a reasonable possibility of success. The Court of Appeal agreed with the Motions Judge that the screening mechanism under s. 225.4 was more stringent than for the authorization of a class action under art. 1003 of the *Code of Civil Procedure* and required more than a mere possibility of success. It also agreed that the threshold was met in this case.

processus à la FDA. Elle a également informé régulièrement ses actionnaires au sujet du résultat de ses études cliniques visant à évaluer l'efficacité et l'innocuité du médicament, y compris ses effets secondaires possibles. Les études indiquaient que les avantages du médicament étaient « obtenus sans effets secondaires significatifs ».

Comme il est courant dans le cadre du processus d'approbation d'une drogue nouvelle, la FDA a soumis à un comité consultatif d'experts un certain nombre de questions au sujet de ce médicament, notamment des questions au sujet de ses effets secondaires possibles. La FDA a également rendu publiques ces questions en les incorporant dans une série de documents d'information affichés sur son site Web. Thera croyait que les documents d'information déjà fournis par elle à la FDA et les résultats cliniques déjà communiqués à ses investisseurs répondaient de façon exhaustive aux questions précises soulevées par la FDA. Lorsque des entreprises de cotation boursière ont publié ces questions, le prix des actions de la société a chuté. 121851 Canada inc., une société de portefeuille, a vendu ses actions de Thera au cours de cette période. En fin de compte, la FDA a approuvé le médicament et le prix des actions de Thera s'est rétabli.

121851 a demandé au tribunal l'autorisation d'intenter un recours collectif en dommages-intérêts contre Thera, conformément à l'art. 225.4 de la *Loi sur les valeurs mobilières*, alléguant que les renseignements au sujet des effets secondaires possibles du médicament et les questions de la FDA au sujet de ces effets secondaires équivalaient à un changement important dans l'activité, l'exploitation ou le capital de Thera, ce qui donnait naissance à l'obligation, prévue à l'art. 73 de la *Loi sur les valeurs mobilières*, de fournir l'information occasionnelle.

L'article 225.4 confère au tribunal un rôle de gardien qui accorde une autorisation « s'il estime que l'action est intentée de bonne foi et qu'il existe une possibilité raisonnable que le demandeur ait gain de cause ». Le premier juge a conclu que le mécanisme d'autorisation prévu à l'art. 225.4 de la *Loi sur les valeurs mobilières* impose un critère préliminaire plus strict que celui prévu à l'art. 1003 du *Code de procédure civile*, qui traite de l'autorisation générale d'intenter un recours collectif, mais il a jugé que la preuve était suffisante pour étayer la conclusion que l'action intentée par 121851 avait une possibilité raisonnable de succès. La Cour d'appel a convenu avec le premier juge que le mécanisme de filtrage prévu à l'art. 225.4 était plus exigeant que le critère d'autorisation d'un recours collectif prévu par l'art. 1003 du *Code de procédure civile* et qu'il exigeait plus qu'une simple possibilité d'avoir gain de cause. Elle a également conclu qu'il avait été satisfait à ce critère en l'espèce.

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*Held*: The appeal should be allowed.

Section 225.4 of the *Securities Act* is part of a new regime to address breaches of continuous disclosure obligations in the secondary market, the market in which a company's shares are traded publicly after they have been issued or distributed by the company. The reforms were inspired by the recommendations of the Allen Committee, suggested after a number of high profile misrepresentations at publicly traded companies. The Committee concluded that the remedies available to investors injured by misleading disclosure in the secondary trading market were so difficult to pursue, that they were largely illusory. As a result, it recommended the creation of a statutory civil liability regime that would help investors sue issuers, directors, and officers who violated statutory disclosure obligations.

Under Quebec's new regime, when a security is acquired or transferred at the time of a false declaration or omission of information that should have been disclosed, the fluctuation in the value of the security is presumed to be attributable to that fault. Investors are thereby released from the burden of demonstrating that the variation in the market price of the security was linked to the misinformation or omission, and from demonstrating that they personally relied on that misinformation or omission in buying or transferring the security. In order to discourage the kind of strike suits that had become common in the United States under more investor-friendly regimes, the Quebec scheme established an authorization mechanism — s. 225.4 — to permit only actions in good faith and with a "reasonable possibility" that the claim would be resolved "in favour of the plaintiff". The regime reflected an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations.

The "reasonable possibility" that the claim would be resolved in favour of the plaintiff required under s. 225.4 sets out a different and higher standard than the general threshold for the authorization of a class action under art. 1003 of the *Code of Civil Procedure*. Under art. 1003, the court seeks only to identify whether "the facts alleged seem to justify the conclusions sought", that is, whether the applicant has established "a good colour of right". The Quebec legislature used different language in s. 225.4 to create a more meaningful screening mechanism in the securities context so that costly strike suits

*Arrêt* : Le pourvoi est accueilli.

L'article 225.4 de la *Loi sur les valeurs mobilières* s'inscrit dans un nouveau régime visant à lutter contre les atteintes à l'obligation d'information continue dans le marché secondaire, le marché où se négocient publiquement les actions qu'une entreprise a émises ou distribuées. La réforme s'inspire des recommandations faites par le comité Allen à la suite d'un certain nombre d'affaires médiatisées de déclarations inexactes impliquant des sociétés ouvertes. Le comité a conclu que les recours offerts aux investisseurs du marché secondaire lésés par une divulgation trompeuse étaient si difficiles à exercer qu'ils étaient largement illusoires. En conséquence, il a recommandé la création d'un régime légal de responsabilité civile qui aiderait les investisseurs à poursuivre en justice les émetteurs, les dirigeants et les administrateurs qui manquent à leurs obligations légales d'information.

Sous le nouveau régime québécois, lorsqu'un titre est acquis ou transféré à la suite d'une fausse déclaration ou d'un défaut de fournir une information qui aurait dû l'être, la fluctuation de la valeur du titre est présumée être attribuable à cette faute. Les investisseurs se trouvent ainsi libérés du fardeau de démontrer que l'écart enregistré dans le prix du marché pour ce titre est lié à cette information erronée ou à ce défaut de fournir l'information, et du fardeau de démontrer qu'ils se sont personnellement fiés à cette information ou à l'absence de l'information au moment de l'achat ou du transfert du titre. Afin de décourager le genre de recours opportunistes devenus courants aux États-Unis en vertu de régimes plus favorables aux investisseurs, le régime québécois a prévu un mécanisme d'autorisation — l'art. 225.4 — afin de ne permettre que les actions intentées de bonne foi, s'il existe une « possibilité raisonnable que le demandeur ait gain de cause ». Le régime visait donc l'atteinte d'un équilibre entre la volonté de mettre un frein aux recours injustifiés ou opportunistes et celle d'offrir aux investisseurs un recours valable lorsque les émetteurs ne respectent pas leurs obligations d'information.

La « possibilité raisonnable » que le demandeur ait gain de cause qu'exige l'art. 225.4 établit un critère plus exigeant que le critère général d'autorisation applicable en matière de recours collectif prévu à l'art. 1003 du *Code de procédure civile*. Sous le régime de l'art. 1003, le tribunal cherche seulement à déterminer si « les faits allégués paraissent justifier les conclusions recherchées », c'est-à-dire si le demandeur a établi « une apparence sérieuse de droit ». Le législateur québécois a employé un libellé différent à l'art. 225.4 pour créer un mécanisme de filtrage qui soit plus significatif

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and unmeritorious claims would be prevented. The threshold requires that there be a reasonable or realistic chance that the action will succeed.

A case with a realistic chance of success requires the claimant to offer some credible evidence in support of the claim. Courts must therefore undertake a reasoned consideration of the evidence to ensure that the action has some merit, but the authorization stage under s. 225.4 should not be treated as a mini-trial. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. A full analysis of the evidence is unnecessary. What *is* required is sufficient evidence to persuade the court that there is a realistic chance that the action will be resolved in the claimant's favour.

121851 claims that Thera breached s. 73 of the *Securities Act*, which requires issuers to provide timely disclosure of material changes to investors. A material change has two components. There must be a change in the business, operations or capital of the issuer and the change must be material, which means it would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. 121851 argues that when Thera received the FDA briefing materials for the Advisory Committee, it should have issued a responsive press release. But 121851 has not pointed to any evidence that could qualify as a change in Thera's operations, capital or business as described in s. 5.3 of the *Securities Act*. The results of the clinical trials, including potential side effects, were disclosed to shareholders as they became available. There was no new information about the side effects of the drug that required timely disclosure when the FDA mentioned those side effects in the briefing materials.

Nor has 121851 pointed to any evidence to suggest that the questions the FDA posed to its advisory committee about these side effects, or the contents of its briefing package more generally, departed in any way from the regular and routine process through which the FDA assesses whether a drug should be approved. Rather, they

dans le contexte des valeurs mobilières et qui fasse ainsi obstacle aux poursuites opportunistes coûteuses et aux demandes non fondées. Le critère préliminaire exige une possibilité raisonnable ou réaliste que le demandeur ait gain de cause.

Pour démontrer une possibilité réaliste d'avoir gain de cause, le demandeur doit présenter des éléments de preuve crédibles à l'appui de sa demande. Les tribunaux doivent donc entreprendre un examen raisonné de la preuve afin de s'assurer que l'action peut être fondée, mais l'étape de l'autorisation prévue par l'art. 225.4 ne doit pas être traitée comme un mini procès. Si le mécanisme de filtrage a pour objectif d'écarter les poursuites opportunistes coûteuses et celles qui ont peu de chances d'être accueillies, il s'ensuit que les exigences en matière de preuve ne doivent pas être lourdes au point d'être pratiquement identiques à celles d'un procès. Il n'est pas nécessaire de procéder à une analyse complète de la preuve. Ce qui *est* exigé, c'est une preuve suffisante pour convaincre le tribunal de l'existence d'une possibilité réaliste que le demandeur ait gain de cause.

121851 allègue que Thera a dérogé à l'art. 73 de la *Loi sur les valeurs mobilières* qui oblige les émetteurs à fournir aux investisseurs l'information occasionnelle au sujet d'un changement important. Un changement important comporte deux éléments. Il faut un changement dans l'activité, l'exploitation ou le capital de l'émetteur, et ce changement doit être important, c'est-à-dire qu'il doit être raisonnable de s'attendre à ce qu'il ait un effet appréciable sur le cours ou la valeur des titres de l'émetteur. 121851 soutient que lorsque Thera a reçu les documents d'information de la FDA destinés au comité consultatif, elle aurait dû y répondre par un communiqué de presse. Mais 121851 n'a présenté aucun élément de preuve de nature à constituer un changement important dans l'activité, le capital ou l'exploitation de Thera au sens de l'art. 5.3 de la *Loi sur les valeurs mobilières*. Les résultats des essais cliniques, y compris les effets secondaires possibles, ont été communiqués aux actionnaires aussitôt qu'ils ont été disponibles. Aucun nouveau renseignement sur les effets secondaires du médicament ne devait faire l'objet d'une information occasionnelle lorsque la FDA a fait mention de ces effets secondaires dans les documents d'information.

121851 n'a pas non plus signalé aucun élément de preuve tendant à indiquer que les questions posées à son comité consultatif par la FDA au sujet de ces effets secondaires, ou, de façon plus générale, que le contenu de ses documents d'information, s'écartaient d'une quelconque façon du processus courant par lequel la FDA

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are a routine step in the FDA's work to determine whether a drug's benefits outweigh its risks. It is difficult to characterize these questions as any kind of change to Thera's business, operations, or capital requiring a reassuring public response from Thera.

Because the evidence does not credibly point to a material change that could have triggered disclosure obligations, there is no reasonable possibility that 121851's action under s. 73 of the *Securities Act* could succeed.

**Cases Cited**

**Distinguished:** *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; **referred to:** *Cartaway Resources Corp. (Re)*, 2000 BCSECCOM 88, [2000] B.C.S.C.D. No. 92 (QL); *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083, 44 C.P.C. (7th) 80; *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222, leave to appeal refused, 2011 ONSC 1035, 105 O.R. (3d) 212; *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25, 3 C.P.C. (7th) 261; *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, aff'd 2012 BCCA 456, 39 B.C.L.R. (5th) 44; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2014 ONSC 1057, 49 C.P.C. (7th) 12; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2014 ONCA 90, 118 O.R. (3d) 641; *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331; *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

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*Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15 [Bill 19].
*Civil Code of Québec*, arts. 1457, 1607.
*Code of Civil Procedure*, CQLR, c. C-25, art. 1003.
*Securities Act*, CQLR, c. V-1.1, ss. 5 "material fact", 5.3, 73, 225.4.
*Securities Act*, R.S.A. 2000, c. S-4, s. 147.
*Securities Act*, R.S.B.C. 1996, c. 418, s. 85.
*Securities Act*, R.S.N.S. 1989, c. 418, s. 81.

décide si un médicament doit être approuvé. Il s'agit plutôt d'une étape courante qui fait partie du travail de la FDA de décider si les avantages d'un médicament l'emportent sur les risques qu'il présente. Il est difficile de considérer ces questions comme constituant, dans les activités commerciales, l'exploitation ou le capital de Thera, une forme de changement exigeant de cette dernière qu'elle réagisse publiquement de façon rassurante.

Étant donné que la preuve ne permet pas de conclure de manière crédible qu'un changement important a donné naissance à des obligations d'information, il n'existe aucune possibilité raisonnable que 121851 ait gain de cause dans son action intentée sur le fondement de l'art. 73 de la *Loi sur les valeurs mobilières*.

**Jurisprudence**

**Distinction d'avec l'arrêt :** *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; **arrêts mentionnés :** *Cartaway Resources Corp. (Re)*, 2000 BCSECCOM 88, [2000] B.C.S.C.D. No. 92 (QL); *Cornish c. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107; *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600; *Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347; *Marcotte c. Longueuil (Ville)*, 2009 CSC 43, [2009] 3 R.C.S. 65; *Ironworkers Ontario Pension Fund (Trustee of) c. Manulife Financial Corp.*, 2013 ONSC 4083, 44 C.P.C. (7th) 80; *Silver c. Imax Corp.* (2009), 66 B.L.R. (4th) 222, autorisation d'appel refusée, 2011 ONSC 1035, 105 O.R. (3d) 212; *Dobbie c. Arctic Glacier Income Fund*, 2011 ONSC 25, 3 C.P.C. (7th) 261; *Round c. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, conf. par 2012 BCCA 456, 39 B.C.L.R. (5th) 44; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) c. Celestica Inc.*, 2014 ONSC 1057, 49 C.P.C. (7th) 12; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) c. Celestica Inc.*, 2014 ONCA 90, 118 O.R. (3d) 641; *Kerr c. Danier Leather Inc.*, 2007 CSC 44, [2007] 3 R.C.S. 331; *TSC Industries, Inc. c. Northway, Inc.*, 426 U.S. 438 (1976).

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*Loi sur les valeurs mobilières*, L.N.-B. 2004, c. S-5.5, art. 89(1).
*Loi sur les valeurs mobilières*, L.R.O. 1990, c. S.5, art. 75, 138.8(1).

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*Securities Act*, R.S.O. 1990, c. S.5, ss. 75, 138.8(1).
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*Securities Act*, R.S.A. 2000, c. S-4, art. 147.
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APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Bouchard and Gascon JJ.A.), 2013 QCCA 1256, [2013] R.J.Q. 1128, [2013] AZ-50988427, [2013] Q.J. No. 7925 (QL), 2013 CarswellQue 10168 (WL Can.), affirming a decision of Blanchard J., 2012 QCCS 699, [2012] AZ-50834966,

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Rochon, Bouchard et Gascon), 2013 QCCA 1256, [2013] R.J.Q. 1128, [2013] AZ-50988427, [2013] J.Q. nº 7925 (QL), 2013 CarswellQue 7067 (WL Can.), qui a confirmé une décision du juge Blanchard, 2012 QCCS 699, [2012]

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[2012] J.Q. nº 1529 (QL), 2012 CarswellQue 1636 (WL Can.). Appeal allowed.

*Pierre Y. Lefebvre* and *Philippe Charest-Beaudry*, for the appellants.

*Michel Savonitto* and *Vicky Berthiaume*, for the respondent.

*Éric Lemay* and *Dimitri Lascaris*, for the intervener.

The judgment of the Court was delivered by

[1] Abella J. — The genesis of this case was a new drug application to the U.S. Food and Drug Administration (FDA) by a pharmaceutical research and development company based in Montréal. As is common during the new drug approval process, the FDA referred a number of questions about this drug to an expert Advisory Committee, including questions about the drug's potential side effects. The FDA also made these questions public as part of a package of briefing materials on its website. When the questions were publicized by stock quotation enterprises, the price of the company's shares dropped sharply.

[2] A holding company that sold its shares during this period sought authorization to bring a class action for damages under s. 225.4 of the *Securities Act*, CQLR, c. V-1.1, alleging a breach of statutory disclosure obligations.

[3] In 2007, changes to the *Securities Act* created a new statutory cause of action that enabled investors to bring claims against reporting issuers who breach their obligation to disclose material facts and changes to their shareholders. Actions for damages may not be brought without the prior authorization of the court pursuant to s. 225.4. A court will grant

AZ-50834966, [2012] J.Q. nº 1529 (QL), 2012 CarswellQue 1636 (WL Can.). Pourvoi accueilli.

*Pierre Y. Lefebvre* et *Philippe Charest-Beaudry*, pour les appelants.

*Michel Savonitto* et *Vicky Berthiaume*, pour l'intimée.

*Éric Lemay* et *Dimitri Lascaris*, pour l'intervenant.

Version française du jugement de la Cour rendu par

[1] La juge Abella — Le présent pourvoi tire son origine d'une demande de drogue nouvelle présentée à la Food and Drug Administration (FDA) des États-Unis par une société pharmaceutique de recherche et de développement établie à Montréal. Comme il est courant dans le cadre du processus d'approbation d'une drogue nouvelle, la FDA a soumis à un comité consultatif d'experts un certain nombre de questions au sujet de ce médicament, notamment des questions au sujet de ses effets secondaires possibles. La FDA a également rendu publiques ces questions en les incorporant dans une série de documents d'information qu'elle a affichés sur son site Web. Lorsque des entreprises de cotation boursière ont publié ces questions, le prix des actions de la société a enregistré une chute marquée.

[2] Une société de portefeuille qui a vendu ses actions au cours de cette période a demandé l'autorisation d'intenter un recours collectif en dommages-intérêts en application de l'art. 225.4 de la *Loi sur les valeurs mobilières*, RLRQ, c. V-1.1, alléguant un manquement aux obligations d'information imposées par la loi.

[3] Des modifications apportées en 2007 à la *Loi sur les valeurs mobilières* ont créé une nouvelle cause d'action qui permet aux investisseurs de poursuivre en justice les émetteurs assujettis qui manquent à leur obligation de communiquer aux actionnaires tous les faits et changements. Aux termes de l'art. 225.4, aucune action en dommages-intérêts

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authorization "if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff". The issue in this appeal is whether there was a "reasonable possibility" of success within the meaning of this provision.

[4] I agree with the Court of Appeal that the threshold set out in s. 225.4 for authorization requires more than a mere possibility of success, but, with great respect, do not share its conclusion that the threshold was met in this case.

Background

[5] Theratechnologies inc. (Thera) is a pharmaceutical research and development company based in Montréal and listed on the Toronto Stock Exchange. 121851 Canada inc. is a holding company. Roger St-Germain is its sole shareholder and director. At the relevant time, 121851 Canada inc. had 190,000 Thera shares.

[6] On June 1, 2009, Thera filed a new drug application with the FDA for tesamorelin, a drug to reduce excess abdominal fat among HIV patients. The FDA's Center for Drug Evaluation and Research is charged with reviewing and evaluating new drug applications from companies like Thera. Its role is to decide whether the studies submitted by the drug's sponsoring company — typically, its manufacturer — show the new drug to be safe and effective. If the sponsoring company demonstrates that the drug's benefits outweigh its known risks, the FDA will approve it.

[7] As part of its usual process of evaluating the safety and efficacy of a drug, the FDA will often convene a meeting of an expert Advisory Committee. The FDA provides this Advisory Committee with two packages of briefing materials in advance of the meeting, one containing information prepared by the FDA and the other containing information prepared

ne peut être intentée sans l'autorisation préalable du tribunal. Le tribunal accorde l'autorisation « s'il estime que l'action est intentée de bonne foi et qu'il existe une possibilité raisonnable que le demandeur ait gain de cause ». Le présent pourvoi porte sur la question de savoir s'il existait une « possibilité raisonnable » que le demandeur ait gain de cause au sens de l'art. 225.4.

[4] Je suis d'accord avec la Cour d'appel pour dire que le critère d'autorisation énoncé à l'art. 225.4 exige plus qu'une simple possibilité d'avoir gain de cause, mais, avec égards, je ne partage pas sa conclusion selon laquelle il a été satisfait à ce critère en l'espèce.

Contexte

[5] Theratechnologies inc. (Thera) est une société pharmaceutique de recherche et de développement établie à Montréal et inscrite à la Bourse de Toronto. 121851 Canada inc. est une société de portefeuille. Roger St-Germain en est le seul actionnaire et administrateur. À l'époque pertinente, 121851 Canada inc. détenait 190 000 actions de Thera.

[6] Le 1er juin 2009, Thera a déposé auprès de la FDA une demande de drogue nouvelle relative à la tésamoréline, un médicament qui permet de réduire l'excès de gras abdominal chez les patients atteints du VIH. Le centre de recherche et d'évaluation des médicaments de la FDA est chargé d'examiner et d'évaluer les demandes de drogues nouvelles que présentent les entreprises telles que Thera. Il a pour mandat de déterminer si les rapports d'études soumis par l'entreprise qui présente la demande — habituellement le fabricant — établissent l'innocuité et l'efficacité du médicament. Si l'entreprise en question démontre que les avantages du médicament l'emportent sur les risques qu'il présente, la FDA l'approuvera.

[7] Dans le cadre du processus habituel d'évaluation de l'efficacité et de l'innocuité d'un médicament, il arrive souvent que la FDA convoque une réunion d'un comité consultatif d'experts. La FDA remet au préalable au comité deux séries de documents d'information, l'un contenant des renseignements préparés par la FDA, et l'autre des renseignements

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by the sponsoring company. The FDA's package includes a background introductory memorandum that sets out the crucial considerations associated with the application, and questions the FDA wishes to submit to its Advisory Committee to answer upon review of the Briefing Package. Based on the information in the Briefing Package, an Advisory Committee may decide to recommend approval or disapproval of a new drug application. The FDA generally follows the advice of the Advisory Committee, but is not bound to do so.

[8] As its application proceeded through this FDA process, Thera regularly updated its shareholders and the Commission des valeurs mobilières du Québec about developments in the application process. On November 5, 2009, Thera issued a press release announcing that the FDA had requested an opinion from its Endocrinologic and Metabolic Drugs Advisory Committee about Thera's application. On January 18, 2010, Thera announced that the Advisory Committee would meet on February 24, 2010 to discuss its application. On January 25, 2010, Thera issued another press release indicating that the Advisory Committee meeting had been postponed. And on February 25, 2010, it announced that the meeting had been rescheduled for May 27, 2010. On March 22, 2010, it issued a press release confirming this date.

[9] Between 2005 and the end of 2008, as part of its efforts to gain FDA approval for tesamorelin, Thera undertook two "phase-three" clinical trials of the drug that aimed to test its safety and efficacy among HIV patients. A phase-three clinical trial is a randomized, relatively large-scale test of a drug's safety and therapeutic effect on patients. Because the growth hormone that tesamorelin triggers is associated with increased risk of diabetes, the clinical trials measured the blood sugar levels of participating patients to evaluate potential side effects of the drug.

[10] Throughout this period, Thera regularly disclosed information about the progress of its clinical

préparés par la société qui présente la demande. Les documents de la FDA contiennent notamment un exposé contextuel énonçant les enjeux cruciaux soulevés par la demande, ainsi que les questions auxquelles la FDA voudrait que le comité consultatif réponde après avoir étudié l'ensemble de l'information. À la lumière des renseignements contenus dans la série de documents, le comité consultatif peut décider de recommander à la FDA d'approuver ou de rejeter la demande de drogue nouvelle. La FDA suit en général l'avis du comité consultatif, mais elle n'est pas tenue de le faire.

[8] Pendant que la demande suivait son cours à la FDA, Thera a informé régulièrement ses actionnaires et la Commission des valeurs mobilières du Québec de l'évolution du processus. Le 5 novembre 2009, Thera a publié un communiqué de presse annonçant que la FDA avait demandé l'opinion de son comité consultatif des traitements endocriniens et métaboliques au sujet de sa demande. Le 18 janvier 2010, Thera a annoncé que le comité consultatif se réunirait le 24 février 2010 pour examiner sa demande. Le 25 janvier 2010, Thera a publié un autre communiqué de presse annonçant le report de la réunion du comité consultatif. Le 25 février 2010, elle a annoncé que la date de la réunion avait été fixée au 27 mai 2010. Le 22 mars 2010, elle a publié un communiqué de presse confirmant la tenue de la réunion à cette date.

[9] Entre 2005 et la fin de l'année 2008, dans le cadre de ses efforts visant à obtenir l'approbation de la FDA pour la tésamoréline, Thera a procédé à deux essais cliniques de phase 3 destinés à tester l'efficacité et l'innocuité du médicament chez les patients atteints du VIH. L'essai clinique de phase 3 est réalisé sur une base aléatoire et à une échelle relativement grande et vise à tester l'innocuité et les effets thérapeutiques d'un médicament chez les patients. Parce que l'hormone de croissance déclenchée par la tésamoréline est associée à un risque accru de diabète, la glycémie des participants aux essais cliniques a été mesurée afin d'évaluer les effets secondaires potentiels du médicament.

[10] Au cours de cette période, Thera a informé régulièrement ses actionnaires de la progression

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trials to its shareholders. In its 2008 Annual Notice, Thera commented on the results of its studies showing a "good safety profile", and indicated it would study tesamorelin's effects related to glucose intolerance.

[11] In a press release on November 11, 2009, Thera announced the combined results of its phase-three clinical trials, which indicated that possible side effects of the drug on blood sugar were not clinically significant. On March 1, 2010, Thera announced the publication of these results in an article in the *Journal of Acquired Immune Deficiency Syndromes*, concluding that the benefits of the drug were "achieved without significant side effects or perturbation of glucose".

[12] In April 2010, Thera provided the FDA with a Briefing Package that contained a description of tesamorelin and a summary of the results from the different clinical studies that Thera had already disclosed to its investors. This Briefing Package is traditionally made public by the FDA when it publishes its own briefing materials. In its Briefing Package, Thera explained that

> [t]he effect of tesamorelin administration on glycemic parameters was a theoretical safety concern because of well known diabetogenic effect of GH [growth hormone]. In the Phase 3 studies, no clinically significant differences were observed over 52 weeks between tesamorelin 2 mg and placebo for changes from baseline in FBG, insulin, HOMA-IR, and HbA1c. With regard to FBG shifts and changes in glucose categories, as well as shifts in HbA1c categories, greater differences from baseline occurred in the tesamorelin group. Nevertheless, there was some reversal of these effects after the first 26 weeks. Overall, the data suggest no major safety concerns with regard to glucose homeostasis and that any glycemic changes can be managed in clinical practice. [Emphasis added.]

des essais cliniques. Dans sa Notice annuelle pour l'année 2008, Thera a commenté les résultats d'études faisant état d'un « bon profil d'innocuité », et a indiqué qu'elle étudierait les effets de la tésamoréline chez les patients intolérants au glucose.

[11] Le 11 novembre 2009, Thera a annoncé par communiqué les résultats combinés de ses études cliniques de phase 3, suivant lesquels les effets secondaires potentiels du médicament sur la glycémie n'étaient pas cliniquement significatifs. Le 1er mars 2010, Thera a annoncé la publication de ces résultats dans un article du *Journal of Acquired Immune Deficiency Syndromes* et a conclu que les avantages du médicament étaient [TRADUCTION] « obtenus sans effets secondaires significatifs ni perturbation du glucose ».

[12] En avril 2010, Thera a transmis à la FDA un dossier d'information comportant une description de la tésamoréline et un résumé des résultats des différentes études cliniques, résultats que Thera avait déjà communiqués à ses investisseurs. Ce dossier d'information est habituellement rendu public par la FDA au moment où elle publie ses propres documents d'information. Dans son dossier d'information, Thera expliquait ce qui suit :

> [TRADUCTION] L'effet de l'administration de la tésamoréline sur les paramètres glycémiques constituait une préoccupation théorique en matière d'innocuité en raison de l'effet diabétogène bien connu de l'hormone de croissance. Dans les études de phase 3, aucun changement cliniquement significatif par rapport aux valeurs de référence n'a été observé pendant 52 semaines, au cours desquelles 2 mg de tésamoréline ou un placebo ont été administrés, quant à la glycémie à jeun, à l'insuline, au modèle d'homéostasie de l'insulinorésistance (HOMA-IR) et à l'HbA1c. En ce qui concerne les variations de la glycémie à jeun, les changements de catégorie d'indice glycémique et les changements de catégorie d'HbA1c, des différences plus marquées par rapport aux valeurs de référence ont été observées dans le groupe ayant reçu la tésamoréline. Il y avait cependant un certain renversement de ces effets après les 26 premières semaines. Globalement, les données ne révèlent aucune préoccupation majeure en matière d'innocuité en ce qui concerne l'homéostasie du glucose, et elles indiquent que tout changement lié à la glycémie peut être traité cliniquement. [Je souligne.]

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[13] On May 11, 2010, the FDA sent Thera a briefing document it had prepared for the Advisory Committee meeting, including a copy of a Background Introductory Memorandum which contained questions about tesamorelin's side effects. FDA policy was to publish on its website all the materials assembled for the new drug application at least 48 hours before an Advisory Committee meeting. In accordance with its policy, on May 25, the FDA published the information it had compiled about tesamorelin, including the briefing materials compiled by both Thera and the FDA.

[13] Le 11 mai 2010, la FDA a envoyé à Thera un document d'information qu'elle avait préparé en vue de la réunion du comité consultatif, dont une copie d'un exposé contextuel dans lequel figuraient des questions relatives aux effets secondaires de la tésamoréline. La FDA avait comme politique de publier sur son site Web, au moins 48 heures avant la réunion du comité consultatif, tous les documents rassemblés dans le cadre d'une demande de drogue nouvelle. Conformément à sa politique, la FDA a publié le 25 mai les renseignements qu'elle avait recueillis sur la tésamoréline, notamment les documents d'information rassemblés par elle et par Thera.

[14] The FDA's Background Introductory Memorandum attracted the attention of stock quotation enterprises, including Dow Jones who, on the basis of the questions that the FDA had asked its Advisory Committee, expressed concern that tesamorelin could increase the risk of diabetes. At about 9 a.m. on May 25, for example, Dow Jones issued a press release that said: "FDA: Theratechnologies Drug Cuts Abdominal Fat In HIV Patients". A minute later, it issued a second press release: "FDA: Proposed Theratechnologies Drug Might Increase Diabetes Risk". At about 9:30 a.m., it released a short article that underscored the efficacy of the drug, but also drew attention to the fact that some patients in the study had experienced an increased risk of diabetes. The article did not specify that Thera's clinical results had concluded that the effects of tesamorelin on the glycemic parameters of these patients were minor, transitory, and easily clinically managed.

[14] L'exposé contextuel préparé par la FDA a attiré l'attention des entreprises de cotation boursière, dont Dow Jones, laquelle, après avoir pris connaissance des questions soumises par la FDA à son comité consultatif, s'est dite préoccupée par le fait que la tésamoréline pourrait accroître le risque de diabète. Vers 9 h le 25 mai, par exemple, la société Dow Jones a publié un communiqué de presse rédigé comme suit : [TRADUCTION] « FDA : Le médicament de Theratechnologies réduit la graisse abdominale chez les patients atteints du VIH ». Une minute plus tard, elle en publiait un deuxième : « FDA : Le médicament proposé par Theratechnologies pourrait accroître le risque de diabète ». Vers 9 h 30, elle publiait un court article dans lequel elle soulignait l'efficacité du médicament, mais attirait également l'attention sur le fait que, chez certains patients ayant participé à l'étude, le risque de diabète avait augmenté. L'article ne précisait pas que les essais cliniques effectués par Thera avaient permis de conclure que les effets de la tésamoréline sur les paramètres glycémiques de ces patients étaient mineurs, transitoires et facilement traitables cliniquement.

[15] Thera did not react publicly because it believed the briefing documents it had already provided to the FDA and the clinical results it had already made public to its investors offered a comprehensive response to the specific questions the FDA had posed.

[15] Thera n'a pas réagi publiquement parce qu'elle croyait que les documents d'information déjà fournis par elle à la FDA et les résultats cliniques déjà communiqués à ses investisseurs répondaient de façon exhaustive aux questions précises soulevées par la FDA.

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[16] When Mr. St-Germain became aware of the Dow Jones press releases on May 25, he decided to sell his company's shares of Thera, resulting in a net loss of $271,752 from the shares' value on May 21, 2010. For the next two days, Thera's shares were traded extensively and their price dropped by 58 percent. On May 27, 2010, the Toronto Stock Exchange stopped all transactions of Thera's shares. The same day, the Advisory Committee unanimously voted in favour of approving Thera's new drug application for tesamorelin. Thera announced this news by press release late that afternoon. On May 28, when trading of Thera's stock resumed, its share price recovered. The FDA approved the new drug application on November 10, 2010.

[16] Lorsque M. St-Germain a pris connaissance des communiqués de presse publiés par Dow Jones le 25 mai, il a décidé de vendre les actions de Thera détenues par sa société, enregistrant ainsi une perte nette de 271 752 $ par rapport à la valeur du titre en date du 21 mai 2010. Au cours des deux jours suivants, les actions de Thera ont fait l'objet d'un fort volume de transactions et le prix de l'action a chuté de 58 p. 100. Le 27 mai 2010, la Bourse de Toronto a décrété un arrêt des transactions sur le titre de Thera. Le même jour, le comité consultatif a voté à l'unanimité en faveur de l'approbation de la demande de drogue nouvelle présentée par Thera à l'égard de la tésamoréline. Plus tard dans l'après-midi, Thera a publié un communiqué de presse dans lequel elle annonçait la nouvelle. Le 28 mai, à la reprise des transactions sur le titre de Thera, le prix de ses actions s'est rétabli. La FDA a approuvé la demande de drogue nouvelle le 10 novembre 2010.

[17] 121851 sought judicial authorization under s. 225.4 of the *Securities Act* to launch a class action proceeding for damages, claiming that the information that diabetes was among the potential side effects of tesamorelin and the FDA's questions about those side effects amounted to a material change in Thera's business, operations or capital, triggering timely disclosure obligations in the form of a reassuring press release under s. 73 of the *Securities Act*:

[17] 121851 a demandé au tribunal l'autorisation d'intenter un recours collectif en dommages-intérêts, conformément à l'art. 225.4 de la *Loi sur les valeurs mobilières*, alléguant que les renseignements selon lesquels le diabète constituait un des effets secondaires possibles de la tésamoréline et que les questions de la FDA au sujet de ces effets secondaires équivalaient à un changement important dans l'activité, l'exploitation ou le capital de Thera, ce qui donnait naissance à l'obligation de fournir, sous la forme d'un communiqué de presse rassurant, l'information occasionnelle prévue à l'art. 73 de la *Loi sur les valeurs mobilières* :

**73.** A reporting issuer shall provide periodic disclosure about its business and internal affairs, including its governance practices, timely disclosure of a material change and any other disclosure prescribed by regulation in accordance with the conditions determined by regulation.

**73.** L'émetteur assujetti fournit, conformément aux conditions et modalités déterminées par règlement, l'information périodique au sujet de son activité et ses affaires internes, dont ses pratiques en matière de gouvernance, l'information occasionnelle au sujet d'un changement important et toute autre information prévue par règlement.

Section 225.4 states:

L'article 225.4 dispose :

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

**225.4** L'action en dommages-intérêts intentée en vertu de la présente section doit être préalablement autorisée par le tribunal.

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

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

[18] The Motions Judge concluded that the authorization mechanism in s. 225.4 of the *Securities Act* imposed a higher threshold than art. 1003 of the *Code of Civil Procedure*, CQLR, c. C-25 (*C.C.P.*), which deals with the authorization of class actions generally, but found sufficient evidence to support the conclusion that 121851's action had a reasonable possibility of success.

[19] An appeal by Thera to the Court of Appeal was dismissed. The Court of Appeal agreed with the Motions Judge that the screening mechanism under s. 225.4 was more stringent than for the authorization of a class action under art. 1003 of the *Code of Civil Procedure* and required more than a mere possibility of success. It noted that the legislative intention behind s. 225.4 was to make the provision a more robust screening mechanism.

[20] Based on documentary evidence and Mr. St-Germain's testimony, the Court of Appeal was of the view that there was a reasonable possibility that the action would be resolved in his company's favour. As a result, it upheld the order authorizing an action for damages.

Analysis

[21] Section 225.4 of the *Securities Act* is part of a new regime of statutory civil liability to address breaches of disclosure obligations in the secondary market, the market in which a company's shares are traded publicly after they have been issued or distributed by the company. This provision sets out two substantive criteria for the authorization of an action for damages: the action must be brought in good faith and there must be a reasonable possibility that it will be resolved in favour of the claimant. There

La demande d'autorisation énonce les faits qui y donnent ouverture. Elle doit être accompagnée du projet de demande introductive d'instance et être notifiée par huissier aux parties visées, avec un avis d'au moins 10 jours de la date de sa présentation.

Le tribunal accorde l'autorisation s'il estime que l'action est intentée de bonne foi et qu'il existe une possibilité raisonnable que le demandeur ait gain de cause.

[18] Le premier juge a conclu que le mécanisme d'autorisation prévu à l'art. 225.4 de la *Loi sur les valeurs mobilières* impose un critère préliminaire plus strict que celui imposé par l'art. 1003 du *Code de procédure civile*, RLRQ, c. C-25 (*C.P.C.*), qui traite de l'autorisation générale d'intenter un recours collectif, mais il a jugé que la preuve était suffisante pour étayer la conclusion que l'action intentée par 121851 avait une possibilité raisonnable de succès.

[19] La Cour d'appel a rejeté l'appel interjeté par Thera. Elle a convenu avec le premier juge que le mécanisme de filtrage des recours prévu à l'art. 225.4 était plus exigeant que le critère d'autorisation d'un recours collectif prévu par l'art. 1003 du *C.P.C.*, et qu'il exigeait plus qu'une simple possibilité d'avoir gain de cause. Elle a fait remarquer qu'en adoptant l'art. 225.4, le législateur avait l'intention d'en faire un mécanisme de filtrage plus musclé.

[20] Se fondant sur la preuve documentaire et sur le témoignage de M. St-Germain, la Cour d'appel a estimé qu'il existait une possibilité raisonnable que l'action soit tranchée en faveur de ce dernier. Elle a donc confirmé l'ordonnance autorisant l'action en dommages-intérêts.

Analyse

[21] L'article 225.4 de la *Loi sur les valeurs mobilières* s'inscrit dans un nouveau régime de responsabilité civile visant à lutter contre les atteintes à l'obligation de divulgation dans le marché secondaire, le marché où se négocient publiquement les actions qu'une entreprise a émises ou distribuées. Cet article énonce deux conditions de fond de l'autorisation d'intenter une action en dommages-intérêts : l'action doit être intentée de bonne foi, et il doit exister une possibilité raisonnable que le demandeur

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is no dispute that 121851's action is brought in good faith. This case turns then on the interpretation of "a reasonable possibility" that 121851's action will be resolved in its favour. The history and objectives of the authorization mechanism set by s. 225.4 in the context of the *Securities Act* as a whole assist in this exercise.

[22] Like its counterparts elsewhere in Canada, Quebec's *Securities Act* requires companies whose shares are traded in the secondary market to regularly disclose certain information to their security holders and the provincial securities regulator: s. 73; *Securities Act*, R.S.B.C. 1996, c. 418, s. 85; *Securities Act*, R.S.A. 2000, c. S-4, s. 147; *Securities Act*, R.S.O. 1990, c. S.5, s. 75; *Securities Act*, R.S.N.S. 1989, c. 418, s. 81; *Securities Act*, S.N.B. 2004, c. S-5.5, s. 89(1).

[23] Continuous disclosure obligations fall into two categories: periodic disclosure and timely disclosure. Periodic disclosure must be made at regular intervals, typically through the regular provision of documents such as proxy circulars, financial statements and insider trading reports. In these regularly issued documents, companies must disclose all material *facts* — that is, anything "that may reasonably be expected to have a significant effect on the market price or value of securities issued": *Securities Act* (Quebec), s. 5 "material fact".

[24] Timely disclosure obligations, on the other hand, are imposed only when there has been a material *change* in the issuer's affairs. Material changes, which arise from changes in the issuers' business, operations or capital, must be disclosed at the time they occur: *Securities Act* (Quebec), s. 5.3; Mark R. Gillen, *Securities Regulation in Canada* (3rd ed. 2007), at p. 211; David Johnston, Kathleen Doyle Rockwell and Cristie Ford: *Canadian Securities Regulation* (5th ed. 2014), at p. 249.

ait gain de cause. Nul ne conteste que l'action de 121851 est intentée de bonne foi. Le présent pourvoi porte donc sur l'interprétation à donner aux termes « possibilité raisonnable » que le demandeur ait gain de cause. L'historique et les objectifs du mécanisme d'autorisation qu'établit l'art. 225.4 dans le contexte de la *Loi sur les valeurs mobilières* dans son ensemble facilitent cet exercice.

[22] À l'instar des lois équivalentes adoptées ailleurs au Canada, la *Loi sur les valeurs mobilières* du Québec exige des entreprises dont les actions sont négociées sur le marché secondaire qu'elles fournissent régulièrement certaines informations aux porteurs de leurs titres et à l'organisme provincial de réglementation des valeurs mobilières : art. 73; *Securities Act*, R.S.B.C. 1996, c. 418, art. 85; *Securities Act*, R.S.A. 2000, c. S-4, art. 147; *Loi sur les valeurs mobilières*, L.R.O. 1990, c. S.5, art. 75; *Securities Act*, R.S.N.S. 1989, c. 418, art. 81; *Loi sur les valeurs mobilières*, L.N.-B. 2004, c. S-5.5, par. 89(1).

[23] Les obligations d'information continue peuvent être classées en deux catégories : l'information périodique et l'information occasionnelle. L'information périodique doit être fournie à intervalles réguliers, habituellement par la transmission régulière de documents tels que des circulaires de sollicitation de procurations, des états financiers et des déclarations d'initié. Dans ces documents émis régulièrement, les entreprises doivent communiquer tous les *faits* importants — c'est-à-dire tout fait « dont il est raisonnable de s'attendre qu'il aura un effet appréciable sur le cours ou la valeur d'un titre émis ou d'un titre dont l'émission est projetée » : *Loi sur les valeurs mobilières* (Québec), art. 5 « fait important ».

[24] Les obligations d'information occasionnelle, par contre, ne sont imposées qu'en cas de *changement* important dans les affaires de l'émetteur. Les changements importants, qui sont des changements dans l'activité, l'exploitation ou le capital de l'émetteur, doivent être communiqués au moment où ils surviennent : *Loi sur les valeurs mobilières* (Québec), art. 5.3; Mark R. Gillen, *Securities Regulation in Canada* (3e éd. 2007), p. 211; David Johnston, Kathleen Doyle Rockwell et Cristie Ford : *Canadian Securities Regulation* (5e éd. 2014), p. 249.

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[25] Both periodic and timely disclosure obligations are designed to increase fairness in the secondary market:

> [Continuous disclosure] . . . is designed to create a "level playing field" where all investors have access to the same information and all pricing and investment decisions are made from the same starting point. Of course, investors may still value securities differently, depending on how they interpret that information. Different investors have different goals, typically balanced between risk and return. Riskier investments generally yield higher returns, and vice versa. Securities regulation does not tell investors what to do, nor steer them toward or away from particular investments. It should, however, ensure that they have enough information to assess properly the risks involved and make fully informed decisions. [Footnote omitted; Johnston, Rockwell and Ford, at p. 249.]

As a result, the policy of ensuring this "level playing field" reified in statutory continuous disclosure obligations has been called "the most fundamental principle of securities regulation": *Cartaway Resources Corp. (Re)*, [2000] B.C.S.C.D. No. 92 (QL), at para. 216; *Cornish v. Ontario Securities Commission* (2013), 306 O.A.C. 107 (S.C.J.), at para. 40.

[26] Disclosure also supports capital market efficiency by helping investors target the most deserving securities and enhancing the accountability of corporate management: *Cornish*, at para. 40. As investors realize that they have the necessary information, they become more confident in the securities market, and their consequent increased participation leads to more efficient markets: Johnston, Rockwell and Ford, at p. 249.

[27] Section 225.4 emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors. Historically, Canadian investors in the secondary

[25] Les obligations d'information périodique et occasionnelle visent à renforcer l'équité sur le marché secondaire :

> [TRADUCTION] [L'information continue] [. . .] vise à établir « des règles du jeu équitables pour tous », en ce que les investisseurs ont accès à la même information et toutes les décisions qui concernent l'attribution d'une valeur ou l'investissement reposent sur la même base. Certes, les investisseurs peuvent malgré tout attribuer aux titres une valeur différente, selon l'interprétation qu'ils font de cette information. Différents investisseurs poursuivent des objectifs différents, habituellement en tenant compte du risque et du rendement. Les investissements à plus haut risque offrent généralement un rendement plus élevé, et vice versa. La réglementation des valeurs mobilières ne dit pas aux investisseurs ce qu'ils doivent faire, ni ne leur suggère ou leur déconseille des investissements en particulier. Elle doit toutefois veiller à ce que les investisseurs aient suffisamment d'information pour évaluer convenablement le risque et prendre des décisions parfaitement éclairées. [Note en bas de page omise; Johnston, Rockwell et Ford, p. 249.]

Ainsi, la politique visant à assurer des « règles du jeu équitables pour tous » qu'incarnent dans la loi les obligations d'information continue a été qualifiée de [TRADUCTION] « principe le plus élémentaire de la réglementation des valeurs mobilières » : *Cartaway Resources Corp. (Re)*, [2000] B.C.S.C.D. No. 92 (QL), par. 216; *Cornish c. Ontario Securities Commission* (2013), 306 O.A.C. 107 (C.S.J.), par. 40.

[26] L'information favorise également l'efficience des marchés financiers en aidant les investisseurs à cibler les titres les plus prometteurs et en accroissant l'obligation de rendre compte des dirigeants : *Cornish*, par. 40. Lorsqu'ils constatent qu'ils disposent de l'information nécessaire, les investisseurs font davantage confiance au marché des valeurs mobilières et leur participation accrue favorise l'efficience des marchés : Johnston, Rockwell et Ford, p. 249.

[27] L'article 225.4 découle directement des efforts déployés dans l'ensemble du Canada pour que les investisseurs puissent disposer d'un recours valable et plus accessible. Auparavant, les Canadiens

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trading market did not have access to a statutory cause of action when they suffered losses as a result of breaches of legislated continuous disclosure obligations. In common law jurisdictions, investors had to rely on the tort of negligent misrepresentation, which required, among other things, that investors prove that they had relied on the misinformation or omission of information to their detriment: A. C. Pritchard and Janis P. Sarra, "Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada" (2010), 47 *Alta. L. Rev.* 881, at p. 885. Because it was extremely difficult to prove such reliance when securities were purchased in the secondary market, this requirement put meaningful redress out of reach for many who were harmed by dubious disclosure practices: Joseph Groia and Pamela Hardie, *Securities Litigation and Enforcement* (2nd ed. 2012), at p. 352.

qui investissaient sur le marché secondaire ne disposaient d'aucune cause d'action légale pour les pertes découlant de manquements aux obligations d'information continue. Dans les ressorts de common law, les investisseurs devaient invoquer le délit de déclaration inexacte faite par négligence, ce qui les obligeait notamment à prouver qu'ils s'étaient fondés à leur détriment sur une information erronée ou incomplète : A. C. Pritchard et Janis P. Sarra, « Securities Class Actions Move North : A Doctrinal and Empirical Analysis of Securities Class Actions in Canada » (2010), 47 *Alta. L. Rev.* 881, p. 885. Comme la preuve que l'on s'était fié à une information erronée était extrêmement difficile à faire lorsque la transaction avait eu lieu sur le marché secondaire, la plupart des personnes lésées par des pratiques d'information douteuses ne disposaient d'aucun recours valable : Joseph Groia et Pamela Hardie, *Securities Litigation and Enforcement* (2e éd. 2012), p. 352.

[28] In Quebec, investors faced a similarly heavy burden under the *Civil Code*. To establish civil liability, claimants were required to prove a fault, such as the publication of misinformation or the failure to meet a statutory disclosure obligation; that they suffered prejudice; *and* that there was a causal link between the fault and the prejudice — that is, that they had relied on the misinformation in making the trade: arts. 1457 and 1607 of the *Civil Code of Québec*. Demonstrating the requisite causal link proved to be particularly onerous in the securities context: Quebec, National Assembly, Committee on Public Finance, "Étude détaillée du projet de loi n° 19 — Loi modifiant la Loi sur les valeurs mobilières et d'autres dispositions législatives", *Journal des débats de la Commission permanente des finances publiques*, vol. 40, No. 10, 1st Sess., 38th Leg., October 25, 2007 ("Étude detaillée"), at p. 2.

[28] Au Québec, les investisseurs devaient s'acquitter d'un fardeau tout aussi lourd sous le régime du *Code civil*. Pour établir la responsabilité civile, les demandeurs devaient prouver la faute, par exemple la publication d'une information erronée ou un manquement à l'obligation d'information prévue par la loi; qu'ils avaient subi un préjudice *et* qu'il existait un lien causal entre la faute et le préjudice — c'est-à-dire, qu'ils s'étaient fondés sur l'information erronée au moment de la transaction : art. 1457 et 1607 du *Code civil du Québec*. La démonstration du lien causal requis était particulièrement difficile dans le contexte des valeurs mobilières : Assemblée nationale du Québec, Commission permanente des finances publiques, « Étude détaillée du projet de loi nº 19 — Loi modifiant la Loi sur les valeurs mobilières et d'autres dispositions législatives », *Journal des débats de la Commission permanente des finances publiques*, vol. 40, nº 10, 1re sess., 38e lég., 25 octobre 2007 (« Étude détaillée »), p. 2.

[29] During the 1990s, following a series of high profile misrepresentations and incidents of questionable disclosure practices among publicly traded companies in Canada, the Toronto Stock Exchange created the Allen Committee to re-examine the regime governing disclosure in the secondary

[29] Au cours des années 1990, après une série d'affaires médiatisées de déclarations inexactes et de cas de pratiques de divulgation douteuses impliquant des sociétés ouvertes canadiennes, la Bourse de Toronto a chargé le comité Allen de réexaminer le régime régissant la divulgation sur le

market. The Allen Committee concluded that the "current sanctions and funding available to regulators . . . are inadequate" and "the remedies available to investors in secondary trading markets who are injured by misleading disclosure are so difficult to pursue that they are, as a practical matter, largely hypothetical": Committee on Corporate Disclosure, *Final Report — Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange, 1997), at p. 5. It recommended the creation of a statutory civil liability regime that would help investors sue issuers, directors, and officers who violated their statutory disclosure obligations.

[30] The Canadian Securities Administrators, an umbrella organization of Canada's provincial and territorial securities regulators, adopted most of the Committee's recommendations and began developing proposals to implement them across Canada: "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383. Despite the fact that the Allen Committee had not recommended it, and in order to discourage the kind of strike suits that had become common in the United States under more investor-friendly regimes, the Canadian Securities Administrators recommended that in addition to reducing the burden of proof on investors, the new liability regime should include a "screening mechanism" to ensure that only claims with a reasonable chance of success would be brought:

> This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or

marché secondaire. Le comité Allen a conclu que les [TRADUCTION] « sanctions actuelles et le financement accordé aux organismes de réglementation [. . .] sont inadéquats » et que « les recours auxquels ont accès les investisseurs du marché secondaire qui sont lésés par suite d'une divulgation trompeuse sont si difficiles à exercer qu'ils sont, d'un point de vue pratique, largement hypothétiques » : Committee on Corporate Disclosure, *Final Report — Responsible Corporate Disclosure : A Search for Balance* (Bourse de Toronto, 1997), p. 5. Le comité a recommandé la création d'un régime légal de responsabilité civile qui aiderait les investisseurs à poursuivre en justice les émetteurs, les dirigeants et les administrateurs qui manquent à leurs obligations légales d'information.

[30] Les Autorités canadiennes en valeurs mobilières, un organisme qui regroupe les autorités de réglementation des valeurs mobilières de chaque province et territoire, ont adopté la plupart des recommandations du comité et ont commencé à élaborer des propositions pour les mettre en œuvre dans tout le pays : « Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change" », CSA Notice 53-302, reproduit à (2000), 23 OSCB 7383. Bien que ces mesures n'aient pas été recommandées par le comité Allen, et afin de décourager le genre de recours opportunistes devenus courants aux États-Unis en vertu de régimes plus favorables aux investisseurs, les Autorités canadiennes en valeurs mobilières ont recommandé non seulement la réduction du fardeau de preuve qui incombait aux investisseurs, mais également l'instauration d'un nouveau régime de responsabilité doté d'un « mécanisme de filtrage », de sorte que seules pourraient être intentées les actions à l'égard desquelles il existe une possibilité raisonnable que le demandeur ait gain de cause :

> [TRADUCTION] Ce mécanisme de filtrage vise non seulement à réduire les possibilités d'une décision judiciaire défavorable si la cause se révèle sans fondement, mais plus important encore, à faire en sorte d'éviter les recours non fondés, et d'éviter que les défendeurs y consacrent du

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brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit. [Emphasis added; *ibid.*, at p. 7390.]

[31] In 2002, Ontario became the first province to implement the Canadian Securities Administrators' recommendations by inserting a new liability regime into its *Securities Act*. The legislation included a screening mechanism that limited actions against public companies for breaches of continuous disclosure obligations to those actions instituted in good faith with "a reasonable possibility" of being resolved at trial in favour of the plaintiff: s. 138.8(1).

[32] Quebec implemented the recommendations of the Canadian Securities Administrators through Bill 19, *An Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15, which received assent on November 9, 2007. When Bill 19 was before the legislature, Monique Jérôme-Forget, the Minister of Finance at the time, said:

[TRANSLATION] The recourse proposed in Bill 19 is highly harmonized with that in place in Ontario, which is recourse that strongly inspired the other provinces and territories. Only the necessary adjustments were made to reflect civil law notions and vocabulary, and to ensure its harmonious integration into the Québec legislative corpus, including the Securities Act, into which it will be incorporated.

("Étude détaillee", at p. 1)

[33] Under this regime, when a security is acquired or transferred at the time of a false declaration or omission of information that should have been disclosed, the fluctuation in the value of the security is presumed to be attributable to that fault. Investors were thereby released from the heavy

temps et de l'argent, ou à faire en sorte que l'on mette fin au recours au début du processus. En faisant en sorte que les défendeurs puissent raisonnablement s'attendre à ce que l'autorisation d'intenter toute action non fondée soit refusée, l'avant-projet de loi (2000) devrait permettre aux défendeurs de repousser plus facilement les demandeurs qui tentent de les contraindre à négocier le règlement au comptant qui, bien souvent, est le véritable objectif d'une poursuite opportuniste. [Je souligne; *ibid.*, p. 7390.]

[31] En 2002, l'Ontario est devenu la première province à mettre en œuvre les recommandations des Autorités canadiennes des valeurs mobilières en incorporant un nouveau régime de responsabilité dans sa *Loi sur les valeurs mobilières*. La Loi comporte un mécanisme de filtrage qui limite les actions pour violation des obligations d'information continue intentées contre les entreprises publiques à celles qui sont intentées de bonne foi et dont il est « raisonnablement possible » qu'elles soient réglées au moment du procès en faveur du demandeur : par. 138.8(1).

[32] Par son projet de loi n$^{o}$ 19, *Loi modifiant la Loi sur les valeurs mobilières et d'autres dispositions législatives*, L.Q. 2007, c. 15, sanctionnée le 9 novembre 2007, le Québec a mis en œuvre les recommandations des Autorités canadiennes des valeurs mobilières. Lorsque ce projet de loi se trouvait devant la législature, Monique Jérôme-Forget, qui était alors ministre des Finances, a dit ce qui suit :

Le recours que propose le projet de loi n$^{o}$ 19 est hautement harmonisé avec celui déjà mis en place en Ontario, un recours qui a aussi fortement inspiré les autres provinces et territoires. Seules les adaptations nécessaires ont été apportées pour refléter les notions et le vocabulaire civilistes et pour assurer son intégration harmonieuse au corpus législatif québécois, dont la Loi sur les valeurs mobilières, où il sera intégré.

(« Étude détaillée », p. 1)

[33] Sous ce régime, lorsqu'un titre est acquis ou transféré à la suite d'une fausse déclaration ou d'un défaut de fournir une information qui aurait dû l'être, la fluctuation de la valeur du titre est présumée être attribuable à cette faute. Les investisseurs se trouvent ainsi libérés du lourd fardeau

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burden of demonstrating that the variation in the market price of the security was linked to the misinformation or omission, and from demonstrating that they personally relied on that information or omission in buying or transferring the security.

de démontrer que l'écart enregistré dans le prix du marché pour ce titre est lié à cette information erronée ou à ce défaut de fournir l'information, et du fardeau de démontrer qu'ils se sont personnellement fiés à cette information ou à l'absence de l'information au moment de l'achat ou du transfert du titre.

[34] The scheme also establishes an authorization mechanism to permit only actions in good faith with a "reasonable possibility of success". As the Court of Appeal noted, Quebec's new regime therefore reflected an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations.

[34] Le régime prévoit aussi un mécanisme n'autorisant que les actions intentées de bonne foi, s'il existe une « possibilité raisonnable que le demandeur ait gain de cause ». Comme l'a indiqué la Cour d'appel, le nouveau régime québécois vise donc l'atteinte d'un équilibre entre la volonté de mettre un frein aux recours injustifiés ou opportunistes et celle d'offrir aux investisseurs un recours valable lorsque les émetteurs ne respectent pas leurs obligations d'information.

[35] Given this history, I agree with the Court of Appeal and Motions Judge that the "reasonable possibility" of success required under s. 225.4 sets out a different and higher standard than the general threshold for the authorization of a class action under art. 1003 of the *C.C.P.* Under art. 1003, the court seeks only to identify whether "the facts alleged seem to justify the conclusions sought" — that is, whether the applicant has established "a good colour of right": *Infineon Technologies AG v. Option consommateurs*, [2013] 3 S.C.R. 600, at para. 62; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at paras. 5 and 9-10; *Marcotte v. Longueuil (City)*, [2009] 3 S.C.R. 65, at para. 94. As this Court pointed out in *Infineon Technologies*, the low threshold for authorizing a class action under art. 1003 of the *C.C.P.* reflects the "twin objectives of deterrence and compensation that animate the class action system": para. 125.

[35] À la lumière de cet historique, je conviens avec la Cour d'appel et le premier juge que la « possibilité raisonnable » que le demandeur ait gain de cause qu'exige l'art. 225.4 établit un critère plus exigeant que le critère général d'autorisation applicable en matière de recours collectif prévu à l'art. 1003 du *C.P.C.* Sous le régime de l'art. 1003, le tribunal cherche seulement à déterminer si « les faits allégués paraissent justifier les conclusions recherchées » — c'est-à-dire, si le demandeur a établi « une apparence sérieuse de droit » : *Infineon Technologies AG c. Option consommateurs*, [2013] 3 R.C.S. 600, par. 62; *Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347, par. 5 et 9-10; *Marcotte c. Longueuil (Ville)*, [2009] 3 R.C.S. 65, par. 94. Comme la Cour l'a souligné dans l'arrêt *Infineon Technologies*, le seuil de preuve peu élevé auquel il doit être satisfait pour obtenir l'autorisation d'exercer un recours collectif sous le régime de l'art. 1003 du *C.P.C.* respecte le « double objectif de dissuasion et d'indemnisation inspirant le régime de recours collectif » : par. 125.

[36] The Quebec legislature used different language in s. 225.4 to create a more meaningful screening mechanism in the securities context so that costly strike suits and unmeritorious claims would be prevented. Courts are given an important gatekeeping role, which requires them to conduct a preliminary examination of the impugned action or inaction to

[36] Le législateur québécois a employé un libellé différent à l'art. 225.4 pour créer un mécanisme de filtrage qui soit plus significatif dans le contexte des valeurs mobilières et qui fasse ainsi obstacle aux poursuites opportunistes coûteuses et aux demandes non fondées. Les tribunaux s'y voient confier un important rôle de gardien, qui les oblige à procéder

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assess whether it could be said to have a reasonable possibility of success: Pritchard and Sarra, at p. 893. The question before us is as Belobaba J. asked in *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp*. (2013), 44 C.P.C. (7th) 80 (Ont. S.C.J.):

> Is this simply a screening mechanism to keep out "strike suits" that are plainly unmeritorious and have no chance of success? Or, is this a preliminary merits test that should have more bite? [para. 36]

[37] I am aware that there has been some discussion in the Ontario and British Columbia courts about what the threshold is, all seeking to find a balance between preventing cases without a realistic prospect of success but encouraging those with a likelihood of success: *Silver v. Imax Corp*. (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.), at para. 324, leave to appeal refused (2011), 105 O.R. (3d) 212 (Div. Ct.); *Dobbie v. Arctic Glacier Income Fund* (2011), 3 C.P.C. (7th) 261 (Ont. S.C.J.), at paras. 129-30; *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, at para. 76, aff'd (2012), 39 B.C.L.R. (5th) 44 (C.A.); *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2014), 49 C.P.C. (7th) 12 (Ont. S.C.J.), at para. 112; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2014), 118 O.R. (3d) 641 (C.A.), at paras. 81-89.

[38] In my view, as Belobaba J. suggested in *Ironworkers*, the threshold should be more than a "speed bump" (para. 39), and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.

à un examen préliminaire de l'action ou de l'inaction en cause afin de déterminer s'il est possible de dire qu'il existe une possibilité raisonnable que le demandeur ait gain de cause : Pritchard et Sarra, p. 893. La question dont nous sommes saisis est la même que celle que le juge Belobaba s'est posée dans *Ironworkers Ontario Pension Fund (Trustee of) c. Manulife Financial Corp.* (2013), 44 C.P.C. (7th) 80 (C.S.J. Ont.) :

> [TRADUCTION] S'agit-il simplement d'un mécanisme de filtrage destiné à éliminer les « poursuites opportunistes » qui sont manifestement dénuées de fondement et n'ont aucune chance d'être accueillies? Ou, s'agit-il d'un critère préliminaire du bien-fondé du recours qui devrait avoir davantage de mordant? [par. 36]

[37] Je suis consciente que certains tribunaux de l'Ontario et de la Colombie-Britannique ont abordé la question du critère préliminaire, et qu'ils ont tous cherché à établir un équilibre entre la nécessité d'empêcher les actions sans possibilité réaliste de succès et le besoin d'encourager celles qu'il serait possible d'accueillir : *Silver c. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (C.S.J. Ont.), par. 324, autorisation d'appel refusée (2011), 105 O.R. (3d) 212 (C. div.); *Dobbie c. Arctic Glacier Income Fund* (2011), 3 C.P.C. (7th) 261 (C.S.J. Ont.), par. 129-130; *Round c. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, par. 76, conf. par (2012), 39 B.C.L.R. (5th) 44 (C.A.); *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) c. Celestica Inc.* (2014), 49 C.P.C. (7th) 12 (C.S.J. Ont.), par. 112; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) c. Celestica Inc.* (2014), 118 O.R. (3d) 641 (C.A.), par. 81-89.

[38] À mon avis, comme le juge Belobaba l'a suggéré dans l'affaire *Ironworkers*, le critère préliminaire doit être plus qu'un [TRADUCTION] « dos d'âne » (par. 39), et les tribunaux doivent entreprendre un examen raisonné de la preuve afin de s'assurer que l'action peut être fondée. Autrement dit, pour favoriser l'atteinte de l'objectif législatif consistant à instaurer un mécanisme de filtrage dissuasif musclé qui écarte les demandes non fondées, le critère préliminaire exige une possibilité raisonnable ou réaliste que le demandeur ait gain de cause.

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[39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.

[39] Pour démontrer une possibilité raisonnable d'avoir gain de cause, le demandeur doit offrir une analyse plausible des dispositions législatives applicables, et il doit également présenter des éléments de preuve crédibles à l'appui de sa demande. Cette approche est celle qui, à mon avis, permet le mieux de réaliser l'intention qu'avait le législateur lorsqu'il a instauré le mécanisme de filtrage : faire en sorte d'écarter les demandes qui n'ont guère de chances d'être accueillies — et d'éviter que l'on y consacre en vain temps et argent. Je suis d'accord avec la Cour d'appel, cependant, pour dire que l'étape de l'autorisation prévue par l'art. 225.4 ne doit pas être traitée comme un mini-procès. Il n'est pas nécessaire de procéder à une analyse complète de la preuve. Si le mécanisme de filtrage a pour objectif d'écarter les poursuites opportunistes coûteuses et celles qui ont peu de chances d'être accueillies, il s'ensuit que les exigences en matière de preuve ne doivent pas être lourdes au point d'être pratiquement identiques à celles d'un procès. De telles exigences compromettraient l'objectif du mécanisme de filtrage, soit de protéger les émetteurs assujettis contre les poursuites opportunistes et les recours non fondés et coûteux. Ce qui *est* exigé, c'est une preuve suffisante pour convaincre le tribunal de l'existence d'une possibilité raisonnable que le demandeur ait gain de cause.

[40] 121851 alleges that Thera breached its obligation under s. 73 of the *Securities Act* to provide timely disclosure of material changes to its investors. Section 5.3 of the *Securities Act* defines a "material change" as

[40] 121851 allègue que Thera a manqué à l'obligation que lui impose l'art. 73 de la *Loi sur les valeurs mobilières* de fournir à ses investisseurs l'information occasionnelle au sujet d'un changement important. L'article 5.3 de la *Loi sur les valeurs mobilières* définit comme suit le « changement important » :

a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or a decision to implement such a change made by the directors or by senior management of the issuer who believe that confirmation of the decision by the directors is probable.

. . . un changement dans l'activité, l'exploitation ou le capital de l'émetteur dont il est raisonnable de s'attendre à ce qu'il ait un effet appréciable sur le cours ou la valeur de l'un des titres de l'émetteur, soit la décision de mettre en œuvre un tel changement prise par les administrateurs ou par la direction supérieure lorsqu'elle croit probable que les administrateurs confirmeront cette décision.

As this statutory definition makes clear, a material change has two components. There must be a change in the business, operations or capital of the issuer

Il ressort clairement de cette définition que le changement important comporte deux éléments. Il faut un changement dans l'activité, l'exploitation ou le

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and the change must be material, which means it would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer: *Securities Act*, s. 5.3. Both elements are required to trigger an obligation of timely disclosure.

[41] 121851 argues that a material change occurred on May 11, 2010, when Thera received the FDA briefing materials, which included a Background Introductory Memorandum asking the Advisory Committee to comment on "the findings of glucose intolerance and development of diabetes associated with Egrifta [tesamorelin] therapy and its impact on longterm cardiovascular risk". This information was made public on May 25, 2010, when the FDA posted the memorandum, alongside all the briefing materials it had generated on tesamorelin, on its website.

[42] In my view, however, 121851 has not pointed to any evidence that could qualify as a material change in Thera's operations, capital or business as described in s. 5.3 of the *Securities Act*. And without some evidence of a material change that corresponds to the statutory requirements, 121851's action cannot reasonably hope to succeed.

[43] Tesamorelin operates by activating a growth hormone, which, in other contexts, has been associated with an increased risk of diabetes. Thera's phase-three clinical trials measured the blood sugar levels of participating patients to evaluate the risk associated with this potential side effect. The trials compared five glycemic parameters recognized by the scientific community and the American Diabetes Association in patients taking tesamorelin and patients taking a placebo, and revealed that tesamorelin did not have a clinically significant effect on the glucose levels of patients.

[44] The results of the clinical trials were disclosed to shareholders as they became available.

capital de l'émetteur, et ce changement doit être important, c'est-à-dire qu'il doit être raisonnable de s'attendre à ce qu'il ait un effet appréciable sur le cours ou la valeur des titres de l'émetteur : *Loi sur les valeurs mobilières*, art. 5.3. Les deux éléments sont nécessaires pour donner naissance à l'obligation d'information occasionnelle.

[41] 121851 soutient qu'un changement important est survenu le 11 mai 2010 lorsque Thera a reçu les documents d'information de la FDA, dont l'exposé contextuel dans lequel cette dernière demandait au comité consultatif de commenter les [TRADUCTION] « conclusions associant l'intolérance au glucose et le développement du diabète à l'administration de l'Egrifta [tésamoréline] et celles relatives à l'effet à long terme du médicament sur le risque de maladie cardiovasculaire ». Cette information a été rendue publique le 25 mai 2010, lorsque la FDA a affiché sur son site Web l'exposé ainsi que tous les documents d'information qu'elle avait générés au sujet de la tésamoréline.

[42] À mon avis, cependant, 121851 n'a présenté aucun élément de preuve de nature à constituer un changement important dans l'activité, le capital ou l'exploitation de Thera au sens de l'art. 5.3 de la *Loi sur les valeurs mobilières*. Or, sans élément de preuve d'un changement important qui permette de satisfaire aux exigences de la loi, 121851 ne peut raisonnablement espérer avoir gain de cause.

[43] La tésamoréline agit en libérant une hormone de croissance qui, dans d'autres contextes, est associée à un risque accru de diabète. Lors des essais cliniques de phase 3 effectués par Thera, on a mesuré la glycémie des participants afin d'évaluer le risque associé à ce possible effet secondaire. On a comparé cinq paramètres glycémiques reconnus par le milieu scientifique et l'American Diabetes Association chez, d'une part, les patients qui prenaient de la tésamoréline et, d'autre part, les patients qui prenaient un placebo, et il est apparu que la tésamoréline n'avait pas d'effet cliniquement significatif sur le taux de glucose des patients.

[44] Les résultats de ces essais cliniques ont été communiqués aux actionnaires aussitôt qu'ils ont

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In its November 2008 Annual Notice, for example, Thera summarized its clinical results to date and noted that

> the administration of [the hormone] is not indicated for glucose-intolerant patients, a condition often observed in these patients. Consequently, Theratechnologies decided to study the effect of tesamorelin in the treatment of this condition. Highlights of the study included a good safety profile, a clear effect on body composition and a clinically relevant reduction in visceral fat while subcutaneous fat was preserved.

[45] On November 11, 2009, Thera, in collaboration with two external experts, presented the combined results of its two phase-three clinical trials at the 12th European AIDS Conference. The fact of this presentation and its content were disclosed to investors via a press release, which stated that "[n]o clinically important changes in glucose parameters were observed after treatment with tesamorelin . . . ."

[46] On March 1, 2010, Thera issued a press release announcing the publication of a study detailing its combined clinical results in the publicly available *Journal of Acquired Immune Deficiency Syndromes*. The press release provided a link to the study, which included an abstract highlighting the clinical results and concluding that the potential side effects of tesamorelin were not significant:

> Tesamorelin reduces visceral fat by approximately 18% and improves body image distress in HIV-infected patients with central fat accumulation. These changes are achieved without significant side effects or perturbation of glucose. [p. 311]

[47] Through these press releases, Thera disclosed to its shareholders that it was monitoring tesamorelin's side effects, including on patients' blood sugar levels. It provided both summaries and full studies detailing the results of its clinical trials. There is no allegation that any of these reports were either false or misleading. A reasonable investor

été disponibles. Dans sa Notice annuelle de novembre 2008 par exemple, Thera a résumé les résultats cliniques jusque-là obtenus et a indiqué ce qui suit :

> . . . l'administration de [l'hormone] n'est pas indiquée chez les patients intolérants au glucose, une condition fréquemment observée chez ces patients. Theratechnologies a donc entrepris d'étudier l'effet de la tésamoréline dans le traitement de cette condition. Les faits saillants de l'étude ont démontré un bon profil d'innocuité, un effet sur la composition corporelle et une réduction cliniquement pertinente de la graisse viscérale, sans affecter la graisse sous cutanée.

[45] Le 11 novembre 2009, avec la collaboration de deux experts externes, Thera a présenté les résultats combinés de ses deux études cliniques de phase 3 à la 12e Conférence européenne sur le sida. Elle a informé ses investisseurs de la tenue et du contenu de cette présentation par un communiqué de presse dans lequel elle affirmait : « Aucun changement cliniquement significatif n'a été observé au niveau des paramètres glycémiques, suite à l'administration de la tésamoréline . . . »

[46] Le 1er mars 2010, Thera a annoncé par un communiqué de presse la publication d'un article exposant dans le détail les résultats combinés de ses essais cliniques dans le *Journal of Acquired Immune Deficiency Syndromes*, accessible au public. Ce communiqué contenait un lien avec cet article, dont le résumé faisait ressortir les résultats cliniques et concluait que les effets secondaires potentiels de la tésamoréline n'étaient pas significatifs :

> [TRADUCTION] La tésamoréline réduit d'environ 18 p. 100 le tissu adipeux viscéral et améliore l'image corporelle des patients infectés par le VIH qui présentent un excès de graisse abdominale. Ces changements sont obtenus sans effets secondaires significatifs ni perturbation du glucose. [p. 311]

[47] Par ces communiqués de presse, Thera a informé ses actionnaires qu'elle surveillait les effets secondaires de la tésamoréline, notamment sur la glycémie des patients. Elle a fourni à la fois des résumés et des études détaillées des résultats de ses essais cliniques. Personne ne prétend que l'un ou l'autre de ces rapports était faux ou trompeur. Tout

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who read Thera's news releases would have known that blood sugar issues and diabetes were potential side effects of the drug, and that Thera's clinical trials had found they were not clinically significant.

[48] As a result, this case can be distinguished from *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, in which the Court held that information contained in drilling results regarding a mining company's exploration site could constitute a material change in the "business, operations, assets or ownership of the issuer", since they could reasonably be expected to significantly affect the company's assets. Unlike the drilling results at issue in *Pezim*, the potential side effects of tesamorelin had already been disclosed to shareholders well before the FDA published its questions and the rest of its briefing materials. There was no new information about the side effects of tesamorelin that required timely disclosure as of May 11, 2010.

[49] 121851's argument is more analogous to the claim in *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331. The company, which was making an initial public offering (IPO) of its shares, had issued preliminary prospectuses which included a sales forecast for the fourth quarter of the fiscal year to its potential investors. Unseasonably warm weather, however, knocked the company's sales forecasts off track as the quarter progressed. After its IPO had closed, the company disclosed its intra-quarterly results in a press release, triggering a sharp drop in its share value. Although the company ultimately realized its initial sales forecasts, the claimants launched a class action, alleging that the company had withheld the intra-quarterly results to ensure the success of its IPO.

investisseur raisonnable ayant lu les communiqués de presse de Thera aurait su que les problèmes de glycémie et de diabète faisaient partie des effets secondaires potentiels du médicament, et que les études cliniques effectuées par Thera concluaient que ces effets n'étaient pas cliniquement significatifs.

[48] Par conséquent, la présente affaire se distingue de l'affaire *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, où la Cour a conclu que les résultats d'essais effectués sur la composition minérale d'un site d'exploration minière pouvaient constituer pour un émetteur un changement important dans « ses activités commerciales, son exploitation, ses éléments d'actif ou sa propriété », puisqu'ils témoignaient d'un changement important dans la nature des éléments d'actif de l'entreprise. À la différence des résultats de forage en cause dans l'arrêt *Pezim*, l'information sur les effets secondaires potentiels de la tésamoréline avait déjà été communiquée aux actionnaires bien avant que la FDA ne publie ses questions et le reste de ses documents d'information. Aucun nouveau renseignement sur les effets secondaires de la tésamoréline ne devait faire l'objet d'une information occasionnelle en date du 11 mai 2010.

[49] La thèse avancée par 121851 ressemble davantage à celle de l'affaire *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331. La société, qui lançait un premier appel public à l'épargne (PAPE), avait déposé des prospectus provisoires dans lesquels elle présentait aux investisseurs potentiels des prévisions de vente pour le quatrième trimestre de l'exercice. Or, à mesure que le trimestre avançait, le temps exceptionnellement doux compromettait la réalisation des prévisions de vente de la société. Après la clôture du PAPE, la société a publié un communiqué de presse dans lequel elle communiquait ses résultats intratrimestriels, ce qui a provoqué une chute marquée du cours de ses actions. Bien que la société ait fini par réaliser ses prévisions initiales de vente, les demandeurs ont intenté un recours collectif, alléguant que la société avait omis de communiquer les résultats intratrimestriels pour assurer le succès de son PAPE.

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[50] This Court held that the intra-quarterly results did not constitute a material change to the business, operations or capital of the company because the warm weather that triggered the drop in sales was external to the company and its business:

> . . . a change in intra-quarterly results is not itself a change in the issuer's business, operations or capital and, for that matter, does not necessarily signal that a material change has occurred. Sales often fluctuate (as here) in response to factors that are external to the issuer.
>
> It almost goes without saying that poor intra-quarterly results may *reflect* a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves. [Emphasis in original; paras. 46-47.]

[51] The same is true in this case. 121851 argues that the FDA's preoccupation with the side effects represents a material change in Thera's operations, business or capital. But it has not pointed to any evidence to suggest that the questions the FDA posed to its Advisory Committee about these side effects, or the contents of its Briefing Package more generally, departed in any way from the regular and routine process through which the FDA assesses whether a drug should be approved. Nor is there any evidence that the questions reflected new and undisclosed information about tesamorelin. In fact, the evidence on the record suggests the opposite. It is FDA policy to prepare briefing materials for an Advisory Committee, including information compiled by both the FDA and the sponsoring company, and to

[50] La Cour a conclu que les résultats intratrimestriels ne constituaient pas un changement important dans les activités, l'exploitation ou le capital de la société, parce que le temps doux qui avait causé un ralentissement des ventes était un facteur qui n'avait rien à voir avec la société et son entreprise :

> . . . un changement dans les résultats intratrimestriels ne constitue pas en soi un changement dans les activités commerciales, l'exploitation ou le capital de l'émetteur et, du reste, n'indique pas nécessairement qu'un tel changement s'est produit. Les ventes fluctuent souvent (comme c'est le cas en l'espèce) en raison de facteurs n'ayant rien à voir avec l'émetteur.
>
> Il va presque sans dire que les piètres résultats intratrimestriels peuvent *refléter* un changement important dans l'exploitation commerciale. Une société qui, par exemple, a restructuré ses activités peut connaître de piètres résultats intratrimestriels en raison de cette restructuration, mais c'est la restructuration, et non les résultats eux-mêmes, qui constituerait un changement important et donnerait ainsi naissance à l'obligation de divulguer. De plus, de piètres résultats intratrimestriels peuvent inciter une entreprise à modifier ses activités commerciales, son exploitation ou son capital afin d'améliorer son rendement. Là encore, pourtant, l'obligation de divulguer prendrait naissance en raison du changement dans les activités commerciales, l'exploitation ou le capital, et non en raison des résultats eux-mêmes. [En italique dans l'original; par. 46-47.]

[51] Il en va de même en l'espèce. 121851 soutient que les inquiétudes de la FDA quant aux effets secondaires du médicament constituaient un changement important dans les activités commerciales, l'exploitation ou le capital de Thera. Or, elle n'a signalé aucun élément de preuve tendant à indiquer que les questions posées à son comité consultatif par la FDA au sujet de ces effets secondaires, ou, de façon plus générale, que le contenu de ses documents d'information, s'écartaient d'une quelconque façon du processus courant par lequel la FDA décide si un médicament doit être approuvé. Aucun élément de preuve ne permet non plus de conclure que les questions portaient sur des données nouvelles et non communiquées au sujet de la tésamoréline. En fait, la preuve au dossier tend

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post those materials two days before an Advisory Committee meeting. Questions from the FDA to its expert Advisory Committee about the side effects of a drug do not constitute a departure from the normal FDA process, or, necessarily an indication of whether the drug will be approved. Rather, they are a routine step in the FDA's work to determine whether a drug's benefits outweigh its risks. As such, it is difficult to characterize these questions as any kind of change to Thera's business, operations, or capital requiring a reassuring public response from Thera.

[52] 121851 argues that the market's reaction demonstrates that the FDA's concerns about side effects constitute a material change. It points out that the Canadian Securities Administrators' "National Policy 51-201 Disclosure Standards" includes among its list of potentially "material" information "any development that affects the company's resources, technology, products or markets": Article 4.3. Because this example falls under the subheading of "changes in business and operations", 121851 submits that the FDA's questions are a development that could be considered a material change.

[53] This section of the policy, however, deals with the market impact of events, not whether they are best characterized as material facts or material changes. To adopt this list as dispositive of whether there was a change in the business, operations or capital of a reporting issuer would collapse the distinction between material facts and material changes, significantly expanding timely disclosure obligations beyond what is required by statute.

plutôt à indiquer le contraire. La FDA a pour politique de rassembler des documents d'information à l'intention d'un comité consultatif, notamment des renseignements préparés par elle et l'entreprise qui présente la demande, et de les afficher deux jours avant la réunion du comité consultatif. Le fait pour la FDA de soumettre des questions à son comité consultatif d'experts au sujet des effets secondaires d'un médicament ne déroge pas du processus qu'elle suit habituellement, pas plus qu'il ne s'agit nécessairement d'un indice quant à savoir si le médicament sera approuvé. Il s'agit plutôt d'une étape courante qui fait partie du travail de la FDA de décider si les avantages d'un médicament l'emportent sur les risques qu'il présente. C'est pourquoi il est difficile de considérer ces questions comme constituant une forme de changement dans les activités commerciales, l'exploitation ou le capital de Thera qui exigeait de cette dernière qu'elle réagisse publiquement de façon rassurante.

[52] 121851 soutient que la réaction du marché démontre que les préoccupations de la FDA au sujet des effets secondaires du médicament constituent un changement important. Elle souligne que l'« Instruction générale 51-201 relative aux lignes directrices en matière de communication de l'information », publiée par les Autorités canadiennes en valeurs mobilières, mentionne parmi les exemples d'information pouvant être « importante » les « événements ayant une incidence sur les ressources, la technologie, les produits ou les débouchés de la société » : art. 4.3. Comme cet exemple se trouve sous la rubrique « Changements dans l'activité et l'exploitation », 121851 fait valoir que les questions de la FDA constituent un événement que l'on pourrait considérer comme un changement important.

[53] Cette section de l'instruction générale traite cependant de l'incidence des événements en cause sur le marché, non de la question de savoir s'il convient mieux de les considérer comme des faits importants ou comme des changements importants. Considérer que cette liste est déterminante quant à savoir si un changement est survenu dans les activités commerciales, l'exploitation ou le capital d'un émetteur assujetti ferait tomber la distinction

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This would, in effect, allow the Canadian Securities Administrators' policy to amend Quebec's securities legislation, contrary to this Court's ruling in *Pezim*.

[54] It is true that Thera had sometimes disclosed routine aspects of the FDA process in press releases to its shareholders in the months leading up to the Advisory Committee meeting, but this does not bring the FDA's questions to its Advisory Committee within the statutory definition of a material change. Thera had a statutory duty to disclose material changes in its operations, capital or business in a timely manner, not to reassure its investors at every stage of the FDA approval process.

[55] Finally, even if Thera had issued a press release on May 11, 2010 after it received the FDA's briefing materials, it is not clear what reassurance Thera could have provided at this stage, given that the outcome of the FDA process, as every reasonable investor would have known and as Thera repeatedly made clear, is always uncertain. As the U.S. Supreme Court acknowledged in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), there are risks of excessive disclosure, which could "simply . . . bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking": pp. 448-49, cited in *Cornish*, at para. 41.

[56] Because the evidence does not credibly point to a material change that could have triggered timely disclosure obligations, there is no reasonable possibility that 121851's action under s. 73 of the *Securities Act* could succeed. I would allow the appeal with costs.

entre les faits importants et les changements importants, ce qui aurait pour conséquence d'étendre la portée de l'obligation d'information occasionnelle bien au-delà de ce que prescrit la loi. Cela permettrait, dans les faits, aux Autorités canadiennes des valeurs mobilières de modifier par leur politique la loi québécoise sur les valeurs mobilières, ce qui irait à l'encontre de la conclusion de notre Cour dans *Pezim*.

[54] Il est vrai que Thera avait parfois divulgué à ses actionnaires certains aspects courants du processus de la FDA dans les communiqués de presse qu'elle a publiés au cours des mois ayant précédé la réunion du comité consultatif, mais les questions soumises par la FDA au comité ne constituent pas pour autant un changement important au sens de la loi. Thera avait une obligation légale de fournir l'information occasionnelle au sujet d'un changement important survenu dans son exploitation, son capital ou ses activités commerciales, non pas de rassurer ses investisseurs à chacune des étapes du processus d'approbation de la FDA.

[55] Enfin, même si elle avait publié un communiqué de presse le 11 mai 2010, après avoir reçu les documents d'information de la FDA, quelle information rassurante Thera aurait-elle pu fournir à cette étape, puisque l'issue du processus de la FDA, comme tous les investisseurs raisonnables le savent et comme Thera l'a dit clairement à plusieurs reprises, est toujours incertaine? Comme la Cour suprême des États-Unis l'a reconnu dans l'arrêt *TSC Industries, Inc. c. Northway, Inc.*, 426 U.S. 438 (1976), l'information excessive présente des risques, dont celui de [TRADUCTION] « carrément [. . .] inonder les actionnaires de renseignements futiles, ce qui ne contribue pas à la prise de décisions éclairées » : p. 448-449, cité dans *Cornish*, par. 41.

[56] Étant donné que la preuve ne permet pas de conclure de manière crédible qu'un changement important a donné naissance à des obligations d'information occasionnelle, il n'existe aucune possibilité raisonnable que 121851 ait gain de cause dans son action intentée sur le fondement de l'art. 73 de la *Loi sur les valeurs mobilières*. Je suis d'avis d'accueillir le pourvoi avec dépens.

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*Appeal allowed with costs.*

*Solicitors for the appellants: Fasken Martineau DuMoulin, Montréal.*

*Solicitors for the respondent: Savonitto & Ass. inc., Montréal.*

*Solicitors for the intervener: Siskinds, Desmeules, avocats, Québec; Siskinds, London.*

*Pourvoi accueilli avec dépens.*

*Procureurs des appelants : Fasken Martineau DuMoulin, Montréal.*

*Procureurs de l'intimée : Savonitto & Ass. inc., Montréal.*

*Procureurs de l'intervenant : Siskinds, Desmeules, avocats, Québec; Siskinds, London.*

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# Tab 20

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tietz v. Bridgemark Financial Corp.,*
2024 BCSC 1166

Date: 20240702
Docket: S197731
Registry: Vancouver

2024 BCSC 1166 (CanLII)

Between:

**Michael Tietz, Duane Loewen, Robin Lee, Mike Dotto, Grant Greenwood, Malcolm Runkee, Americo Morlani, Greg Lomnes and Stacey Dionne**

Plaintiffs

And

**Bridgemark Financial Corp., Jackson & Company Professional Corp., Anthony Jackson, Lukor Capital Corp., Justin Edgar Liu, Rockshore Advisors Ltd. (formerly known as Cam Paddock Enterprises Inc.), Cameron Robert Paddock, Konstantin Lichtenwald, Simran Singh Gill, JCN Capital Corp., John Bevilacqua, Essos Corporate Services Inc., Sway Capital Corp., Von Rowell Torres, Detona Capital Corp., Danilen Villanueva, Natasha Jon Emami, Altitude Marketing Corp., Ryan Peter Venier, Platinum Capital Corp., 658111 B.C. Ltd., Jason Christopher Shull, Tryton Financial Corp., Abeir Haddad, Tavistock Capital Corp., Robert John Lawrence, Jarman Capital Inc., Scott Jason Jarman, Northwest Marketing and Management Inc., Rufiza Esmail, Denise Trainor, Aly Babu Mawji, Escher Invest SA, Hunton Advisory Ltd., Randy White, Kendl Capital Limited, 1153307 B.C. Ltd., Russell Grant Van Skiver, Bertho Holdings Ltd., Robert William Boswell, Haight-Ashbury Media Consultants Ltd., Ashkan Shahrokhi, Saiya Capital Corporation, Tara Haddad, Keir Paul MacPherson, Tollstam & Company Chartered Accountants, Albert Kenneth Tollstam, 727 Capital, David Raymond Duggan, Viral Stocks Inc., 10x Capital, Cryptobloc Technologies Corp., Neil William Stevenson-Moore, Kenneth Clifford Phillippe, Brian Biles, Kootenay Zinc Corp., Robert Tindall, Affinor Growers Inc., Nicholas Brusatore, Sam Chaudhry, Green 2 Blue Energy Corp., Slawomir Smulewicz, Michael Young, Glenn Little, Beleave Inc., Andrew Wnek, Bojan Krasic, Citation Growth Corp. (formerly known as Liht Cannabis Corp. and Marapharm Ventures Inc.), Linda Sampson, David Alexander, Yari Alexander Nieken, Blok Technologies Inc., Robert Dawson, James Hyland, Preveceutical Medical Inc., Stephen Van Deventer, Shabira Rajan, Abattis Bioceuticals Corp., Robert Abenante, Kent McParland, Speakeasy Cannabis Club Ltd., Marc Geen, Mervyn Geen, Jeremy Ross, Alexander Kaulins, KOPR Point Ventures Inc. (formerly known as New Point Exploration Corp.), Bryn Gardener-Evans, International Canyon Holdings Ltd., Jatinder Singh Bal, Asahi**

**Capital Corp., Wilson Su, 1053345 B.C. Ltd., Asiatic Management Consultants Ltd. (NEV.), Asiatic Management Consultants Ltd. (B.C.), 1140258 B.C. Ltd., Arlene Victoria Alexander, 1113300 B.C. Ltd., David Greenway, 1002349 B.C. Ltd., Hanspaul Pannu, Saman Eskarandi, Grant Farkes, Amber Papou, Aida Reed, and Isodoro Alonso**

Defendants

Before: The Honourable Madam Justice Wilkinson

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiffs: | P. Bennett<br>N. Kovak<br>N. Baker |
| Counsel for the Defendants Tavistock Capital Corp., Robert Lawrence, Sway Capital Corp., Robert Boswell, Bertho Holdings Ltd., Jason C. Shull, Platinum Capital Corp; 658111 BC Ltd, and Majuba Hill Copper Corp (formerly known as New Point Exploration Corp.): | D. Yaverbaum |
| Appearing as agent for the Defendant Cryptoboc Technologies Corp.: | A. Sood |
| Appearing on his own behalf: | K. Phillippe |
| Appearing as agent for the Defendant David Alexander: | T. Roper |
| No other appearances | |
| Place and Dates of Hearing: | Vancouver, B.C.<br>December 6-8, 2023 |
| Written Submissions Received: | March 21, 2024<br>April 8, 2024<br>May 31, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 2, 2024 |

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[1] The plaintiffs seek certification of their proposed class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] on their own behalf and on behalf of all persons, other than the defendants and any other excluded persons, wherever they may reside or be domiciled, who acquired securities in the following companies (collectively, the "Issuers") in the following periods (collectively, the "Class Periods"):

a) in the defendant Kootenay Zinc Corp. ("Kootenay") between January 30, 2018 and November 26, 2018;

b) in the defendant, Affinor Growers Inc. ("Affinor") between March 5, 2018 and November 26, 2018;

c) in the defendant Green 2 Blue Energy Corp. ("Green Corp.") between April 12, 2018 and November 26, 2018;

d) in Beleave Inc. ("Beleave") between April 24, 2018 and November 26, 2018;

e) in the defendant Citation Growth Corp. formerly known as Marapharm Ventures Inc. ("Marapharm") between May 17, 2018 and November 26, 2018;

f) in the defendant Cryptobloc Technologies Corp. ("Cryptobloc"), between May 18, 2018 and November 26, 2018;

g) in the defendant BLOK Technologies Inc. ("BLOK") between June 1, 2018 and November 26, 2018;

h) in PreveCeutical Medical Inc. ("PreveCeutical") between April 9, 2018 and November 26, 2018; and

i) in the defendant KOPR Point Ventures Inc., formerly known as New Point Exploration Corp. and subsequently known as Bam Bam Resources Ltd. and then Majuba Hill Copper Corp. ("New Point"), between July 25, 2018 and November 26, 2018.

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[2] A number of named defendants have entered into settlement agreements which have received approval or of which approval is pending. The action against some others has been discontinued. This application was also adjourned against other named defendants.

[3] For the reasons below, I grant the plaintiffs' application for certification with respect to the defendants subject to the application.

**Background of the claims**

[4] On the start date for each of the above Class Periods, the relevant Issuer announced a private placement for the Issuer's shares. The plaintiffs allege that the private placements, together with an additional private placement in Speakeasy Cannabis Club Ltd. ("Speakeasy"), were each part of a scheme which was conceived in January 2018, by the defendants Anthony Jackson ("Jackson"), Justin Liu ("Liu"), Cameron Paddock ("Paddock") and Aly Babu Mawji ("Mawji"), and which the Issuers participated in with a group of purported consultants.

[5] Pursuant to the alleged scheme, a subset of the purported consultants, operating in concert with each Issuer, agreed to acquire the Issuer's shares in a private placement, on the condition that the Issuer paid the subscribing purported consultants and a subset of associated, non-subscribing purported consultants lump-sum consulting fees from the proceeds of the private placement on the closing of the private placement, or shortly thereafter. The lump-sum payments consumed a significant portion, or, in some cases, substantially all, of the ostensible proceeds of each private placement. The lump-sum consulting fee payments were made pursuant to consulting agreements entered into between the Issuers and the purported consultants, which the plaintiffs allege were a sham and a false pretence. This is because they allege that neither the Issuers nor the purported consultants had any *bona fide* expectation that services of any real value would be provided, and, they allege, no such services were provided.

[6] In public documents released and filed by the Issuers as part of the alleged scheme, each Issuer announced that the private placement had been arranged, and

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then completed, at a certain disclosed price for a certain amount of proceeds. The Issuers did not disclose that their receipt of those proceeds was conditional upon the Issuer's agreement to contemporaneously return a significant amount of the proceeds to the purported consultants, pursuant to "sham" consulting agreements, and that, as a result, the subscribing purported consultants obtained the Issuer's shares at a much lower price than the disclosed purchase price, and only a small portion of the proceeds was truly available to the Issuer to use as working capital.

[7] The alleged scheme therefore enabled the subscribing purported consultants to obtain each Issuer's shares for a price that was substantially less than the disclosed purchase price, and substantially less than the price at which each Issuer's shares were then trading. The plaintiffs allege that most of the subscribing purported consultants then sold the subscription shares for a significant profit, at prices lower than the disclosed purchase price but significantly above the effective price paid by the purported consultants. The plaintiffs also allege that some of the subscribing purported consultants sold short shares of the Issuers in the secondary market at prices significantly more than the effective prices they had paid to acquire the shares, and then used the subscription shares to settle their short sales.

[8] There was no public disclosure of the alleged scheme until November 26, 2018, when the BC Securities Commission (the "Commission") issued a news release (the "BCSC News Release"), announcing that it was investigating the scheme, and a Notice of Hearing and Temporary Order (the "Temporary Order") that applied to the Issuers and most of the purported consultants.

[9] The plaintiffs and each member of the proposed class, acquired securities in one of the Issuers after the Issuer announced it had arranged one of the private placements, and before the Commission revealed the general nature of the scheme on November 26, 2018.

[10] The scheme allegedly benefitted the Issuers by enabling them to retain a portion of the private placement proceeds, while falsely informing the market, including the plaintiffs and class members, that there was over-subscribed investor

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interest in the Issuers, and that the Issuers had greater capital for use in their operations than was truly the case.

[11] The scheme allegedly damaged the plaintiffs and class members because they claim they either acquired shares in the Issuers that they would otherwise never have purchased, or acquired those shares at a price higher than they would have paid, if the scheme had never been implemented or had been fully and fairly disclosed.

[12] The plaintiffs submit the Issuers' alleged misrepresentations enabled the subscribing purported consultants to sell large volumes of subscription shares in the secondary market in short periods of time, at prices less than the disclosed purchase price, or to use subscription shares to cover secondary market short selling of their private placement allocations, and thus earn a substantial profit at the expense of the plaintiffs and class members. The purported consultants' conduct of selling also allegedly damaged the plaintiffs and class members by causing the trading prices for the Issuers' shares to fall significantly. The secondary market trading price of each Issuer's shares, in the ten days after the disclosure of the scheme, was substantially less than the price the plaintiffs and class members paid for the shares they acquired during the Class Periods.

**The defendants subject to this application for certification**

[13] The defendants, in the action, are organized into the following four groups (some defendants are in multiple groups, because those defendants are alleged to have participated in the scheme in multiple capacities). For the purposes of this application, they are as follows:

a) The "Defendant Issuers": BLOK, Cryptobloc, Green Corp., Marapharm and New Point.

b) The "Issuer Officers and Directors" refers to the defendants that directed or controlled the Defendant Issuers and other named defendants at the relevant times. This group for the purposes of this application is: David

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Alexander, Brian Biles, Bryn Gardener-Evans, James Hyland, Glenn Little, Kenneth Clifford Phillippe, Slawomir Smulewicz, Neil William Stevenson-Moore and Michael Young.

c) The "Purported Consultants" refers to the defendants which the plaintiffs allege participated in the scheme with the Defendant Issuers and other defendants, by either (i) subscribing to shares in an Issuer's private placement and receiving lump-sum consulting fees in connection with the private placement or (ii) entering into consulting agreements with an Issuer, and receiving consulting fees, in connection with the private placement without also subscribing to shares. This group for the purposes of this application is: 1053345 B.C. Ltd., 10X Capital, 1140258 B.C. Ltd., 1153307 B.C. Ltd., 727 Capital, Asahi Capital Corp., Asiatic Management Consultants Ltd. (Nev.), Bertho Holdings Ltd., Detona Capital Corp., Natasha Jon Emami, Escher Invest SA, Saman Eskarandi, Essos Corporate Services Inc., Simran Singh Gill, Haight-Ashbury Media Consultants Ltd., Hunton Advisory Ltd., International Canyon Holdings Ltd., Jarman Capital Inc., JCN Capital Corp., Kendl Capital Limited, Keir Paul MacPherson, Northwest Marketing and Management Inc. ("Northwest"), Paddock, Rockshore Advisors Ltd., Sway Capital Corp., Tavistock Capital Corp., Danilen Villanueva and Viral Stocks Inc.

d) The "Purported Consultants Officers and Directors" refers to the defendants the plaintiffs allege directed or controlled the corporate Purported Consultants, at the material times. For the purposes of this application, these defendants are the following defendants: Robert Abenante, Arlene Victoria Alexander, Jatinder Singh Bal, John Bevilacqua, Robert William Boswell, David Raymond Duggan, Scott Jason Jarman, Robert John Lawrence, Mawji, Paddock, Ashkan Shahrokhi, Wilson Su, Von Rowell Torres, Denise Trainor, Russell Grant Van Skiver, Danilen Villanueva and Randy White.

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**The claims**

[14] The plaintiffs assert the following causes of action on their own behalf and on behalf of the putative class members:

a) Unlawful means conspiracy:

i. The plaintiffs claim damages for unlawful means conspiracy against the Purported Consultants and the Defendant Issuers. The plaintiffs allege that the scheme was dishonest, deceitful and deceptive, and constituted a fraud on the market for the Issuers' shares, contrary to s. 380(1)(a) and (2) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*] and conduct resulting in or contributing to a misleading appearance of trading activity or insider trading, contrary to ss. 57 and 57.2 of the *Securities Act*, R.C.B.C. 1996, c. 418 [*Securities Act*].

ii. Alternatively, the plaintiffs seek disgorgement of the benefit the Purported Consultants, or some of them, obtained as a result of their tortious conduct, as an alternative remedy for the tort of conspiracy. The plaintiffs allege that, as a result of the scheme, the Purported Consultants who acquired shares in the private placements earned a substantial profit from the sale or short sale of those shares, at the expense of the plaintiffs and the class.

iii. The plaintiffs seek declarations that each of the Purported Consultant Officers and Directors are personally liable for the acts carried out in the unlawful conspiracy by the Purported Consultant for which they acted as officer or director, and that each of the Issuer Officers and Directors are personally liable for the acts carried out in the unlawful conspiracy by the Defendant Issuer for which they acted as officer or director.

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b) Statutory claims for secondary market misrepresentations, pursuant to ss. 140.3 and 140.5 of the *Securities Act*, seeking statutory damages against the Defendant Issuers and the Issuer Officers and Directors; and

c) Fraudulent misrepresentation or, in the alternative, negligent misrepresentation, seeking damages against the Defendant Issuers and the Issuer Officers and Directors.

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**Certification under the *CPA***

[15] Section 4(1) of the *CPA* establishes the requirements for the certification of class proceedings. The court must certify the proceeding if the plaintiff establishes that:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

[16] The court must construe the provisions of the *CPA* generously in order to achieve its well-settled objectives of judicial economy, access to justice and behaviour modification. As the Court of Appeal for British Columbia succinctly summarized in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd, [2010] S.C.C.A. No. 32:

> [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby

> making economical the prosecution of otherwise unaffordable claims); and behavior modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].

[17] Certification is a procedural step that "is decidedly not meant to be a test of the merits of the action": *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16. The certification stage focuses on the form of the action; the question "is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Microsoft*]; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.

[18] The evidentiary burden on a certification motion is low. The first requirement, that the pleadings disclose a cause of action, is decided solely on the pleadings.

[19] For the remaining requirements, in s. 4(1)(b)–(e), the plaintiffs need only show "some basis in fact" that the requirements are met. Again, this does not involve an assessment of the merits of the action. The purpose of evidence at this stage is to establish a minimum factual basis for the certification criteria, not for the claim itself: *Hollick* at para. 25; *Microsoft* at paras. 99–100; and *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at paras. 33–34 [*Mentor*].

[20] The certification test places the court in the role of a gatekeeper. The court must screen out claims that are not appropriate for resolution as class proceedings, recognizing that the goal of the *CPA* is to be fair to both plaintiffs and defendants and that "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency": *Thorburn v. British Columbia (Public Safety and Attorney General)*, 2012 BCSC 1585 at para. 117, aff'd 2013 BCCA 480. See also *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 31 and *Pro-Sys* at para. 103.

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[21] Class proceedings can impose unnecessary burdens on the parties and the courts, and "the process may be seen as an extortion through the exercise of the power of strength in numbers": *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922 at para. 18, rev'd on other grounds 2011 BCCA 187, rev'd in part 2013 SCC 58.

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**Causes of action**

[22] The first requirement for certification under s. 4(1) is that the pleadings disclose a cause of action. The court must assess this requirement on the same standard that applies to an application to strike pleadings under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg 168/2009—that is, "whether, assuming the pleaded facts are true, it is plain and obvious the action cannot succeed": *Finkel* at para. 16. In other words, the court can only refuse to certify an action on the basis of failing to meet the requirement of s. 4(1)(a) if, based solely on the pleadings, the claim has no reasonable prospect of success: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 54, citing *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198.

[23] In assessing the pleadings, the court must read the claim "generously, and accommodate inadequacies that are merely the result of drafting deficiencies": *Situmorang* at para. 55, citing *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22 [*FORCOMP*], leave to appeal to SCC ref'd, 40051 (30 June 2022). The fact that a claim is novel or unsettled at law is not a bar to certification, nor is the court obligated to permit such claims to proceed. Rather, the court must consider whether, when the facts pleaded are taken as true, it would recognize the cause of action. If not, the claim is bound to fail and the court must deny certification: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18–19 [*Atlantic Lottery*]; *Pearce* at para. 56.

**Unlawful means conspiracy**

[24] The plaintiffs seek damages for unlawful conspiracy against the Purported Consultants and the Defendant Issuers, as set out at para. 302 of their further amended notice of civil claim ("FANCC").

[25] The Court of Appeal summarized the elements of the tort of civil conspiracy in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*. (1993), 96 B.C.L.R. (2d) 156, 1993 CanLII 6870 at para. 5 [*Can-Dive*] as follows:

> [4] According to *Canada Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-2, the tort of conspiracy exists if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> [5] Accordingly, the following elements must be proved:
>
> 1. an agreement between two or more persons;
> 2. concerted action taken pursuant to the agreement;
> 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
>
> (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
>
> 4. actual damage suffered by the plaintiff.

[26] Pleadings alleging conspiracy must be as specific as possible, having regard to the scope of information that is reasonably available to the plaintiffs: *Can-Dive* at para. 9; *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 132–133. In claims of conspiracy, the existence of the agreement is often inferred from circumstantial evidence because direct evidence of an agreement is rarely available: *FORCOMP* at para. 54.

[27] Before me, the plaintiffs more specifically allege that each of the Purported Consultants and Defendant Issuers engaged in unlawful means conspiracy.

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***1. An agreement between two or more persons***

[28] The FANCC alleges that, in or around January 2018, the defendants Jackson, Liu, Paddock and Mawji conceived of and agreed to participate in a scheme whereby certain of the Purported Consultants would subscribe to shares in an Issuer's private placement, on the following terms:

a) shortly before or contemporaneously with the private placement, the Issuer would enter into consulting agreements with the Purported Consultants who were acquiring shares under the private placement as a condition of them doing so, and also with certain other Purported Consultants who were not acquiring shares under the private placement, as a further condition of the participation in the private placement of the Purported Consultants who were acquiring shares;

b) the consulting agreements entered into with the Issuers would provide for payment of lump-sum consultant fees to the Purported Consultants who entered in the consulting agreements, and it was a further condition of the participation in the private placement of the Purported Consultants who were acquiring shares that all the fees payable under all the consulting agreements would be paid from the proceeds of the private placement upon their receipt or on the closing of the private placement or shortly thereafter;

c) on or before the closing of the private placement, the Purported Consultants who were acquiring shares under the private placement would pay an amount to the Issuer for those shares at the price per share publicly disclosed by the Issuer to be the purchase price for shares issued under the private placement (the "Disclosed Share Price");

d) the Issuers distributed the shares to Purported Consultants who were acquiring them under the private placement pursuant to the consultant exemption to the prospectus requirement in s. 2.24 of the Canadian Securities Administrators' National Instrument 45-106 Prospectus Exemption (the "Consultant Exemption");

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e) on or before private placement closed, or shortly thereafter, the Issuer paid the lump-sum consultant fees payable under the consulting agreement to the Purported Consultants who entered into those agreements from the proceeds of the private placement; and

f) the total amount paid to the Purported Consultants under the consulting agreements consisted of a significant portion, and in some cases, substantially all of the proceeds of the private placement.

[29] As alleged, the predominant purpose of the scheme was to maintain the share price of each Issuer, through the deception that each private placement had resulted in significant capital financing for the Issuer, and to enable the Purported Consultants to profit from that deception, at the expense of the plaintiffs and class members.

[30] The FANCC pleads that Jackson, Liu, Paddock and Mawji first implemented the scheme in early February 2018 with the private placement in Kootenay, for which Jackson was, at the time, both a director and the chief financial officer. Jackson, Liu, Paddock and Mawji then allegedly promoted the scheme to the other Purported Consultants and, acting in concert with some of them, arranged for the subsequent private placements to be carried out pursuant to the scheme.

[31] Each of the other Purported Consultants agreed to join the scheme, the FANCC alleges, either when they (i) entered into a consulting agreement with an Issuer and obtained shares in that Issuer as part of one of the private placements in the scheme, or (ii) entered into a consulting agreement with an Issuer as part of the private placement transaction, but did not acquire shares in the Issuer. For each of the Purported Consultants, the FANCC sets out, in as much detail as possible, when each of the Purported Consultants is alleged to have agreed to participate in the scheme, the private placement in relation to which they agreed to participate and how they evidenced that agreement.

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[32] The claim alleges that each of the Defendant Issuers became a party to the conspiracy when they agreed to undertake a private placement in accordance with the terms of the scheme. For each Defendant Issuer, the FANCC describes the private placements in question, including the dates on which they were announced and closed and, in some detail, the terms of the agreements with the Purported Consultants.

[33] These allegations assert an overarching conspiracy across the private placements, at least in respect of the four defendants who are alleged to have conceived of the scheme and arranged for its implementation in the various private placements.

[34] The fact that the scheme ultimately involved 12 different private placements, with some involving different participants, does not change the nature of the alleged overarching conspiracy into 12 separate conspiracies. As alleged, the scheme expanded as the series of steps were carried out over and over again in the various private placements, sometimes picking up and sometimes leaving participants as it rolled from Issuer to Issuer. Despite these changes in participants, the plaintiffs claim the predominant purpose of the scheme, as described above, remained the same throughout its implementation across Issuers.

[35] The Purported Consultants and Issuers are linked in the facts as pleaded through their concerted action to carry out the private placement in which they agreed to participate in accordance with the terms of the scheme.

[36] Despite the position of defendants to the contrary, it is not necessary for the plaintiffs to allege and prove that all of the participants knew each other or were aware of all of the details as to how the conspiracy was carried out with other Issuers or were involved in the scheme with all of the Issuers. It is sufficient that each participant was aware of the general nature of the common design and adhered to it: *R. v. Barra*, 2021 ONCA 568 at paras. 179–181.

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[37] With regard to the consequences of such participation, it is a settled principle that "[all] participants in a conspiracy are jointly liable for the damages resulting from the conspiracy, regardless of the degree of their participation or the date on which they joined the conspiracy": *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 at para. 141. Whether this principle is somehow circumscribed by a defendant's participation in one or more but not all private placements carried out in the scheme is not an issue that can be resolved on the pleadings, as it cannot be said that it is plain and obvious that the principle expressed in *Mancinelli* does not apply to the conspiracy as it is alleged in the FANCC.

[38] The authorities referred to me by some defendants concerning joint and several liability—namely, *Carcillo v. Canadian Hockey League*, 2023 ONSC 886 and *I.C.B.C. v. Stanley Cup Rioters*, 2016 BCSC 1108—are not applicable to this application as those cases involved attempts to impose collective liability in the absence of any allegation of conspiracy: *Carcillo* at para. 276; and *Stanley Cup Rioters* at para. 32. In *Carcillo*, Justice Perell noted that, in contrast to the claim in that case, collective liability is imposed in cases of conspiracy based on the personal fault of each party "who agrees to join the conspiracy and who actually contributes to the planning, financing, and execution of the conspiracy", at para. 276. This is the premise of the plaintiffs' claim of joint and several liability in this case, and it cannot be said, on the basis of the allegations in the FANCC, that this claim is bound to fail.

***2. Unlawful actions taken pursuant to the agreement***

[39] The unlawful means element of the tort is met if the defendants engage in conduct that is wrong in law: *Mancinelli* at para. 138.

[40] Conduct that is wrong in law, for the purposes of the tort of civil conspiracy, can encompass conduct that is actionable as a matter of private law, such as deceit. It can also involve illegal conduct that is not actionable at private law, such as criminal conduct, quasi-criminal conduct or breach of a statute: *XY, LLC v. Zhu*, 2013 BCCA 352 at paras. 49–50, citing *Agribrands Purina Canada Inc. v.*

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*Kasamekas*, 2011 ONCA 460 at paras. 36–38, leave to appeal to SCC ref'd, 35555 (20 February 2014); and *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 83.

[41] Where the pleadings allege that certain means are unlawful, the court is to accept those pleadings as factual. The pleadings stage is not the time to assess whether each alleged act was unlawful in the circumstances: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at para. 80.

[42] The statement of facts section of the FANCC sets out—first in summary and then in chronological order for each private placement—the actions allegedly taken by each of the Defendant Issuers and Purported Consultants in furtherance of the agreed upon scheme.

[43] Briefly, the FANCC alleges that each of the Defendant Issuers, in furtherance of the scheme, (i) entered into the sham consulting agreements as a condition for the subscribing Purported Consultants' participation in their respective private placements, (ii) issued shares to the subscribing Purported Consultants, (iii) contemporaneously repaid a substantial portion of the private placement proceeds to the Purported Consultants in lump-sum payments and (iv) misrepresented the material facts of the private placement in various public documents. Some of the Defendant Issuers, namely Kootenay, Affinor and Cryptobloc, also allegedly misrepresented the reason for the increased trading activity in their shares following the private placement.

[44] In relation to the Purported Consultants, the FANCC alleges that (i) each Purported Consultant entered into one or more sham consulting agreements with one or more Issuers, which were a condition for the subscribing Purported Consultants' participation in the respective private placements, (ii) certain of the Purported Consultants subscribed to shares in one or more of the private placements, (iii) contemporaneously with the closing of each private placement, the Purported Consultants who had entered into consulting agreements with the Issuer received lump-sump payments from the proceeds of the private placement, the payment of which was a condition for the subscribing Purported Consultants'

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participation in the private placement and (iv) in the days and weeks following each private placement, some or all of the subscribing Purported Consultants sold or short sold the Issuer's shares—or transferred the shares to other Purported Consultants who then sold or short sold the shares—in the secondary market at prices that were less than the disclosed purchase price, but significantly above the effective price the Purported Consultants had actually paid for the shares, when the contemporaneously returned payments are taken into account. At the time the subscribing Purported Consultants engaged in the share transactions, they each knew that the Issuer's representations regarding the private placement were false, in that they omitted material facts about the private placement.

[45] The FANCC asserts multiple different bases for the unlawfulness of the actions taken by the Purported Consultants and Defendant Issuers.

[46] The FANCC alleges that the consulting agreements were a sham and false pretence, in that neither the Issuers nor the Purported Consultants had any expectation services of any real value would be provided, and no such services were provided. Therefore, as set out, the Purported Consultants had no right to receive, and the Issuers had no right to issue, the shares pursuant to the Consultant Exemption, which defines a "consultant" at s. 2.22 as a person that:

> (a) is engaged to provide services to the issuer or a related entity of the issuer, other than services provided in relation to a distribution,
>
> (b) provides the services under a written contract with the issuer or a related entity of the issuer, and
>
> (c) spends or will spend a significant amount of time and attention on the affairs and business of the issuer or a related entity of the issuer.

[47] The FANCC alleges that, in furtherance of the conspiracy, for each of the private placements, the relevant Issuer returned a substantial portion of the proceeds to the Purported Consultants as lump-sum consulting fee payments. The plaintiffs claim the Purported Consultants therefore knew that they had been issued shares that had not been fully paid. The issuance and receipt of the shares in this manner was unlawful because, the FANCC alleges, statutory provisions prohibit the issuance of shares for future services. Section 64(2) of the *Business Corporations*

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*Act*, S.B.C. 2002, c. 57, for example, states that "[a] share must not be issued until it is fully paid", and then provides in s. 64(3) that:

> 64 (3) A share is fully paid when
>
> (a) consideration is provided to the company for the issue of the share by one or more of the following:
>
> (i) past services performed for the company;
>
> (ii) property;
>
> (iii) money, and
>
> (b) the value of the consideration received by the company equals or exceeds the issue price set for the share under section 63.

(See also *Canada Business Corporation Act*, R.S.C. 1985, c. C-44, s. 25(3) and *Union Bank v. Morris*, [1900] O.R. No. 396 (C.A.), appeal to SCC ref'd, 31 S.C.R. 594.)

[48] The FANCC also alleges that, in furtherance of the conspiracy, the Issuers made misrepresentations regarding the private placements, with the knowledge and with the agreement and acquiescence of the Purported Consultants. These misrepresentations were, the FANCC alleges, unlawful both pursuant to the *Securities Act* and at common law as fraudulent or, in the alternative, negligent misrepresentations.

[49] The FANCC further alleges that the Purported Consultants who acquired shares in one or more of the private placements sold or short sold all of more of those shares for a significant profit, while knowing that the material facts of the private placements had not been disclosed to the market. That conduct was, the FANCC alleges, dishonest, deceitful and deceptive, as well as contrary to the *Securities Act*. As persons engaged in, or proposing to engage in, business or professional activity with an issuer, and who knew material facts with respect to the issuers, the Purported Consultants were in a "special relationship" with each Issuer within the meaning of s. 3 of the *Securities Act*, which states, in part:

> 3 For the purposes of sections 57.2 and 136, a person is in a special relationship with an issuer if the person

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> …
>
> (b) has engaged in, is engaging in or is considering or proposing to engage in any business or professional activity with or on behalf of the issuer or with or on behalf of a person described in paragraph (a) (ii) or (iii), [or]
>
> …
>
> (d) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge while in a relationship described in paragraph (a), (b) or (c) with the issuer

[50] The Purported Consultants' sales of each Issuer's shares, while in the special relationship with the Issuer, and while knowing material facts that had not been disclosed, allegedly contravened the insider trading prohibitions set out in s. 57.2 of the *Securities Act*, which states, in part:

> 57.2 (2) A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person
>
> (a) is in a special relationship with the issuer, and
>
> (b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

[51] The plaintiffs also allege that each of the above acts contravened, individually and collectively, the prohibition in the *Securities Act* against manipulation and fraud in the securities market. Section 57 states, in part:

> 57 (1) A person must not, directly or indirectly, engage in or participate in conduct relating to a security, derivative or underlying interest of a derivative if the person knows, or reasonably should know, that the conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security,
>
> (b) contributes to a fraud perpetrated by another person, or contributes to another person's attempt to commit a fraud, relating to a security, derivative or underlying interest, or
>
> (c) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a derivative or an underlying interest of a derivative.
>
> (2) A person must not, in relation to a security, derivative or benchmark,
>
> (a) perpetrate a fraud, or
>
> (b) attempt to perpetrate a fraud.

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[52] Assuming the facts alleged in the FANCC are true, the allegation that each of the Purported Consultants and the Issuers engaged in conduct that resulted in a misleading appearance of trading in, or an artificial price for, a security, or either perpetrated a fraud or contributed to a fraud perpetrated by another person, relating to a security, contrary to s. 57, is not bound to fail.

[53] Similarly, the FANCC alleges that the actions taken by the Defendant Issuers and Purported Consultants in furtherance of the scheme amounted, individually and collectively, to criminal conduct, in contravention of both the fraud and fraud affecting the public market offences set out in s. 380(1)(a) and (2) of the *Criminal Code*:

> 380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars;
>
> …
>
> (2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[54] Assuming, as required, that all of the facts alleged in the FANCC are true, it is not plain and obvious to me that the claim that each of the Purported Consultants and Issuers engaged in unlawful acts in furtherance of the agreed upon scheme is bound to fail.

***3. Knowledge that damage would result***

[55] The plaintiffs allege that the scheme was directed towards the plaintiffs and class members, and the Purported Consultants and Defendant Issuers knew that their actions would result in harm to the plaintiffs and class members.

[56] Specifically, the FANCC alleges the following:

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a) Neither the Purported Consultants nor the Defendant Issuers had any *bona fide* expectation that services of any real value would be provided under the consulting agreements. The consulting agreements were a sham and were entered into in order to provide a false pretence (i) for the Issuers to use the Consultant Exemption to distribute shares to the Purported Consultants, (ii) for the Issuers to repay part of the purchase price to the Purported Consultants and (iii) for the Issuers to state they had received the full proceeds from the private placements, when it was always understood and intended, by each of the Issuers and the Purported Consultants who acquired shares, that part of the purchase price would be returned to the Purported Consultants and would never be available to the Issuer for any other purpose;

b) Each of the Defendant Issuers and the Purported Consultants who participated in the private placements knew that the true facts regarding the private placements were not disclosed to the investing public (including the plaintiffs and class members), and knew that the Issuers' representations regarding the private placement were false; and

c) While knowing that the material facts had either been misrepresented or not been disclosed to the market, the Purported Consultants who acquired shares in the Issuers in the private placements sold or short sold most or all of the Issuers' shares, or transferred their shares to other Purported Consultants to be sold or short sold, in the secondary market (i.e. to the plaintiffs and class members) at prices that were discounted from the Disclosed Share Price, and significantly in excess of the effective price the Purported Consultants had actually paid for the shares.

[57] As alleged, the unlawful conspiracy was directed at the plaintiffs and class members as the purchasers of shares in the Issuers after each private placement was carried out. Each of the Issuers and the Purported Consultants allegedly knew that the plaintiffs and class members, after each private placement, would purchase

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shares in each Issuer that the plaintiffs and class members either never would have purchased, or would only have purchased at substantially lower prices, had the conspiracy never been carried out or had the true nature of the private placements been disclosed to the market.

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***4. Damages suffered***

[58] The plaintiffs and class members allegedly suffered actual damages which are causally connected to the conspiracy. The FANCC alleges that the unlawful conspiracy caused loss and damage to the plaintiffs and class members through:

a) The purchase by them of shares or additional shares in the Issuers which they either never would have purchased, or would have only purchased at a lower price, had the unlawful conspiracy and the private placements never been carried out or had the true nature of the private placements been disclosed; and

b) The erosion in the trading price of the shares in an Issuer acquired by the plaintiffs and the class members, resulting from the sale or short sale by the Purported Consultants of the Issuer's shares at prices discounted to the trading price of the shares, but at a substantial profit to the Purported Consultants.

***Does the rule in* Foss & Harbottle *bar the claim of conspiracy?***

[59] Some defendants submit the plaintiffs' claim in conspiracy is barred by the rule in *Foss v. Harbottle*. Pursuant to the rule, shareholders do not have a claim against a third party for wrongs done to a corporation: *Foss v. Harbottle* (1843), 67 E.R. 189 (U.K.H.L.); *Hercules Management v. Ernst & Young*, [1997] 2 S.C.R. 163, 1997 CanLII 345 at para. 59. They say that such a claim is rightly to be made by the Issuers, if anyone.

[60] In the FANCC, the plaintiffs claim the consulting agreements were a sham, in that neither the Purported Consultants nor the Issuers expected that services of any real value would be provided under them. For the purpose of s. 4(1)(a) of the *CPA*

and assessing whether the claim offends the rule in *Foss v. Harbottle*, this allegation must be taken as true. I do not read the FANCC as asserting a claim against the Purported Consultants for a breach of their consulting agreements with the Issuers.

[61] The plaintiffs are seeking to recover from the Purported Consultants and the Issuers for the fraud on the market for the Issuers' shares carried out by the Purported Consultants and the Issuers. I do not view the rule in *Foss v. Harbottle* as precluding the plaintiffs' claim against the Purported Consultants for that fraud, simply because the fraud was allegedly designed to and resulted in secondary market purchases of shares in the Issuers by the plaintiffs and class members. The loss suffered by them because of these share purchases is not alleged to be a consequence of a wrong done to the Issuers, but rather is the consequence of the fraud on the market carried out by Purported Consultants and the Issuers of which the plaintiffs and class members were the intended victims.

[62] There are allegations asserting the direct connection between the Purported Consultants' action and the harm suffered by the plaintiffs. This avoids the rule in *Foss v. Harbottle*, as the loss is not derivative of any loss suffered by the Issuers and does not involve a claim that properly belongs them. As well, no breach of fiduciary duty owed to any of the corporations involved is alleged as a basis for the plaintiffs' claims.

[63] The rule does not bar the claim.

***Conclusion on the claim in conspiracy***

[64] I find that the FANCC pleads all of the requisite elements for a claim of unlawful means conspiracy as against each of the Defendant Issuers and Purported Consultants. Assuming all of the pleaded facts are true, it is not plain and obvious that the claim for unlawful means conspiracy is bound to fail.

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***Disgorgement of profits as an alternative for damages***

[65] In the alternative to damages, as against the Purported Consultants, the plaintiffs and class members seek disgorgement of the benefit the Purported Consultants obtained as a result of the unlawful conspiracy.

[66] Disgorgement of profit is a gain-based remedy which may be available as an alternative remedy for certain forms of tortious conduct, which includes deceit. Disgorgement is a remedy, not a standalone cause of action, which should no longer be referred to as "waiver of tort" because the term is confusing: *Atlantic Lottery* at paras. 23–30.

[67] In reviewing the tortious wrongdoing for which disgorgement may be an available remedy in *Atlantic Lottery*, Justice Brown explicitly referred to deceit:

> [36] … While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century….

[68] Similarly, in *Reid v. Ford Motor Company et al*, 2006 BCSC 712, Justice Gerow observed, using the now out-dated terminology, that waiver of tort:

> [15] … has been utilized to prevent unjust enrichment and has been applied to property torts such as conversion, trespass and misappropriation of goods or property through deceit, usurpation of office and fraud.

(See also *Amertek Inc. v. Canadian Commercial Corp.* (2003), 229 D.L.R. (4th) 419, 2003 CanLII 49369 (Ont. S.C.J.) at para. 372, rev'd on other grounds 76 O.R. (3d) 241, 2005 CanLII 23220 (C.A.), leave to appeal to SCC ref'd, 31141 (16 February 2006).)

[69] The availability of disgorgement as an alternative remedy for fraud reflects the longstanding principle that fraudulent wrongdoers should not be permitted to retain the profits of their deceit. As the Court of Appeal explained in *Huff v. Price,* (1990), 51 B.C.L.R. (2d) 282, 1990 CanLII 5402 (C.A.) at 8:

> Certainly it is part of the principles applicable to the assessment of damages for fraud or for breach of fiduciary duty to deprive the wrongdoer of the fruits of the fraudulent acts …

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[70] Similar reasoning applies when a wrongdoer accumulates profits by way of a civil conspiracy that is implemented through fraudulent and deceitful acts. For example, in *Canadian National Railway Company v. Holmes*, 2022 ONSC 1682 [*Holmes*], one of the defendants, Mr. Holmes, an employee of the plaintiff ("CN"), diverted millions of dollars in CN contracts to companies he secretly owned. The Ontario Superior Court of Justice found Mr. Holmes liable for, among other things, breach of fiduciary duty, breach of confidence and deceit. Mr. Holmes had also diverted the profits from the scheme to his common law spouse, Ms. Flynn, who had assisted in the scheme by serving as director and officer for the various companies. The Court found Ms. Flynn liable for conspiracy, concluding that she had engaged in deceitful conduct to further the scheme, including signing numerous corporate documents with a pseudonym, which attested to her having attended meetings that never occurred: *Holmes* at para. 13. As a remedy, the Court ordered both defendants, and their corporations and trusts, to disgorge the over $10-million profit they had earned as a result of the scheme: *Holmes* at para. 545. Importantly, Ms. Flynn was never an employee of CN and did not owe CN any fiduciary duties, yet she was still ordered to disgorge the profits earned as a result of the conspiracy.

[71] Here, the FANCC discloses a claim for the profits accrued by the Purported Consultants as a result of the tortious conspiracy, as an alternative remedy to damages. The FANCC alleges that the Purported Consultants who subscribed to shares in each private placement earned a significant profit by short selling or selling the subscription shares, often at prices below the Disclosed Share Price, and below the secondary market price of the shares at the time, and always significantly in excess of the effective price the Purported Consultants had actually paid for the shares.

[72] The Purported Consultants allegedly sold, or short sold, those shares while knowing that the material facts of the private placements had not been disclosed to the market, and that the plaintiffs and the class members would not have purchased those shares, or would have purchased them for a significantly lower price, had the

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scheme never been carried out or had the true nature of the private placements been disclosed.

[73] The FANCC alleges that the Purported Consultants who acquired shares in the Issuers, as part of the private placements, earned a substantial profit by means of a scheme which was implemented through fraudulent and deceitful acts, by both the Purported Consultants and the Issuers. If proven, it would be unjust to permit the Purported Consultants to retain those profits.

[74] It is not plain and obvious that the claim for disgorgement of those profits, as an alternative remedy for the tortious wrongdoing, is bound to fail.

***Personal liability***

[75] The plaintiffs and class members seek declarations that:

a) The Purported Consultant Officers and Directors are personally liable for any damages or disgorgement for unlawful conspiracy awarded against the Purported Consultant for which they acted as an officer or director; and

b) The Issuer Officers and Directors are personally liable for any damages for unlawful conspiracy awarded against the Defendant Issuer for which they acted as an officer or director.

[76] Courts have long recognized that when those in control of a company direct the company to do something that is wrong, the individuals as well as the company are responsible for the consequences: *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110 at para. 18.

[77] Further, the court may pierce the corporate veil when those directing the corporation have used it to engage in fraudulent conduct: *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2018 BCSC 2146 at paras. 163–165.

[78] The plaintiffs allege that (i) each of the Purported Consultant Officers and Directors directed and controlled the Purported Consultant for which they acted as an officer or director to commit the acts which the Purported Consultant carried out

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in the unlawful conspiracy, and (ii) each of the Purported Consultant Officers and Directors knew that, or were recklessly or wilfully blind to whether, those acts were dishonest, deceitful and deceptive, and contrary to s. 380(1)(a) and (2) of the *Criminal Code* and to ss. 57 or 57.2 of the *Securities Act*.

[79] The claim also alleges that (i) each of the Issuer Officers and Directors directed and controlled the Defendant Issuer for which they acted as an officer or director to commit the acts which the Issuer carried out in the unlawful conspiracy, and (ii) each of the Issuer Officers and Directors knew that, or were recklessly or wilfully blind to whether, those acts were dishonest, deceitful and deceptive, and contrary to s. 380(1)(a) and (2) of the *Criminal Code* and to ss. 57 or 57.2 of the *Securities Act*.

[80] Thus, the FANCC alleges that each of the Purported Consultant Officers and Directors and each of the Issuer Officers and Directors directed their respective corporations to undertake deceitful, unlawful and criminal actions, while either knowing, or being recklessly or wilfully blind to, the deceitful and unlawful nature of those actions.

[81] It is not plain and obvious that the claims for personal liability are bound to fail.

**Statutory secondary market liability**

[82] The plaintiffs have already obtained leave to pursue their statutory claims for secondary market misrepresentations pursuant to s. 140.3 of the *Securities Act*, as against the Defendant Issuers and their respective Issuer Officers and Directors: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 2275 [*Leave Decision*], rev'd in part 2022 BCCA 307 [*Leave Appeal*]; *Tietz v. Global Etsimate Capital Corp.*, oral reasons pronounced March 20, 2023.

[83] Given that the leave determination included a judicial finding that the statutory claims have a reasonable chance of succeeding at trial (*Leave Decision* at paras.

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52–56; *Leave Appeal* at para. 157), I find the FANCC discloses viable statutory causes of action for misrepresentations on the secondary market.

**Fraudulent or negligent misrepresentation**

[84] The FANCC pleads causes of action against the Defendant Issuers and their respective Issuer Officers and Directors for fraudulent misrepresentation or, in the alternative, negligent misrepresentation, in relation to the misrepresentations made in the private placement news releases and the Form 9s.

***Fraudulent misrepresentation***

[85] The Supreme Court of Canada summarized the elements of the tort of fraudulent misrepresentation, or civil fraud, in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21 as follows:

a) a false representation made by the defendant;

b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

c) the false representation caused the plaintiff to act; and

d) the plaintiff's actions resulted in a loss.

(See also *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at paras. 24–25.)

[86] The FANCC alleges that each of the Defendant Issuers released, and their respective Issuer Officers and Directors authorized, permitted or acquiesced in the release of, private placement news releases and Form 9s that contained misrepresentations regarding the material facts of the private placements. The claim further alleges that each of the Issuers, and their respective Issuer Officers and Directors, knew, at the time those documents were released or filed, that the misrepresentations were false, or acted with reckless disregard as to whether those misrepresentations were true.

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[87] The plaintiffs further allege that the Defendant Issuers made the misrepresentations, and the respective Issuer Officers and Directors authorized, permitted or acquiesced in the release of the misrepresentations, with the intention that the plaintiffs and class members would rely on the misrepresentations in determining whether to purchase shares in the Defendant Issuer, and to induce the plaintiffs and class members to purchase the shares.

[88] Finally, the FANCC alleges that the plaintiffs and class members reasonably relied, directly or indirectly, on the misrepresentations in the news releases and the Form 9s in making their decision to purchase shares in the relevant Issuer. As a result, the plaintiffs and class members suffered a loss because they each purchased shares in the Issuer that they would not have purchased, or would have only purchased for a significantly lesser price, had the private placements never occurred or had the misrepresentations never been made and the true circumstances of the private placements been disclosed.

[89] I find the FANCC pleads all of the required elements for viable claims in fraudulent misrepresentation, against the Defendant Issuers and their Issuer Officers and Directors. As such, it is not plain and obvious that the claim for fraudulent misrepresentation is bound to fail.

***Negligent misrepresentation***

[90] The elements for a claim in negligent misrepresentation are summarised by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] S.C.R. No. 87, 1993 CanLII 146 at 110:

a) there must be a duty of care based on a “special relationship” between the representor and the representee;

b) the representation in question must be untrue, inaccurate or misleading;

c) the representor must have acted negligently in making said misrepresentation;

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d) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

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[91] In relation to the duty of care, it is not plain and obvious that there is no special relationship between issuers and secondary market purchasers, or between the participating officers and directors who approved the representations and the secondary market purchasers, when the secondary market purchasers' reliance on the representations was both foreseeable and reasonable in the circumstances: *Dugal v. Manulife Financial*, 2013 ONSC 4083 at para. 83, leave to appeal ref'd 2014 ONSC 1347; *Silver v. Imax Corporation* (2009), 86 C.P.C. (6th) 273, 2009 CanLII 72334 (Ont. S.C.J.) at paras. 25–55.

[92] Here, the FANCC alleges at para. 334 that each of the Issuer Officers and Directors knew and understood, at the time the private placement news releases and the Form 9s were released, that those documents were released to comply with the Defendant Issuers' disclosure obligations, and that those documents were released with the intention they would be reasonably relied upon by the plaintiffs and class members in making their decision to invest in the Defendant Issuers.

[93] As the Ontario Superior Court of Justice stated in *Silver*, in relation to the Ontario equivalent of the *Securities Act*, "[t]he continuous disclosure obligations of a reporting issuer are prescribed by and under the OSA, and the intended recipients of such disclosure are the investing public": at para. 47.

[94] The FANCC also alleges the Issuer Officers and Directors knew and understood that the information in the private placement news releases and Form 9s would be, and was, incorporated into the trading price of the Defendant Issuers' shares.

[95] Given these pleadings, it is not plain and obvious that the Defendant Issuers and their respective Issuer Officers and Directors did not owe the plaintiffs and the

class members, as the intended recipients of the misrepresentations, a duty of care to take reasonable steps to ensure the representations were accurate.

[96] The FANCC further alleges that each of the Issuer Officers and Directors breached the duty of care by:

a) Failing to review the consulting agreements used to purportedly justify the use of the Consultant Exemption to distribute shares under the private placements; and

b) Failing to require that the private placement news releases and Form 9s disclose:

i. the consulting agreements the Purported Consultants entered into contemporaneously with and as a condition of the private placement;

ii. the amount of the proceeds of the private placement which would be immediately used to pay lump-sum consulting fees under the consulting agreements;

iii. the impact of those payments on the effective share price paid by the Purported Consultants who acquired shares in the private placement; and

iv. the true amount of the proceeds of the private placement available to the Defendant Issuer to use as working capital.

[97] The FANCC goes on to allege that if the Issuer Officers and Directors had not breached their duty of care, the private placements in each Defendant Issuer would either not have been carried out, or the misrepresentations in the private placement news releases and Form 9s would not have been made.

[98] The FANCC goes on to allege that the plaintiffs and class members reasonably relied, directly or indirectly, on the misrepresentations in the private placement news releases and the Form 9s in making the decision to acquire shares

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in the Defendant Issuers, and that each of the plaintiffs and class members suffered loss as a result.

[99] Given these pleadings, it is not plain and obvious that the claim for negligent misrepresentation, against the Defendant Issuers and their respective Issuer Officers and Directors, in relation to the misrepresentations in the private placement news releases and Form 9s, is bound to fail.

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## Admissibility of evidence

### Costin Affidavit #1

[100] Included in the evidentiary record for consideration on the application is a partially redacted affidavit sworn by a lead investigator for the Commission, Alan Costin, on November 21, 2018 (“Costin Affidavit #1”). This affidavit, prepared for use by the Commission, sets out the information Mr. Costin gathered investigating the scheme for the Commission. The plaintiffs downloaded the affidavit from a link provided by the Commission and attached it as Exhibit A to the Affidavit #1 of Joanne Hung, sworn December 8, 2022.

[101] The appearing defendants submitted their position on the application does not turn on whether the affidavit is admitted into evidence or not, although concerns were raised as to the admissibility and reliability of the hearsay content both in the body of the affidavit as an exhibit itself and the documents exhibited to Mr. Costin’s affidavit.

[102] Many of the paragraphs which are objected to by some defendants are not referenced by the plaintiffs in their certification argument, and the plaintiffs have no objection to the exclusion of these paragraphs from the evidentiary record. These are paragraphs 8, 9, 29, 30, 32, 39–41, 62, 68(c) and (d), 84, 92, 100, 107, 209, 211, 216, 218 and 221. The plaintiffs also have no objection to the exclusion from the record of subparagraphs 13(e), 13(g), 13(p) and 13(dd). The first three subparagraphs refer to information provided to Mr. Costin by Konstantin Lichtenwald about some of the defendants. The plaintiffs have not expressly referenced that

information and have no objection to the exclusion of these subparagraphs. Subparagraph 13(dd) is referenced in the plaintiffs' argument, as it contains information obtained about the relationship between defendants Mawji, Denise Trainor, Rufiza Esmail and Northwest that Mr. Costin obtained from a review of the transcripts of evidence given by Mawji and Trainor in compelled interviews with the Alberta Securities Commission.

[103] While the plaintiffs do not accept that this is evidence which could not be included in the evidentiary record, they are content not to rely on this evidence. As such, I will not make a decision on the admissibility of the portions of Costin Affidavit #1 referred to in the above paragraph.

[104] The admissibility of the Costin Affidavit #1 was one subject of appeal in the *Leave Appeal*. The Court of Appeal held that Mr. Costin's evidence that the records attached to Costin Affidavit #1, including some consulting agreements, were obtained from the Issuers or their counsel is admissible pursuant to R. 22-2(13), which allows for hearsay evidence on an interlocutory application, such as the application for leave under the *Securities Act*: *Leave Appeal* at paras. 90–91, 105–112.

[105] I find that just as the records attached to Costin Affidavit #1 were admissible on the leave application to show a reasonable possibility of success for the statutory secondary market misrepresentation claims asserted by the plaintiffs, those records are admissible here to show some basis in fact for the common issues arising out of the claims the plaintiffs seek to have certified: *Liptrot v. Vancouver College Limited*, 2022 BCSC 1851 at para 39.

[106] I agree with the plaintiffs that it would be a strange result if these records were admissible on the merits-based reasonable possibility of success test applied on the statutory leave application, but somehow are not admissible on the lower standard of some basis in fact for the common issues, which does not involve any assessment of the merits of the claim: *MM Fund v. Americas Gold and Silver Corp*., 2022 ONSC 6515 at para. 57.

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[107] With regard to objections to para. 84 of Costin Affidavit #1, in which Mr. Costin sets out a summary of his telephone conversation in September 2018 with the defendant Michael Young, then the CEO of the defendant Green 2 Blue, I find that this is a record by Mr. Costin of an admission made by Young and Green 2 Blue and is admissible on that basis.

[108] With regard to objections to paras. 49 and 50, in which Mr. Costin describes both the software system he used to obtain electronic trading records and the reports generated by that software, some defendants submit this is improper opinion evidence. However, Mr. Costin is not expressing an opinion but rather is stating his personal knowledge and understanding of how the software works and the kind of reports it produces. This evidence is properly admissible pursuant to R. 22-2(13).

[109] Costin Affidavit #1 is admissible for the purposes of this interlocutory application and I will consider the content referred to by the plaintiffs when examining the evidentiary record.

**New evidence**

[110] On March 13, 2024, I granted leave to the plaintiffs to file an affidavit exhibiting two orders with related settlement agreements made by the Commission on February 21 and 24, 2024. The settlement agreements contain admissions by defendants in this action concerning the alleged scheme. I provided the parties with the opportunity to provide supplemental submissions on the treatment of this evidence.

***The Liu Commission Settlement Agreement***

[111] An order of the Commission dated February 21, 2024, approving a settlement agreement (the “Liu Commission Settlement Agreement”) with Liu, Lukor Capital Corp. and Asiatic Management Consultants Ltd. (collectively, the “Liu Defendants”) dated February 20, 2024, and a copy of that settlement agreement, were published by the Commission at 2024 BCSECCOM 73 and 2024 BCSECCOM 74,

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respectively. The agreed statements of facts in the settlement includes admissions that:

a) The Liu Defendants participated in a scheme in which individuals and companies entered into consulting agreements with certain Canadian Securities Exchange ("CSE") Issuers and received prepaid consulting fees from the Issuers. The consultants performed little or no consulting work. Some consultants purchased free trading shares of the Issuers through private placements, for which placements the issuers relied on the Consultant Exemption. The issuers retained only a portion of the funds raised because they paid most of the private placement funds to the consultants as prepaid consulting fees shortly before or after the private placements and the places, in most instances, sold their shares shortly after the purchase, generally below the private placement price;

b) Liu promoted the scheme to several Issuers. Liu and Lukor Capital Corp. ("Lukor") participated as placees for a total of $5,635,000 worth of units in three private placements by two Issuers. In each instance, Liu and Lukor received free trading shares because of the Consultant Exemption and sold the shares either before they received them or shortly after receiving them. Liu obtained free trading shares from other places and sold them shortly after receiving them;

c) In additional to obtaining private placements shares in their own names, the Liu Defendants also paid $12,370,500 to other places who used the funds to purchase other private placement shares as part of the scheme; and

d) One or more of the Liu Defendants directly received consulting fees which collectively totaled $4,543,750 from all nine issuers. One or more of the Liu Defendants or other entities associated to Liu indirectly received additional amounts from other consultants.

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[112] The Liu Commission Settlement Agreement is the first admission by any defendant that most of the private placements at issue were carried out as part of the scheme alleged by the plaintiffs. The "scheme" as defined in the settlement agreement is substantially similar to the scheme alleged in the FANCC.

[113] This settlement agreement is also the first admission by one of the Purported Consultants that the consultants who entered into consulting agreements with the Defendant Issuers as part of the scheme and received prepaid consulting fees from the private placement funds performed "little or no consulting work". The Liu Defendants collectively entered into consulting agreements with each of the Defendant Issuers.

[114] The Liu Defendants also admit that Liu promoted the scheme to several Issuers and paid over $12 million to other places who used the funds to purchase other private placement shares as part of the scheme.

***The Jackson Commission Settlement Agreement***

[115] An Order of the Commission dated February 26, 2024, approving a settlement agreement (the "Jackson Commission Settlement Agreement") with Jackson, BridgeMark Financial Corp. ("Bridgemark") and Jackson & Company Professional Corp. (collectively, the "Jackson Defendants") dated March 1, 2024, and a copy of that settlement agreement, were published by the Commission at 2024 BCSECCOM 81 and 2024 BCSECCOM 82, respectively. The agreed statement of facts in the settlement includes admissions that:

a) As part of a scheme, nine issuers publicly announced gross proceeds of $50,854,671 through 12 private placements between February and August 2018, but only retained $7,892,722 of that amount. Jackson met with some of the Issuers to explain the Consultant Exemption. Jackson facilitated the delivery of paperwork, including subscription agreements, consulting contracts and private placement cheques for some of the Issuers; and

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b) BridgeMark participated as a placee for a total of $2,000,002 worth of units in a private placement by one issuer. BridgeMark received free trading shares because of the Consultant Exemption and sold the shares shortly before and after it received them. BridgeMark and Jackson & Company Professional Corp. acted as consultants for eight issuers for gross proceeds of $3,358,750.

[116] I agree with the settled law in Ontario that the admissions of fact in settlement agreements with securities regulators, despite inclusion of a limiting use clause, are admissible in subsequent civil proceedings: *Fischer v. IG Investment Management*, 2023 ONSC 915 at para. 194. While they may be inadmissible at trial against any defendants who are not parties to the agreements, this does not preclude their use in an application for certification to show some basis in fact for the plaintiffs' proposed common issues relating to the conspiracy: *Leave Appeal* at paras. 106–112.

**Identifiable class**

[117] The second requirement for certification as a class proceeding is that there be an identifiable class of two or more persons: *CPA*, s. 4(1)(b). The principles governing this requirement are summarized in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82:

> • the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
>
> • the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
>
> • the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
>
> • the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.
>
> [Emphasis in original.]

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[118] The proposed class includes all persons, other than the defendants and any other Excluded Persons, wherever they may reside or be domiciled, who acquired securities in the Issuers during the Class Period defined for each Issuer, each of which runs from the date the Issuer announced its first private placement to November 26, 2018, as set out earlier in these reasons. “Excluded Persons” are currently defined in the FANCC at para. 101 as follows:

> a) any other persons or entities who entered into consulting agreements with any of the Issuers in the time periods set out in paragraphs 100(a) through 100(k) [of the FANCC] (the “Unnamed Consultants”);
>
> b) the past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of the defendants or any Unnamed Consultants; and
>
> c) any family members of any of the individual defendants, or of any individual person who otherwise falls within (a) and (b) above.

[119] The object of this definition of Excluded Persons is to ensure that those affiliated with the defendants do not benefit from their unlawful conduct through participation in the class. To ensure that end is achieved, the plaintiffs propose to amend the definition of Excluded Persons to include the following as subparagraph (d):

> d) any entities which are controlled by, or are under common control with, an individual defendant, or any family member of either an individual defendant or any individual person who falls within (a) and (b) above.

[120] This will preclude a corporation controlled by an individual Excluded Person from participating in the class.

[121] Membership in the proposed class is defined by objective criteria which do not depend on the merits of the claim. If a person purchased securities in one of the

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Issuers during the Class Period defined for that Issuer and is neither a defendant nor an Excluded Person, then they are a member of the class. Each of the plaintiffs purchased securities in an Issuer during the relevant Class Period and, as a result, is a member of the proposed class.

[122] The class definition also bears a rational relationship to the proposed common issues because it includes persons who purchased each Issuer's shares during the period within which the alleged conspiracy, and its attendant misrepresentations, were operative.

[123] I therefore accept the plaintiffs' new proposed amended definition of Excluded Persons.

[124] I must also consider whether the proposed class is overbroad. In particular, in the present case, is it appropriate, as proposed by the plaintiffs, to (i) certify a global class and (ii) include so-called "early sellers", i.e. persons who sold their securities prior to November 26, 2018, within the class?

**A global class**

[125] The proposed class is global, in that it includes investors who reside outside of British Columbia, as well as outside of Canada. It is also not limited to investors who acquired the Issuers' securities on the CSE. While each of the Issuer's securities traded on the CSE, their securities also traded on certain other exchanges, in particular (i) the securities of every Issuer except for Beleave were also listed on the Frankfurt Stock Exchange, and (ii) the securities of every Issuer (not including Speakeasy) were also quoted on the OTC Markets Group ("OTC") in the United States.

[126] There are, as noted in *Bergen v. WestJet Airlines Ltd*., 2021 BCSC 12 at para. 58, aff'd 2022 BCCA 22 [*Trotman*], numerous examples of Canadian courts certifying class actions that include non-resident class members. In *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 [*Airia*], leave to appeal to SCC ref'd, 37887 (25 October 2018), the Court of Appeal for Ontario, in dismissing a jurisdictional

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challenge to a proposed global class in a class proceeding arising from a conspiracy to fix prices for freight shipping services, concluded at para. 107 that jurisdiction over non-resident class members may be established where:

a) there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

b) there are common issues between the claims of the representative plaintiff and the non-resident class members; and

c) the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out are provided.

[127] I agree that a real and substantial connection exists, in the present case, between the subject matter of the action and British Columbia, and that jurisdiction exists over the representative plaintiffs and the defendants. Pursuant to s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, a real and substantial connection between British Columbia and the facts on which a proceeding is based is presumed to exist if the proceeding:

a) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;

b) concerns a tort committed in British Columbia; or

c) concerns a business carried on in British Columbia.

[128] The Court has already granted leave to bring the statutory claims, in British Columbia, against the Defendant Issuers and their respective Defendant Issuer Officers and Directors. None of the Defendant Issuers or the Issuer Officers and Directors objected to the Court's jurisdiction to determine the plaintiffs' statutory claims. There must, therefore, be a real and substantial connection between British Columbia and the subject matter of the statutory claims. The common law claims, for conspiracy and misrepresentation, arise from the exact same constellation of facts,

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and also concern torts committed in British Columbia. The alleged conspiracy was implemented through the private placements in the Issuers, and the alleged misrepresentations pertained to material facts about the private placements in the Issuers. Each of those Issuers are, or were, "reporting issuers" in British Columbia for the purposes of the *Securities Act*.

[129] Further, all of the Defendant Issuers, and indeed, all of the Issuers except for Beleave, have their registered offices in British Columbia. Jackson, Liu, Paddock and Mawji, the Defendants who are alleged to have conceived of the scheme, initiated its implementation, promoted the scheme to the other Purported Consultants and arranged for the private placements in the other Issuers, are all residents of British Columbia, and the corporate Purported Consultants that they each direct or control are all BC companies. Indeed, nearly all of the Purported Consultants and the Purported Consultants Officers and Directors are, to the best of the plaintiffs' knowledge, either residents of or have their registered offices in BC. Only eight of them, based on the currently available evidence, appear to reside, or be registered, outside of BC. The proposed representative plaintiffs, for their part, have plainly all consented to the jurisdiction of this Court.

[130] In short, a real and substantial connection exists between British Columbia and the subject matter of the present claim, and jurisdiction exists, by reasons of presence, consent and the subject matter of the action, over the defendants and the plaintiffs. This is, presumably, why none of the defendants have directly challenged the Court's jurisdiction to hear the claim.

[131] Turning to the last two factors set out by the Court of Appeal for Ontario in *Airia*, there are common issues between the proposed representative plaintiffs and any non-resident members of the proposed class. The claims asserted on behalf of the resident and non-resident investors are the same, and the resident and non-resident class members have the same interest in the common issues. In relation to safeguards, as discussed below, the notice and litigation plan set out reasonable and workable procedures for providing class members, both resident and non-

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resident, with notice of the claim and a corresponding opportunity to opt out. The proposed representative plaintiffs will, as also discussed below, capably and fairly represent the interests of the class, including its non-resident members; in this regard, it is also notable that several of the proposed representative plaintiffs are also non-residents.

[132] Analogous global classes have been certified in other class actions involving alleged misrepresentations on the secondary market. For example, in *Abdula v. Canadian Solar Inc.*, 2015 ONSC 53, leave to appeal ref'd, 2015 ONSC 4322 (Div. Ct.), the Ontario Superior Court of Justice certified a class proceeding in relation to claims for statutory misrepresentations, negligent misrepresentation and oppression, for a global class that included investors, wherever they may reside or be domiciled, who acquired securities in the defendant, Canadian Solar, on the NASDAQ, during the class period. Notably, in *Abdula*, the defendant's securities were not traded on a Canadian exchange. Justice G.E. Taylor rejected the defendant's argument that the class, for the negligent misrepresentation and oppression claims, should be limited to Ontario residents. There was a real and substantial connection between the claims and Ontario, largely because the defendant was a Canadian company which, although its principal place of business was in China, maintained an executive office in Ontario and disseminated information from Ontario to its shareholders and prospective shareholders. Conversely, while there had been a parallel action in the United States, it had been finally dismissed; as a result, the only avenues for recovery for the non-resident shareholders were the Ontario proceeding or individual lawsuits. Justice Taylor therefore concluded that certifying a global class furthered the objectives of class proceedings legislation by providing access to justice for claimants who would otherwise have no practical way to obtain compensation: *Abdulla* at paras. 46–63; see also *Dyck v. Tahoe Resources Inc.*, 2021 ONSC 5712 at paras. 322–334; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at paras. 587–592 [*Green ONSC*], rev'd on other grounds 2014 ONCA 90 [*Green ONCA*], aff'd 2015 SCC 60 [*Green SCC*].

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[133] Defendants challenge the appropriateness of a global class. They submit that in a securities class action, it is inappropriate to certify a class that includes purchasers of shares from exchanges that are outside of Canada. That was the result in the proposed class in the statutory claim brought in *Pearson v. Boliden Ltd*., 2002 BCCA 624. Madam Justice Newbury explained that the requirements for disclosure in provincial securities legislation did not apply to distributions outside of Canada:

> [70] Outside Purchasers: Similar reasoning applies to exclude those (the "outside purchasers") who bought their shares pursuant to distributions occurring in the Territories of Canada or outside of Canada, where no provincial *Securities Act* has application and where no prospectus (as defined in any of the *Acts*) was or could be required to be circulated. Instead, the laws of those jurisdictions must be looked to establish disclosure and filing requirements and the consequences of non-compliance. As submitted by counsel for Nesbitt Burns, the *Acts* of the provinces do not attach civil consequences to offering documents prepared in and pursuant to the laws of a foreign state.
>
> [Emphasis in original.]

[134] As such, they submit, the statutory provisions relied on have no application to shares that were distributed on the Frankfurt Stock Exchange or through the OTC Markets Group in the United States: see *Kaynes v. BP, PLC*, 2014 ONCA 580 at paras. 47–48, leave to appeal to SCC ref'd, 36127(26 March 2015). I agree.

[135] However, I do not agree that the same follows for the non-statutory claims.

[136] A sub-class of purchasers through the CSE will be required with respect to the statutory claims.

[137] Apart from that sub-class, certification of a global class is appropriate and consistent with the objectives of the *CPA* in the present case.

**Early sellers**

[138] The proposed class includes "early sellers", i.e. persons who acquired one or more of the Issuers' securities after the Issuer(s) announced a private placement and then sold some or all of those securities before November 26, 2018, when the Commission announced it was investigating the scheme.

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[139] It is not uncommon for “early sellers” to be excluded from the class in claims for misrepresentations to investors where they have sold all of their shares before the trigger date. In *Pearson*, the plaintiffs alleged that the defendant had, in a prospectus, misrepresented the status of a tailings dam at one of its mines, and they sought compensation for the loss in share value that occurred after the tailings dam collapsed. The Court of Appeal for British Columbia held that the “early sellers”, i.e. investors who purchased in the distribution but sold before the dam collapsed, must be excluded from the class because any depreciation in the value of their shares resulted from the sale, not the misrepresentation: “As for the argument … that the ‘early sellers’ may have paid too much for their shares, if that is correct then they also sold their shares for ‘too much’”: *Pearson* at para. 92 (emphasis in original).

[140] However, “early sellers” are not universally excluded from securities class actions. For example, in *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, rev’d on other grounds 2011 ONSC 3782 (Div. Ct.), Justice Strathy opined that, while it may be appropriate, as a general rule, to exclude “early sellers” from the class, it was not appropriate to exclude them in the case before him because the defendants alleged that there had been partially corrective disclosures during the class period. He noted that in such circumstances, the onus of proving that the “early sellers” could not have suffered a loss should be on the defendants at trial: at para. 122. The Ontario Superior Court of Justice also, for example, decided to keep “early sellers” in the class in *Green ONSC* at paras. 580–583 and in *Dobbie v. Arctic Glacier Income Fund et al*, 2011 ONSC 25 at paras. 203–207, leave to appeal granted, 2012 ONSC 25.

[141] Of these cases, I am bound only by *Pearson*. In any event, I do not see the facts in the present case as being complicated—in that there were no alleged partially corrective disclosures during the Class Periods—nor do I see facts pleaded to support a claim that an early seller suffered a loss.

[142] The class definition will exclude early sellers who sold all of their shares prior to November 26, 2018.

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**Common issues**

[143] The third requirement for certification is that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members": *CPA*, s. 4(1)(c). The *CPA* defines "common issues" in s. 1 as "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[144] The principles governing the common issues requirement are summarised in *N&C Transportation Ltd. v. Navistar International Corporation*, 2018 BCCA 312 [*Navistar*], leave to appeal to SCC ref'd, 38327 (28 March 2019) as follows:

> [92] … To be a "common issue", an issue must be a substantial and necessary ingredient of the claim of each member of the class: *Hollick* at para. 18. Resolution of the common issue need not, however, be determinative of liability. It is sufficient if the proposed common issue is an issue of fact or law common to all claims and its resolution will move the litigation forward: *Jones* at para. 4. In some cases, there may need to be further individual actions on certain issues, such as damages or causation (see, e.g., *Rumley v. British Columbia*, 2001 SCC 69 at para. 36; *CPA*, ss. 7(a), 27).

[145] Courts must assess the common issues requirement in light of the purposes of class proceedings, including judicial economy. Resolving common issues on a class-wide basis avoids duplication of fact-finding and legal analysis: *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111 at para. 65, leave to appeal to SCC ref'd, 38678 (17 October 2019); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39.

[146] The answers to the common issues need not be the same for each class member. The commonality requirement does not mean that an identical answer is necessary for all class members, or even that the answer must benefit each of them to the same extent: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45–46. As Justice Saunders explained in *Watson*, at para. 152, while all class members must have the same qualitative stake in the answer, the common issues need not

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have the same importance for each class member: “In other words, they cannot pull in opposite directions on the issue”.

[147] The plaintiffs must provide “some basis in fact” to support the fulfilment of the common issue requirement. The court’s inquiry at this stage does not require an assessment of the merits of the claim; rather, it focuses on the suitability of the action as a class proceeding: *Watson* at para. 145. Thus, as the Court of Appeal reiterated in *Mentor*, “the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred”: at para. 33. See also *Pro-Sys* at paras. 103–105, 110.

[148] As the Court of Appeal explained in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, the purpose for requiring some basis in fact to support the common issues is to provide the certification judge “with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial, as opposed to being simply a procedural complication for claims that are not truly common”: at para. 139.

**Conspiracy common Issues**

[149] The first group of proposed common issues, issues one to four, addresses the conspiracy claim:

1) Did the Purported Consultants and the Issuers, or any of them, conspire to implement and carry out a scheme for the distribution of shares of the Issuers pursuant to the Private Placements that was contrary to s. 380 of the *Criminal Code* and to s. 57 of the *Securities Act*?

2) If the answer to (1) is yes, was the unlawful conspiracy directed at the Class members as purchasers of securities of an Issuer subsequent to the Private Placement in that Issuer through which the unlawful conspiracy was carried out?

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3) If the answer to (1) is yes, in respect of one or more of the Purported Consultants and Defendant Issuers, did those Purported Consultants and Defendant Issuers know, or ought they to have known, that the unlawful conspiracy would cause loss and damage to the Class members?

4) If the answer to (3) is yes, are those Purported Consultants and Defendant Issuers jointly and severally liable to the Class members for all losses suffered by the Class members as a result of the unlawful conspiracy?

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[150] Each of the above issues addresses the actions and knowledge of the Issuers and Purported Consultants in conceiving and implementing the scheme and the legal significance of that conduct. The scheme, as alleged by the plaintiffs, was implemented by a large, but defined, set of defendants, namely the Issuers and the Purported Consultants, through a defined set of private placements and relied upon a standard set of misrepresentations set out in a defined set of documents. Whether or not some or all of the Issuers and Purported Consultants took the actions alleged and whether or not those actions amount to a civil conspiracy are inquiries that can be done on a common basis, without the need for evidence from individual class members.

[151] Those defendants who have responded to the certification application have opposed the proposed common issues primarily on the grounds that, in their view, there is insufficient evidence that the proposed issues are common across the Issuers. Some submit that almost all of the common issues improperly include separate issues relating to separate Issuers in the same proposed common issue.

[152] An issue can be common even if the answer to the issue may not be the same for each class member: *Vivendi* at paras. 45–46; *Watson* at para. 152. It is possible, for example, that the Court will find that certain Purported Consultants only conspired to carry out a scheme in relation to the distribution of shares in a subset, rather than all, of the Issuers. The proposed common issues on conspiracy are

common because the answers address substantial and necessary ingredients of each class member's claim in conspiracy.

[153] The evidentiary record establishes an ample basis in fact that resolving the proposed issues on conspiracy on a common basis (i.e. in a single inquiry for all of the private placements) will avoid considerable duplication of fact-finding and legal analysis. As stated by the Commission in its further extension of the Temporary Order on May 29, 2019, there is "a striking similarity in the transactions which are at the heart of the matters…": *Re BridgeMark Financial Corp*., 2019 BCSECCOM 191 at para. 41.

[154] First, the evidentiary record establishes that a substantial majority of the Purported Consultants participated in the private placements at two or more of the Issuers, either as subscribing consultants or as associated consultants who entered into consulting agreements with the Issuer as part of the private placement transaction. In brief, the evidence establishes at least some basis in fact that:

a) Liu, either directly or through his corporation, Lukor, participated as a subscribing consultant in three private placements at three of the Issuers, namely Kootenay, Speakeasy and New Point, and as an associated consultant in six other private placements, those at Green Corp., Cryptobloc, BLOK and PreveCeutical, and the first private placements at both Beleave and Marapharm.

b) Detona Corp., whose sole director is Danilen Villanueva, participated as a subscribing consultant in eight private placements at seven of the Issuers, namely Kootenay, Affinor, Green Corp., Beleave, Marapharm, Cryptobloc, BLOK and PreveCeutical, and as an associated consultant in the New Point private placement.

c) Paddock, either directly or through Paddock Inc., participated as a subscribing consultant in nine private placements in eight of the Issuers, namely Kootenay, Affinor, Green Corp., Beleave, Marapharm, Cryptobloc,

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PreveCeutical and Speakeasy, and as an associated consultant in the BLOK private placement.

d) Northwest, which the plaintiffs allege is managed and controlled by Mawji, participated as a subscribing consultant in eight private placements at seven of the Issuers, namely Kootenay, Affinor, Marapharm, Beleave, PreveCeutical, Speakeasy and New Point, and as an associated consultant in the first Beleave private placement.

e) JCN Capital Corp., whose sole director is John Bevilacqua, participated as a subscribing consultant in four private placements, at Affinor, Cryptobloc, BLOK and Marapharm, and as an associate consultant in at least three private placements, at Green Corp., Beleave and PreveCeutical. The plaintiffs allege JCN Capital Corp. also participated as an associated consultant in the first Marapharm private placement.

f) Escher Invest SA, Hunton Advisory Ltd. and Kendl Capital Ltd. are each either owned or directed by Randy White and participated in the private placements as follows:

    i. Escher Invest SA participated as a subscribing consultant in the private placements at New Point and Marapharm, and as an associated consultant in at least two private placements, in Beleave and PreveCeutical.

    ii. Hunton Advisory Ltd. participated as a subscribing consultant in four private placements, at Green Corp., BLOK, Marapharm and New Point, and as an associated consultant in at least two private placements, at Cryptobloc and Beleave.

    iii. Kendl Capital Ltd. participated as a subscribing consultant in three private placements, at Green Corp., BLOK and Marapharm, and as an associated consultant in at least three private placements, at Beleave, PreveCeutical and New Point. The plaintiffs allege Kendl Ltd. also

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participated as an associated consultant in the first Marapharm private placement.

g) Sway Capital Corp. and Essos Corporate Services Inc. are each solely directed by Von Rowell Torres, who was also a director of Kootenay, and participated in the private placements as follows:

   i. Sway Capital Corp. participated as a subscribing consultant in three private placements at two Issuers, namely Marapharm and Beleave, and as an associated consultant in at least three private placements, at Beleave, BLOK and PreveCeutical.

   ii. Essos Corporate Services Inc. participated as a subscribing consultant in one private placement, at Cryptobloc, and as an associated consultant in three private placements, at BLOK, Marapharm and PreveCeutical.

h) 727 Capital, 10X Capital and Viral Stocks Inc. are each registered in the Cayman Islands, and each participated as associated consultants in the same three private placements, at BLOK, Beleave and New Point.

i) Tavistock Capital Corp., whose sole director is Robert John Lawrence, participated as a subscribing consultant in three private placements at two issuers, namely Marapharm and New Point.

j) Simran Singh Gill is the sole director of a company called BridgeMark Management Ltd. and an employee of BridgeMark, and participated in two private placements as a subscribing consultant, with Marapharm and Cryptobloc, and as an associated consultant in at least one private placement, in Beleave.

k) Keir Paul MacPherson participated as a subscribing consultant in two private placements, in BLOK and Beleave, and as an associated consultant in at least one private placement, in Marapharm.

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l) Saiya Capital Corp., whose sole director is Tara Haddad, participated as a subscribing consultant in one private placement, in Beleave, and as an associated consultant in at least two private placements, in Green Corp. and Marapharm.

m) Albert Kenneth Tollstam or Tollstam & Company Chartered Accountants participated as a subscribing consultant in two private placements, Green Corp. and Beleave. The plaintiffs allege Albert Kenneth Tollstam also participated as an associated consultant in the first Marapharm private placement.

n) Tryton Financial Corp., whose sole director is Abeir Haddad, participated as an associated consultant in at least three private placements, in Marapharm, Cryptobloc and PreveCeutical.

o) 1053345 B.C. Ltd., whose sole director is Robert Abenante, participated as an associated consultant in two private placements, at Marapharm and Beleave.

p) Asahi Capital Corp., whose sole director is Wilson Su, participated as an associated consultant in two private placements, in Marapharm and Beleave.

q) Natasha Jon Emami is an employee of Jackson & Company Professional Corp., and participated as an associated consultant in two private placements, at Green Corp. and Beleave.

r) International Canyon Holdings Ltd., whose sole director is Jatinder Singh Bal, participated as an associated consultant in two private placements, at Beleave and Marapharm.

s) Jarman Capital Inc., whose sole director is Scott Jason Jarman, participated as a subscribing consultant in two private placements, at PreveCeutical and New Point.

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t) 1140258 B.C. Ltd., whose sole director is Arlene Victoria Alexander (who, the plaintiffs allege, is the spouse of David Alexander, a director of Marapharm and a CFO of BLOK), participated as a subscribing consultant in two private placements, in BLOK and Marapharm.

[155] In comparison, there are only about 14 Purported Consultants for which there is evidence, at present (as the plaintiffs do not yet know the identity of all the Purported Consultants who entered into consulting agreements with Kootenay, Affinor and Speakeasy), that they participated in only one of the private placements. Notably, apart from Asiatic Management Consultants Ltd., each of the 13 other Purported Consultants participated as a subscribing consultant, and seven of these are the Alexander group which subscribed to the BLOK private placement.

[156] In addition, the evidence only indicates that Altitude Marketing Corp., whose sole director is Ryan Peter Venier, participated as a subscribing consultant in the Cryptobloc private placement. However, the plaintiffs also allege that Altitude Marketing Corp. participated as an associated consultant in the first Marapharm private placement.

[157] That said, there is a considerable overlap in the identities of the participating Purported Consultants for each private placement, which, in turn, provides a basis in fact to support the conclusion that resolving the proposed issues regarding conspiracy on a common basis, across the Issuers, will avoid a substantial duplication of fact-finding or legal analysis.

[158] Further, the “striking similarity” across the private placements is not limited to the identities of the participating Purported Consultants. The evidence also establishes some basis in fact that the Purported Consultants engaged in the same conduct across multiple private placements. In particular:

a) There is, indisputably, evidence that each of the Issuers, including the Defendant Issuers, released similar documents in relation to their respective private placements (in each case, at least two news releases and a Form

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9), in which they each made substantively similar representations, setting out the price of the units in the private placement, the proceeds which were expected or received and how the Issuer intended to use the proceeds. There is no dispute that, in those documents, none of the Issuers disclosed that the Issuer had either agreed to or had already paid substantial consulting fees in relation to the private placement.

b) For multiple private placements, there is evidence that the participation of the subscribing Purported Consultants was conditional upon the Issuer entering into consulting agreements with a group of the Purported Consultants which included the subscribing Purported Consultants. For example, according to Bojan Krasic, Beleave's former CFO, entry into the consulting agreements was a condition for the subscribing Purported Consultants' participation in both Beleave private placements. Similarly, in their cross-examinations in the petition proceedings resulting in the *Leave Decision* (the "Leave Petition"), (i) Cryptobloc's former CEO, Neil William Stevenson-Moore, (ii) PreveCeutical's former CEO, Stephen Van Deventer, and (iii) New Point's former CEO, Bryn Gardener-Evans, each stated that the subscribing Purported Consultants' participation in their respective private placements was conditional upon each Issuer entering into the consulting agreements. According to Affinor's former CEO, Nicholas Brusatore, the Affinor private placement was presented, by Liu and Jackson, as an offering "for four million dollars on which consulting fees would be paid".

c) For many of the private placements, there is evidence that the consulting agreements entered into with the Purported Consultants were essentially identical and contained the same contractual terms, apart from the services to be provided and the amount of the fee. Moreover, the evidence indicates that the consulting agreements were essentially the same not just for each private placement, but across multiple private placements. For the Green Corp., Cryptobloc, New Point and BLOK private placements, Costin

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obtained copies of the consulting agreements entered into with the Purported Consultants and attached them to his affidavit. BLOK also disclosed consulting agreements on SEDAR. Krasic attached two of the consulting agreements, with Detona Capital Corp. and Northwest, to his affidavit. In addition, a number of the Purported Consultants have disclosed the consulting agreements they entered into with one or more of the Issuers at the time of the Issuer's private placement, including agreements with Marapharm, Cryptobloc, PreveCeutical, Green Corp. and Beleave. All of these consulting agreements contain essentially the same terms, except for the description of the services to be provided and the compensation, and nearly all of them provide for lump-sum, non-refundable consulting fees (the exception is the consulting agreement between Cryptobloc and Paddock Inc., which contemplates a consulting fee payment of $15,000/month).

d) For most of the private placements, there is evidence the Issuer paid the participating Purported Consultants substantial lump-sum consulting fees contemporaneously with the Issuer's receipt of the private placement proceeds. For example:

    i. According to Affinor's later financial disclosures, Affinor paid out $3,500,000 in consulting fees from the $3,996,667 in private placement proceeds it received on March 8, 2018, pursuant to 14 three-month consulting agreements it entered into on March 1, 2018.

    ii. According to Costin's review of Green Corp.'s banking records, Green Corp. received the $4,280,000 in private placement proceeds between April 12, 2018 and April 17, 2018, and paid $3,540,500 to the eleven Purported Consultants from April 16, 2018 to April 23, 2018.

    iii. Similarly, Beleave's first private placement closed on April 27, 2018, for $5 million in proceeds, and, according to Krasic, Beleave paid lump-sum consulting fees totalling $3,750,000 to the 12 participating Purported Consultants on April 25, 2018. Similarly, Beleave's second

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private placement closed on June 12, 2018, for $5 million in gross proceeds, and, according to Krasic, Beleave paid the 13 participating Purported Consultants lump-sum consulting fees totalling $3,750,000 on June 1, 2018.

iv. According to Marapharm's later financial disclosures, Marapharm paid $3,647,000 in aggregate consulting fees to the subscribers in its first private placement and $3,848,000 to certain subscribers to its second private placement—in both cases, "[i]n conjunction with the closing of the private placement".

v. According to Costin's review of Cryptobloc's banking records, the private placement proceeds of $4,500,000 were deposited between May 24, 2018 and June 5, 2018 and then, from May 24, 2018 to June 8, 2018, Cryptobloc paid funds totalling $3,909,500 to the participating Purported Consultants.

vi. According to BLOK's later financial disclosures, BLOK paid consulting fees totalling $4,107,500 in cash, in advance, concurrently with its private placement, which was for gross proceeds of $4,857,500.

vii. According to evidence given in the Leave Petition by Van Deventer, PreveCeutical paid consulting fees totalling $2,775,000 to the participating Purported Consultants, on June 26, 2018, from the $4 million in subscription proceeds PreveCeutical received from the subscribing Purported Consultants.

viii. In its settlement agreement with the Commission, Speakeasy agreed that, between July 24, 2018, the day Speakeasy announced the closing of its private placement, and August 2, 2018, Speakeasy returned $1,450,000 of the $3,000,000 in private placements proceeds to eight Purported Consultants.

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ix. According to Costin's review of New Point's banking information, between July 31, 2018 and August 16, 2018, the private placement proceeds of $4,647,500 were deposited into New Point's account and then, between July 31, 2018 and August 21, 2018, New Point paid a total of $3,972,500 to the participating Purported Consultants.

e) In addition to the admissions of fact from the Liu Commission Settlement Agreement that little or no consulting services were provided, there is similar additional evidence with respect to some of the specific private placements at issue. According to Costin, Green's CEO, Young, stated that "the consultants had definitely underperformed" and that the company had not received good value from the consultants. In Beleave's settlement agreement with the Commission, Beleave agreed that, for both of its private placements, the consultants provided no consulting services. According to Krasic, the facts Beleave agreed to in the settlement agreement are true, to the best of his knowledge. In BLOK's later financial disclosures, BLOK stated that it had been "unable to identify any significant services" provided by the consultants under the consulting agreements, other than the subscriptions to the private placement. Similarly, in financial disclosures released in 2019, PreveCeutical stated that its current management did not believe that value-for-money was provided by the consultants and did not anticipate that the consulting agreements would be fulfilled. And, in its settlement agreement with the Commission, Speakeasy agreed that no services were provided by the purported consultant group. Further, in its June 2020 decision partially extending the Temporary Order, the Commission stated that the further evidence before it indicated that "Liu, Lukor and another related company received $4.2 million in consulting fees" from eight Issuers "and provided minimal evidence that consulting services were provided" and, similarly, that Bridgemark and Jackson & Company Professional Corp. "received over $3.3 million in consulting fees" from eight issuers "and provided minimal evidence that consulting services were provided".

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f) Finally, as reviewed above, there is evidence that for most of the private placements (all but Kootenay, Affinor and PreveCeutical), most or all of the subscribing Purported Consultants sold most, and usually all, of the Issuer's shares shortly after the private placement, for an average price-per-share below the disclosed purchase price. In total, across all the private placements, 20 different subscribing Purported Consultants quickly sold shares acquired for a purported total cost of over $36.5 million for a loss of over $10.3 million.

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[159] In short, the evidentiary record establishes some basis in fact that overlapping groups of the same Purported Consultants employed the same actions at each private placement. Most of the Purported Consultants participated in multiple private placements and, for most of those private placements, there is some evidence that the Purported Consultants, together with each Issuer, followed the same pattern of conduct. This "striking similarity" in the participants and the steps taken at each private placement provides a strong basis in fact that the proposed issues on conspiracy meet the requirements for certification as common issues, because trying the conspiracy issues on a common basis, across the Issuers, will avoid substantial duplication of fact-finding and legal analysis. If the present action were, as some of the defendants appear to be advocating, divided into separate actions for each Issuer, the court in each of those actions would have to ascertain whether many of the same Purported Consultants engaged in the same alleged conduct and determine, in each proceeding, whether that conduct constituted a conspiracy at law. Each of those separate proceedings would be considering essentially the same body of evidence, because evidence of how the same Purported Consultants engaged in the same alleged conduct at other private placements would be highly relevant to each proceeding.

[160] The reasoning of the Court of Appeal in the *Leave Appeal* further demonstrates the commonality of the factual and legal issues across the private placements at each Issuer. The question in the *Leave Appeal* was whether, for the Affinor private placement, the evidence was sufficient to establish a reasonable

possibility the secondary market misrepresentation claims against Affinor would succeed at trial. The Court of Appeal determined that the evidence from Krasic, regarding the Beleave private placements, was relevant to assessing the merits of the claims in relation to the Affinor private placement, because three of the four Purported Consultants who subscribed to the Affinor private placement also participated in the Beleave private placement: "While the Krasic Affidavit was evidence of the conduct of a third-party issuer, these three subscribers to the Beleave private placement were not third parties to Affinor's part in the alleged conspiracy": *Leave Appeal* at para. 101.

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[161] Similarly, the Court of Appeal concluded that there was "substantial merit" to the argument that evidence of the Affinor subscribers' participation in other private placements, for which there was evidence that entry into the consulting agreements was a condition for the private placement, supported the inference that the same condition was employed in the Affinor private placement: *Leave Appeal* at paras. 130–136.

[162] In conclusion, there is basis in fact that determining the proposed issues on conspiracy as common issues, across the Issuers, will substantially advance each class member's claim and avoid substantial duplication of fact-finding and legal analysis.

**Disgorgement common issues**

[163] The next set of proposed common issues, issues five to seven, addresses the availability of the remedy of disgorgement:

> 5. Did the Purported Consultants, or any of them, accrue a benefit from the sale of some or all of the shares they acquired in the Issuers pursuant to the unlawful conspiracy, either [as] a subscriber in one of the Private Placements or as a recipient of shares transferred to them from such a subscriber?

6. If the answer to (5) is yes, are the Class members who acquired securities in those Issuers entitled to disgorgement of those accrued benefits, as a remedy for the unlawful conspiracy?

7. If the answer to (6) is yes, what is the amount of the accrued benefit which each of the Purported Consultants must disgorge to the Class members?

[164] Each of these issues focuses on the conduct of the Purported Consultants and the legal significance of that conduct. They can be determined without the need for evidence from individual class members, and their resolution will substantially advance the claims of all class members.

[165] There is a basis in fact, in the evidence, that the question of whether the Purported Consultants accrued a benefit can be determined as a common issue. For his investigation of the scheme for the Commission, Costin obtained electronic trading records which indicate that nearly all of the subscribing Purported Consultants sold most or all of the Issuer's shares shortly after each private placement.

[166] Several of the subscribing Purported Consultants have also confirmed their sale of the Issuer's shares.

[167] Further, as described above, there is evidence that numerous subscribing Purported Consultants accrued a considerable cumulative benefit over numerous private placements, such that the disgorgement issues can, and should, be resolved on a common basis across the Issuers. Moreover, based upon the available evidence, in particular the admissions in the Liu Commission Settlement Agreement, it is probable that the benefits accrued from the share sales for one private placement were used to finance the repetition of the scheme at other private placements.

[168] The disgorgement issues meet the requirements for certification as common issues.

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**Personal liability common issues**

[169] The next set of common issues, issues eight and nine, addresses the alleged personal liability of the Purported Consultants Officers and Directors and the Issuer Officers and Directors:

> 8. Are the Purported Consultants Officers and Directors, or any of them, personally liable for the acts carried out in furtherance of the unlawful conspiracy by the Purported Consultant for which they acted as an officer or director, or both?
>
> 9. Are the Issuer Officers and Directors, or any of them, personally liable for the acts carried out in furtherance of the unlawful conspiracy by the Defendant Issuer for which they acted as an officer or director, or both?

[170] These proposed issues address only the conduct of the defendant Purported Consultants Officers and Directors and the Issuer Officers and Directors and the legal significance of that conduct. They can be resolved without reference to evidence from individual class members. The resolution of these questions will substantially advance each class member's claim.

[171] The evidence establishes a basis in fact that these questions can be resolved on a common basis. As reviewed above, each of the Purported Consultants Officers and Directors and each of the Issuer Officers and Directors directed or managed a Purported Consultant or Issuer which took steps in furtherance of the conspiracy, and most of those Purported Consultants participated in multiple private placements. Notably, the evidence also demonstrates some overlap in the participation of certain Purported Consultants Officers and Directors, and certain Issuer Officers and Directors, across the private placements.

[172] There is basis in fact that the proposed common issues on personal liability can be determined on a common basis and that resolving these questions in a single proceeding, across the Issuers, will avoid a substantial duplication of fact-finding and legal analysis.

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**Secondary market liability common issues**

[173] The next set of proposed common issues, issues ten to 24, address the statutory claims for misrepresentation on the secondary market.

[174] Each of these issues addresses the conduct and knowledge of the Defendant Issuers and Issuer Officers and Directors and the legal significance of that conduct in relation to the statutory cause of action. Common issues 22, 23 and 24 address the calculation of damages, the application of the statutory limit on damages and the proportionate liability of any or all of the Defendant Issuers or Issuer Officers and Directors for those damages. These issues can be determined on a common basis because the *Securities Act* prescribes a fixed formula for the calculation of damages which does not depend on any subjective evidence from class members regarding, for example, reliance on the misrepresentations: *Securities Act*, ss. 140.5–140.7.

[175] There is basis in fact in the evidentiary record that these issues can be resolved on a common basis, across the Defendant Issuers. As reviewed above, there is evidence that most Purported Consultants participated in multiple private placements, in addition to evidence of striking similarity in many of the actions taken across the private placements. The Court of Appeal's reasoning in the *Leave Appeal* strongly underscores that, for the determination of whether the alleged misrepresentations occurred in relation to one Defendant Issuer's private placement, evidence that many or all of the same participants engaged in the same alleged conduct at other private placements will be highly relevant. For example, the Court of Appeal concluded that the evidence of Krasic, regarding the Beleave private placements, was relevant to the determination of whether there was a reasonable possibility the alleged misrepresentations occurred in the Affinor private placement, because most of the same Purported Consultants participated in both private placements. Justice Willcock explained:

> [104] I would not accede to the argument of the Affinor Respondents that the case management judge correctly determined that the Krasic Affidavit was not probative because it did not speak to the statutory misrepresentations described in the notice of civil claim. The alleged conspiracy was pleaded and while, as the judge found, there was no allegation in the secondary market

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> claims that there were misrepresentations with respect to the legitimacy of the consulting contracts, evidence of a scheme to defraud investors is still some evidence that there was a misrepresentation as to price or the proceeds of the placement. It is also, indirectly, evidence of the materiality of the representations in the impugned press releases and Form 9s, demonstrating an intent to release documents or public oral statements that would affect the market and therefore be material. In short, evidence of the existence of a scheme or plan to manipulate the market was not irrelevant to the allegation that the Issuers misrepresented the price paid for the shares or the proceeds of the private placements.
>
> [Emphasis added.]

[176] The proposed common issues addressing the statutory cause of action for secondary market misrepresentation meet the requirements for certification as common issues.

**Fraudulent or negligent misrepresentation common issues**

[177] The last set of proposed common issues, issues 25 to 30, addresses the common law misrepresentation claims for fraudulent or negligent misrepresentation.

[178] The proposed issues only address the existence of the misrepresentations, the Defendant Issuers' or Issuer Officers and Directors' knowledge of the falsity of the misrepresentations and the existence and breach of the duty of care, which is relevant for the negligent misrepresentation claims. Because they are individual determinations, the common issues do not address the reliance or damages components of the common law misrepresentation claims.

[179] Similar common issues in relation to negligent misrepresentation have been certified as common issues in other class proceedings where leave to bring a secondary market claim has also been granted. For example, in *Green ONCA*, the plaintiffs obtained leave to pursue their secondary market claims, and, in relation to the common law misrepresentation claims, the Court of Appeal for Ontario found, at para. 99, that "certifying issues other than reliance that are common to the negligent misrepresentation claims would significantly advance those claims." Justice Feldman noted, for example, that investors who are entitled to a recovery beyond the limits set for the statutory claim could use the findings on the negligent misrepresentation

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common issues to advance their individual claims. As a result, the Court of Appeal for Ontario certified common issues on negligent misrepresentation that related to the conduct and intent of the issuer, noting that the trial judge could order individual trials to determine the issues of reliance and damages, if necessary: *Green ONCA* at para. 104. The Supreme Court of Canada affirmed the Court of Appeal's certification of the five issues on negligent misrepresentation: *Green SCC* at paras. 124–128; see also *Dugal* at para. 93; *LBP Holdings Ltd. v. Hycroft Gold Corporation,* 2020 ONSC 59 at paras. 31–32 [*Hycroft Gold*].

[180] I agree that certifying common issues on negligent misrepresentation is appropriate when, as here, it achieves judicial economy and advances the litigation, even if individual reliance may remain as an outstanding issue. In *Navistar*, for example, the Court of Appeal concluded that certain common issues relating to negligent misrepresentation regarding the defendant's conduct and intent in making the representations were appropriate for certification because "they can be determined on a class-wide basis without requiring individual evidence from class members. In addition, the resolution of these issues will move the litigation forward": at para. 133. See also *Navistar* at paras. 146–149; *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at paras. 87–88, aff'd 2013 BCCA 21.

[181] The evidence provides basis in fact that the proposed common issues on fraudulent and negligent misrepresentation can be resolved as common issues, across the Defendant Issuers. Again, as discussed above, the evidence demonstrates a substantial commonality in both the participants and the substantive actions taken by those participants across the private placements at each Issuer, such that the determination of whether the conduct underlying the alleged misrepresentations occurred at one Defendant Issuer will, necessarily, require consideration of evidence indicating that all or some of the same participants engaged in the same alleged conduct in other private placements. The Court of Appeal's reasoning in the *Leave Appeal* underscores this conclusion, in that evidence regarding the same participants engaging in the same conduct in other private placements was determined to be relevant to assessing the likelihood the

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same conduct occurred in relation to the Affinor private placement: *Leave Appeal* at paras. 101–104 and 130–136.

[182] I find that the proposed common issues on common law misrepresentation meet the requirements for certification as common issues.

**Preferable procedure**

[183] Next, the court must be satisfied that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues: *CPA*, s. 4(1)(d).

[184] Section 4(2) of the *CPA* provides a non-exhaustive list of considerations that must inform the preferability analysis.

[185] Two questions dominate the preferability analysis, namely "(a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution": *Finkel* at para. 25. The overarching concern for the preferability analysis is "the three principle goals of class actions, namely judicial economy, behaviour modification and access to justice": *AIC Limited v. Fischer*, 2013 SCC 69 at para. 22, citing *Hollick* at para. 27.

[186] In the present case, there can be no dispute that a class proceeding is the most, if not the only, effective procedure for resolving the statutory claims for secondary market misrepresentation, for which the plaintiffs have obtained leave to pursue against the Defendant Issuers and the Issuer Officers and Directors: *Green ONSC* at para. 611; *Green SCC* at para. 182.

[187] The remainder of the common issues arise from the same factual narrative, engage very similar issues of fact and law as the secondary market misrepresentation claims and involve the same participants. When there is substantial overlap between different legal claims advanced in the same proceeding, and each claim raises common issues, a decision to certify one of the claims weighs heavily in favour of certifying the other: *Fantl v. Transamerica Life Canada*, 2016

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ONCA 633 at para. 39, citing *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236, 2000 CanLII 16886 (C.A.) at paras. 42–47, leave to appeal to SCC ref'd, 37258 (23 February 2017). As the Court of Appeal explained in *Trotman* at para. 61, "one cannot ignore the fact that a class proceeding is otherwise going forward when assessing the relative judicial economy of resolving the additional [common] issues via that class proceeding." Also see the reasoning in *Hycroft Gold* at paras. 19 and 22. The same reasoning applies in the present case.

[188] I note that the Securities Commission has recently held in *Re PreveCeutical Medical Inc. and Stephen Deventer*, 2024 BCSECCOM 19 that findings of materiality are determined with respect to the circumstances of the specific Issuer, a conclusion with which I agree. However, I do not see such an exercise as being a significant obstacle for proceeding by way of a class action. While resolving the materiality question may require the consideration of some evidence that is unique to each Issuer, a considerable portion of the relevant evidence, including on the materiality question itself, will concern the common context of the alleged scheme within which the alleged misrepresentations were made.

[189] The only efficient and fair procedure for resolving the secondary market claims is a class proceeding and, given that the remaining common issues arise from the exact same set of facts and engage very similar questions of fact and law, judicial economy weighs heavily in favour of resolving those issues as part of the of the same class proceeding.

***Do the common issues predominate?***

[190] If the common issues on the statutory claims are resolved in favour of some or all of the class members, those claims will be essentially complete, apart from the individual determinations of each investor's individual damages (if any), in accordance with the formulas set out in the *Securities Act*. Those individual determinations cannot be regarded as predominant, over the liability issues, or class actions would never be feasible for the statutory cause of action. For the common law claims, success on the common issues would considerably advance the action,

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even if individual issues may remain in relation to reliance or damages: *Navistar* at paras. 147–149; *Fantl* at paras. 40–44.

[191] The defendants who have responded to the certification application primarily assert that the common issues do not predominate because, in their view, the action is not properly brought as a single claim, but rather must be divided into separate actions for each Issuer.

[192] However, there is ample basis in fact, in the evidentiary record, of substantial commonality across the private placements, both in the participants and in the actions taken by those participants. There is a strong basis in fact which indicates that trying the proposed claims in a single proceeding, rather than in separate proceedings for each Issuer, would achieve considerable judicial economy by avoiding a substantial repetition in fact-finding and legal analysis: *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583, aff'd 2016 ONCA 250, leave to appeal to SCC ref'd, 37050 (10 November 2016).

[193] The plaintiffs allege a single overarching conspiracy, and there is a significant and substantial overlap in the participation of the Purported Consultants at each private placement and evidence of strikingly similar conduct by the Purported Consultants at those private placements.

[194] It is this commonality which also strongly distinguishes the present claim from the authorities relied upon by the responding defendants. For example, in *MacKinnon v. National Money Mart Company et al*, 2005 BCSC 271, the plaintiffs sought to bring a class action against 18 different payday lending businesses, alleging that each business charged interest at a criminal rate. This Court refused to certify the claim on the grounds that there was insufficient commonality in the claims across the proposed defendants. The defendants operated separate businesses, with different contracts and business practices, such that, in Justice Brown's words, "the fact finding would not be common to the class" and the potential findings of fact and legal analysis for one lender would have little or no application to the other lenders and other borrowers: at para. 26. Here, there is considerable basis in fact

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indicating that the findings of fact and legal analysis in relation to the private placement at one Issuer will substantially advance the claims of each class member, and that trying the claims in a single proceeding is the most fair and efficient option.

***No interest in individual control***

[195] There is no evidence that any prospective class member has an interest in individually controlling the prosecution of his or her own action.

***The claims are not the subject of other proceedings***

[196] The plaintiffs submit they are not aware of any other proceedings advancing the same or similar claims on behalf of the class members. The subject matter of the action has been, and continues to be, the subject of several proceedings before the Commission, as well as a number of hearings before the Investment Industry Regulatory Organization of Canada. However, there is no reason that these regulatory proceedings, which do not seek any compensation for investors, should preclude the certification of the present action.

***Alternatives are less practical and less efficient***

[197] There are no more practical or efficient procedures for resolving these claims. Individual actions are not a practical option because most class members' individual claims are for a modest amount. The plaintiff Michael Tietz, for example, only purchased $4,000 worth of New Point shares, which he sold on January 10, 2019, for $1,243. A loss of this size is, plainly, not sufficient to justify retaining counsel to pursue an individual claim.

[198] As discussed above, separate proceedings divided by Issuer are also not a more efficient option because of the considerable overlap in the factual and legal issues that would have to be addressed at each of those separate claims.

***A class proceeding will not create greater difficulty***

[199] Resolving the class members' claims in a class proceeding will not create greater difficulties than those likely to be experienced if relief is sought through other

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means. Again, individual actions would clearly create more difficulty, and separating the action into different actions, for each Issuer, would require the court to repeatedly adjudicate many of the same factual and legal issues.

[200] The proposed class proceeding provides a fair and efficient procedure for advancing the class members' claims, and there is no other realistically available procedure for resolving the claims. Certification will advance the policy objectives of the *CPA* by promoting access to justice, judicial economy and behavioural modification.

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**Suitable representative plaintiff**

[201] Finally, certification as a class proceeding requires the presence of a suitable representative plaintiff. Section 4(1)(e) of the *CPA* provides:

> (e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

[202] There are multiple proposed representative plaintiffs in the present case. Three proposed representatives reside in British Columbia. The other six reside outside of the province. Pursuant to s. 4(1)(e), there need only be one qualified representative plaintiff for the court to grant certification. In this case, additional plaintiffs have been added to meet the requirement that the claims for secondary market misrepresentation under the *Securities Act* against the Defendant Issuers can only be brought by a person who acquired shares in the Issuer.

[203] However, one plaintiff is sufficient to represent the overall class, particularly since in this case, the class members are united by the claims each of them have against all the defendants in respect of the alleged conspiracy. The *CPA* does not require all representative plaintiffs to be BC residents, nor does it prohibit non-

residents from serving as representative plaintiffs: *CPA*, s. 4.1; *Dominguez v. Northland Properties Corporation*, 2012 BCSC 539 at para. 12. There are several cases where non-residents have been appointed as representative plaintiffs alongside resident representative plaintiffs: *Cheung v. NHK Spring Co., Ltd*, 2022 BCSC 1738 at paras. 8–9, aff'd 2023 BCCA 230; *Olsen v. Behr Process Corporation*, 2003 BCSC 1252 at paras. 5, 30, 37–38; *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at paras. 36, 81, aff'd 2012 BCCA 260; and *Tucci v. Peoples Trust Co*., 2017 BCSC 1525 at paras. 5, 7–8, 276–277, 283, 285, rev'd in part on other grounds 2020 BCCA 246.

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[204] The Alberta Court of Appeal summarized the basic requirements for a representative plaintiff in *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 43, leave to appeal to SCC ref'd, 37229 (2 February 2017)—albeit with respect to Alberta's class proceedings legislation—as follows:

> … With respect, one is not required to be a lawyer or a sophisticated litigant to assume the role of representative plaintiff. The person must be willing and able to assume the role as delineated in the statute, and most importantly, must appreciate the role being played; to work to benefit the class as a whole and not to further her individual claim at the expense of the class. …

[205] Our Court of Appeal expressed in *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353, leave to appeal to SCC ref'd, 36668 (14 April 2016) that "[t]he representative plaintiff represents the class, but need not be representative *of* the class…. He or she need not have a claim typical of the class, or be the 'best' possible representative": at para. 75.

[206] In relation to conflicts, the analysis focuses entirely on the common issues, and whether the representative plaintiff has an interest in the common issues that conflicts with the interests of other class members, as Justice Gerow explained in *Fakhri et al v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717, aff'd 2004 BCCA 549:

> [75] The inquiry about whether the representative plaintiff adequately and appropriately represents class members and potential conflicts of interest is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common

> issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest.

[207] A conflict of interest does not arise merely because a representative plaintiff has a different interest in the common issues than other members of the class, such that, for example, there is a possibility the representative plaintiff could succeed on a common issue while other members of the class fail. A conflict only arises if success for the representative plaintiff means failure for other class members: "The possibility of a judgment that results in success for some but not all class members does not amount to a conflict that disentitles [the plaintiff] to act as the representative plaintiff": *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 66, see also paras. 60–68.

[208] The plaintiffs meet the requirements for appointment as representative plaintiffs:

a) They each purchased shares in one of the Issuers during the relevant Class Period and are not Excluded Persons, and they are therefore members of the class.

b) They are each prepared to devote the necessary time and effort toward representing the class. They have demonstrated their willingness and ability to vigorously prosecute the action on behalf of the class by, for example, retaining and instructing counsel and swearing multiple affidavits in support of both the applications for leave and for certification. Most of the plaintiffs have also submitted to cross-examination on their affidavits for the Leave Petition.

c) The Court has also found that each of the plaintiffs who obtained leave to bring their statutory claims is acting in good faith in bringing those claims: *Leave Decision* at paras. 100–102, 164–167, 203–205, 258–260, and 321–323;

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d) None of the plaintiffs is aware of any conflicts that would prevent him or her from acting as representative plaintiff, and none of the plaintiffs has an interest in the common issues that conflicts with the interests of other class members.

[209] It is possible that the court will ultimately find that the conspiracy was only implemented at some, but not all, of the private placements. In that case, some of the proposed representative plaintiffs and class members will succeed on the common issues, while other proposed representative plaintiffs and class members fail. No conflict of interest arises from this possibility. There would appear to be no risk that establishing the claim in relation to one or more of the private placements will come at the expense of the claims arising from the other private placements.

[210] Apart from the foreign exchange limitation for the statutory claim, there is an alignment of interests. That limitation does not create a conflict.

[211] Section 6 of the *CPA* addresses subclasses as follows:

> 6 (1) Despite section 4 (1), if a class includes a subclass whose members have claims 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 must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff 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 that is in conflict with the interests of other subclass members.

[212] Due to the commonality in the issues across the private placements, apart from the statutory claims, there is no need to appoint separate representative plaintiffs to represent separate groups of investors.

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[213] The representative plaintiffs for the statutory claims sub-class will be the proposed representative plaintiffs who purchased their shares on the CSE. They are all of the proposed representative plaintiffs except Robin Lee, who is a resident of Hawaii and purchased his shares by way of an exchange in the United States of America.

[214] Finally, the plaintiffs have put forward a workable litigation plan and reasonable notice plan.

[215] The Court of Appeal recently explained, in *Godfrey v. Sony Corporation*, 2017 BCCA 302, aff'd 2019 SCC 42, that "[a]t the certification stage, the standard that a litigation plan must meet is not one of perfection": at para. 255. Justice Savage quoted, at para. 253, the following passage from *Fakhri*:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[216] The notice plan and litigation plan proposed by the plaintiffs provide a practical and workable procedure for notifying the class and advancing the litigation:

a) Pursuant to the proposed Certification Notice Plan, attached as Schedule B to the application for certification, the notice of certification will be distributed and published by class counsel (i) posting it on the dedicated website for the action, (ii) directly sending it to any class member who has contacted class counsel or anyone who requests the notice, (iii) disseminating it once across Canada NewsWire, with distribution points in North American financial media where possible and (iv) sending it to the people who are listed as non-objecting beneficial owners of the Defendant Issuer's shares ("the NOBO List") for each of the Defendant Issuer's 2018 and 2019 AGMs,

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within 30 days of the receipt by class counsel of those NOBO Lists from the Issuers, who are to provide the NOBO Lists within 21 days of the order authorising the notice.

b) Class members will have 120 days following the certification order to opt out of the proceedings by providing written notice to class counsel by mail or e-mail.

c) The proposed Litigation Plan, sets out, among other things, a plan for completing document discovery and examinations for discovery, following certification, and exchanging expert reports. The plan proposes that the common issues trial be held between 18 and 24 months after the certification decision. In relation to any individual issues remaining after certification, the plan proposes that following judgment on the common issues, the parties convene for argument under ss. 27 and 28 of the *CPA* to determine the appropriate procedure. At this time the plaintiffs submit they intend to propose the court appoint an assessor to resolve any individual issues of liability that remain and to assess damages for each claiming class member. This has been a successful process approved and executed pursuant to the settlement agreement with Beleave approved by the Court on April 8, 2022.

[217] The plan sets out a workable procedure, with timelines, for advancing the proceeding. The procedure for resolving individual issues will need to be adapted to reflect the type and amount of individual issues that actually remain, following the common issues trial. However, it is understood and expected that litigation plans are something of a “work in progress” and, as the Court of Appeal emphasized in *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149, leave to appeal to SCC ref’d, 38738 (14 November 2019), the purpose of the litigation plan “is not to resolve all procedural issues before certification has taken place”: at para. 57.

[218] I find that the plaintiffs are suitable representative plaintiffs with a workable litigation plan, and as a result, the final requirement for certification is met.

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**Conclusion**

[219] This action is certified as a class proceeding.

[220] The class definition as set out in para. 1 above is approved with the following amendments:

a) it incorporates the definition of Excluded Persons set out in paras. 118 and 119 above; and

b) it further excludes persons who sold, prior to November 26, 2018, all of the Issuers' securities they had purchased during the applicable Class Period.

[221] Two sub-classes are approved, defined as:

a) The "CSE Sub-Class": All persons as set out in para. 1 above who purchased their shares through a Canadian stock exchange; and

b) The "Foreign Sub-Class": All persons as set out in para. 1 above who purchased their shares through a non-Canadian stock exchange.

[222] The common issues 1–30 are approved for the CSE Sub-Class.

[223] The common issues 1–9 and 25–30 are approved for the Foreign Sub-Class.

[224] All representative plaintiffs are approved for the Foreign Sub-Class, and all, excluding Mr. Lee, are also approved for the CSE Sub-Class.

[225] The litigation plan is approved. Class members will have 120 days following this certification order to opt out of the proceedings by providing written notice to class counsel by mail or e-mail.

"Wilkinson J."

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# Tab 21

**CITATION:** Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc., 2014 ONSC 1057
**COURT FILE NO.:** 11-CV-424069CP
**DATE:** 20140219

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**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **BETWEEN:** | |
| TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION TRUST FUND<br>Plaintiff | *Kirk M. Baert*, *Celeste Poltak*, and *Jonathan Bida*, for the Plaintiffs |
| **– and –** | |
| CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI<br>Defendants | *Nigel Campbell*, *Andrea Laing*, *Ryan A. Morris*, and *Will Morrison*, for the Defendants |
| **AND BETWEEN:** | |
| NABIL BERZI<br>Plaintiff | *Kirk M. Baert*, *Celeste Poltak*, and *Jonathan Bida*, for the Plaintiffs |
| **– and –** | |
| CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI<br>Defendants | *Nigel Campbell*, *Andrea Laing*, *Ryan A. Morris*, and *Will Morrison*, for the Defendants |
| **AND BETWEEN:** | |
| HUACHENG XING<br>Plaintiff | *Kirk M. Baert*, *Celeste Poltak*, and *Jonathan Bida*, for the Plaintiffs |
| **– and –** | |
| CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI<br>Defendants | *Nigel Campbell*, *Andrea Laing*, *Ryan A. Morris*, and *Will Morrison*, for the Defendants |
| | **HEARD**: December 8-10, 2013 |

Proceeding under the *Class Proceedings Act, 1992*

**PERELL, J.**

## REASONS FOR DECISION

## A. INTRODUCTION AND OVERVIEW

[1] The Plaintiffs, the Trustees of The Millwright Regional Council of Ontario Pension Trust Fund, Nabil Berzi, and Huacheng Xing, bring this motion for: (a) certification of this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and (b) leave to proceed with statutory claims for misrepresentation and failure to make timely disclosure under the Ontario *Securities Act*, R.S.O. 1990, c. S.5.

[2] The Plaintiffs seek to act on behalf of those who purchased Celestica Inc. shares between January 27, 2005 and January 30, 2007. They seek to advance claims under Part XXIII.1 of the Ontario *Securities Act* and for negligent misrepresentation at common law.

[3] The Plaintiffs allege that between January 2005 to the end of January 2007, Celestica, its chief executive officer, Stephen W. Delaney, and its chief financial officer, Anthony P. Puppi, misrepresented the progress of a restructuring that would close plants and transfer much of Celestica's operations to its plants in lower-cost areas, including a plant in Monterrey, Mexico. The Plaintiffs also allege that the Defendants' announcements and financial statements misrepresented its inventory and its revenue.

[4] The Plaintiffs allege that the Defendants failed to disclose material information and misrepresented the time, cost, progress, and impact of the restructuring. The Plaintiffs describe the alleged misrepresentations generally in paragraph 5 of their factum as follows:

> 5. Throughout the Class Period, the Defendants repeatedly stated the restructuring would be completed in 2006 and would fall within a costs range of no more than $275 million. The Defendants also reassured investors that the Mexico facility was suitable for a large transfer of manufacturing. Near the end of the Class Period, on October 26, 2006, the Defendants stated the restructuring was in its final stages, would be completed by the end of 2006 and had only $15 million in restructuring costs remaining (bringing the total to $271 million). The Defendants' statements were incorrect and as such constituted misrepresentations under the *OSA*.

[5] Further, the Plaintiffs allege that during the Class Period, the Defendants wrongly treated obsolete inventory as current inventory, recorded revenue for sales Celestica did not make, delayed recording new inventory until after reporting periods, and physically removed inventory from Celestica's facilities so it could represent lower inventory levels. Further still, the Plaintiffs allege that Celestica's financial statements were not compliant with Canadian Generally Accepted Accounting Principles ("GAAP").

[6] In resisting the Plaintiffs' motion for leave under Part XXIII of the Ontario *Securities Act*, the Defendants deny that the Plaintiffs have produced any evidence of any misrepresentations. In this regard, the Defendants submit that a revision of an estimate does not make an earlier estimate a misrepresentation.

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[7] Further, the Defendants submit that that in the absence of a restatement, an acknowledgement, a criminal or regulatory finding, or a qualified audit report, the Plaintiffs must adduce some evidence to show that they have a reasonable prospect of successfully demonstrating at trial that the Defendants misled the market by publishing an untrue statement of material fact or by failing to disclose a material change on a timely basis. Once again, the Defendants submit that the Plaintiffs have not produced the evidence to justify leave being granted.

[8] Further still, the Defendants submit that there is no evidence that the market was misled. They submit that the public disclosure record shows that the news that the 2005 restructuring would take longer and cost marginally more than was initially estimated was communicated to the market well in advance of January 30, 2007, the date when the Plaintiffs allege that misrepresentations about the 2005 restructuring were corrected.

[9] The Defendants submit, in any event, that the common law negligence should not be certified because, among other things, it does not satisfy the preferable procedure criterion.

[10] While the Defendants tendered evidence for the certification motion, they did not for the leave motion, and thus it should be noted that the Defendants' defence to the leave motion under the Ontario *Securities Act* is that the Plaintiffs' did not meet the evidentiary burden of the test for leave. In this regard, the Defendants open their factum with a quote from Justice Lax's judgment in *Ainslie v. CV Technologies Inc*. (2008), 93 O.R. (3d) 200 at para. 15 (S.C.J.), where she stated:

> 15. No onus is placed upon proposed defendants by s. 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond. Section 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a 'gatekeeper mechanism'.

[11] The test for leave under the Ontario *Securities Act* is low, and the associated evidentiary burden is also low. In my opinion, the Plaintiffs have met the test and the evidentiary burden for some but not all of their misrepresentation claims.

[12] In my opinion, for the reasons that follow, for the Plaintiffs' statutory claims, the Plaintiffs' motion should succeed with respect to the alleged misrepresentations about Celestica's restructuring and the motion should fail with respect to the alleged misrepresentations about Celestica's inventory and reporting of revenue and with respect to non-compliance with GAAP.

[13] In my opinion, for the reasons that follow, the Plaintiffs' common law negligent misrepresentation claim should not be certified.

## B. EVIDENTIARY BACKGROUND

[14] The Plaintiffs supported their motion for certification under the *Class Proceedings Act, 1992* and their motion for leave under the Ontario *Securities Act* with the following evidence:

- the affidavit of Ian McIsaac, the business representative, executive secretary, and union trustee of the Millwrights;

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- the affidavit of Michael Mazzuca, a lawyer for the Plaintiffs' lawyer of record, who provided copies of the publically available disclosure documents;
- the affidavit of Ken Froese, the senior Managing Director and a chartered accountant with Froese Forensic Partners Ltd., who was retained to prepare an expert's report regarding financial reporting and accounting compliance with respect to Celestica's Restructuring between 2005 to 2007;
- the affidavit of Frank C. Torchio, the President of Forensic Economics Inc., who was retained to provide an expert's opinion regarding the efficiency of the markets of Celestica stock and to provide a preliminary estimate of potential aggregate damages;
- the affidavit of David Weir, the President of NPT RicePoint Class Actions Services Inc. to outline the manner in which notice of certification would be distributed;
- answers to written interrogatories from Foysten, Gordon & Payne, the Millwrights' investment adviser and manager;
- the cross-examination of Mr. Berzi; and
- the cross-examination of Mr. Xing.

[15] Messrs. McIsaac, Mazzuca, Froese, and Torchio were cross-examined.

[16] The Defendants opposed the motion for certification with the following evidence:

- the affidavit of Will Morrison, an associate lawyer of their lawyer of record, who provided copies of the documents referred to in the Plaintiffs' Amended Fresh as Amended Statement of Claim; and
- the affidavit of Robert Patton, a senior consultant at NERA Economic Consulting, who was retained to address Mr. Torchio's evidence about an aggregate damages assessment.

## C. PROCEDURAL BACKGROUND

[17] On March 2, 2007, which is 31 days after the date that the Defendants are alleged to have corrected their misrepresentations, the Millwrights commenced a class action against the Defendants in the United States.

[18] In Canada, on July 30, 2007, Mr. Xing brought a proposed class action against the Defendants, by Notice of Action issued in London, Ontario (Court File No. 54938CP). He filed a Statement of Claim on August 20, 2007.

[19] On August 27, 2008, Mr. Berzi brought a proposed class action by Statement of Claim issued in Toronto, Ontario (Court File No. 08-CV-361468-CP).

[20] On April 8, 2011, the Millwrights brought a proposed class action by Statement of Claim issued in Toronto (Court File No. 11-CV-424069CP).

[21] From July 2007 to April 2011, very little was done to advance the Canadian proposed class actions.

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[22] In 2012, as a result of the Court of Appeal's decision in in *Sharma v. Timminco Limited*, 2012 ONCA 107, reversing 2011 ONSC 8024, leave to appeal to the S.C.C. refused, [2012] S.C.C.A. No. 157, the Defendants moved to have these various actions struck out as statute-barred.

[23] More precisely, on February 16, 2012, the Court of Appeal released its reasons in *Sharma v. Timminco Limited*, where the Court held that s. 28 of the *Class Proceedings Act, 1992*, which normally suspends the running of a limitation period, did not apply to a claim under Part XXIII.1 of the Ontario *Securities Act* until leave had been granted to assert an action.

[24] Until the decision in *Timminco*, the parties to the case at bar were not aware that the running of the limitation period was not suspended by the *Class Proceedings Act, 1992* pending a leave motion for a Part XXIII.1 claim under the Ontario *Securities Act*.

[25] The *Timminco* decision animated the parties to action, and on February 24, 2012, the Millwrights revved up the Ontario action, and they delivered notices of motion to certify their Ontario action as a class proceeding, and to obtain leave under s. 138.8 of the Ontario *Securities Act* or under the analogous provisions in other provinces, and in Ontario, on April 13, 2012, I ordered Mr. Xing's, Mr. Berzi's, and the Millwrights' actions be consolidated without prejudice to the Defendants' limitation period arguments.

[26] On May 14, 2012, the Plaintiffs delivered a Fresh as Amended Statement of Claim.

[27] Around June 22, 2012, the Defendants delivered their Statement of Defence.

[28] Around July 3, 2012, the Plaintiffs delivered their Reply.

[29] In October 2012, relying on a limitation period defence, the Defendants brought a motion to dismiss the Plaintiffs' actions under the Ontario *Securities Act*.

[30] By order dated October 15, 2012, in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083, I dismissed the motion holding that the court had the jurisdiction to apply the special circumstances doctrine and that this jurisdiction could make the Plaintiffs' actions timely if leave was granted under the Ontario *Securities Act*.

[31] I also granted the Plaintiffs leave to amend their Statement of Claim to plead reliance as an element of their common law negligent misrepresentation claim, and I decided that the Plaintiffs had satisfied the cause of action criterion for certification.

[32] The Defendants appealed my October 2012 decision to the Court of Appeal. Meanwhile, the action continued for the balance of the certification motion and for the motion for leave under the Ontario *Securities Act*.

[33] The Defendants' appeal of my October 2012 decision was argued in the Court of Appeal in May 2013, along with the appeals in two other class actions where there was an issue about whether an Ontario *Securities Act* claim was statute-barred as untimely. The Court of Appeal reserved judgment.

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[34] While the Court of Appeal's decision was still under reserve, the certification and leave motion in the case at bar went forward. As part of seeking certification and leave, the Plaintiffs proposed a Second Fresh as Amended Statement of Claim that is similar to the October 2012 pleading but that addresses the reliance issue of the common law negligence claim in paragraphs 125 to 127 as follows:

> 125. The plaintiffs and Class Members relied on these misrepresentations to their detriment by the act of purchasing or acquiring Celestica's shares. They also relied on the defendants' obligation to make timely disclosure of all material facts, to comply with securities law and to prepare quarterly and annual reports in accordance with Generally Accepted Accounting Principles ["GAAP"]. The defendants flagrantly violated these obligations.
>
> 126. The Trustees of the Millwright Regional Council of Ontario Pension Trust Fund retained the services of professional investment managers, Foyston Gordon & Payne Inc. ("FGP") for the purposes of providing professional investment services, including, but not limited to, purchasing, acquiring and managing investments on their behalf. FGP invested in Celestica shares at the market price in reliance upon the defendants' obligation to make timely disclosure of all material facts, to comply with securities law and to prepare quarterly and annual reports in accordance with Generally Accepted Accounting Principles ["GAAP"], which obligations the defendants violated. As a result of the Trustees' reliance on the market price for Celestica shares and the defendants' misrepresentations, the Trustees were therefore relying upon the misrepresentations set out above, to their detriment, resulting in damages to the Trustees and the plaintiffs as particularized below.
>
> 127. The Trustees' agent, FGP, reviewed Celestica's public disclosure and earning calls and relied on the defendants' Class Period misrepresentations. FGP considered the costs range and timing for the restructuring that the defendants had represented. Based on the fact that management had provided a range of potential costs for the restructuring, FGP considered $275 million to be a maximum expectation. FGP invested in Celestica securities with the understanding that $275 million was a firm cap. FGP expected that any material increase in restructuring costs would be disclosed by management in a timely manner. FGP also relied on the defendants' representation regarding the timing of the restructuring. On December 23, 2005, FGP improved its investment ratings for Celestica. At the time, FGP believed the restructuring would come to a close without any need for further restructuring. FGP believed that the restructuring would be completed on time and within stated dollar amounts. By October 27, 2006, FGP believed that the restructuring was largely done. FGP maintained their belief in the cost and timing disclosed by the defendants at the time of purchasing Celestica shares for the Trustees during the Class Period.

[35] The leave and certification motions were argued on December 8-10, 2013. I reserved judgment.

[36] On February 3, 2014, the Court of Appeal released its decision in the appeal of my October 2012 decision along with its judgments in the two companion appeals. See *Green v. CIBC*, 2014 ONCA 90.

[37] The Court of Appeal overturned its decision in *Sharma v. Timminco*, *supra*.

[38] The Court of Appeal dismissed the Defendants' Appeal of my October 2012 decision. The Court held that the Plaintiffs' action in the case at bar was timely, and that it was not necessary to rely on the special circumstances doctrine to save the Plaintiffs' action from being statute-barred.

[39] The Court of Appeal made some comments about the leave test under the Ontario *Securities Act*, of which I will have more to say later.

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## D. THE CORE OF THE PLAINTIFFS' ACTION: THE ALLEGED MISREPRESENTATIONS

[40] Before discussing the factual background and the Defendants' predominately evidence-based argument to resist leave under the Ontario *Securities Act* and certification under the *Class Proceedings Act, 1992*, it is necessary to emphasize that that the Plaintiffs allege several misrepresentations, each of which must be considered discretely.

[41] In their Second Fresh as Amended Statement of Claim, the Plaintiffs enumerate the alleged misrepresentations at paragraphs 112-118 as follows, with my emphasis added:

> *The Defendants' Misrepresentations*
>
> 112. The defendants made, authorized or acquiesced in the making of the following misrepresentations, all of which were false, inaccurate or misleading:
>
> (a) They stated Celestica's financial reporting complied with Generally Accepted Accounting Principles ["GAAP"], which it did not;
>
> (b) They recorded obsolete inventory as current inventory, falsely overstating the value of Celestica's inventory;
>
> (c) They failed to record charges to income (write down) relating to Celestica's excess and obsolete inventory (which there was little or no chance of selling), in accordance with Generally Accepted Accounting Principles ["GAAP"] and which ought to have reflected a loss in Celestica's earnings;
>
> (d) They falsely underreported Celestica's level of inventory by,
>
> (i) failing to record inventory;
>
> (ii) delaying the recording of new inventory until after quarter-end reporting periods so that it would not appear as part of the earlier quarter's financial disclosure;
>
> (iii) not recording inventory that Celestica owned, but which it had physically removed from its facilities;
>
> (e) They falsely recorded revenues Celestica never received, reflecting sales that it had not yet or would never make;
>
> (f) They delayed and manipulated the payment of expenses in order to show a falsely overstated picture of earnings;
>
> (g) They announced a comprehensive restructuring, which they claimed would be completed within a certain time and within a range of costs, when they knew or ought to have known, the restructuring would not be completed in the disclosed time or at that cost;
>
> (h) They falsely stated that Celestica's restructuring was proceeding according to plan, understating the time they knew or ought to have known it would take to complete and the costs involved;
>
> (i) they falsely stated that the restructuring would succeed and was succeeding when it was not objectively reasonable in light of the significant and known inventory issues at the Monterrey facility;

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(j) They falsely stated that the restructuring would provide $125 to $150 million in costs savings for Celestica;

(k) They failed to disclose the true restructuring costs;

(l) They falsely stated that the restructuring was not adversely or significantly affecting its customer relationships, and failed to report significant customer dissatisfaction and the loss of major production contracts with key customers such as Lucent, Cisco, Motorola and AMD.

113. The defendants knew or ought to have known that Celestica had excessive amounts of obsolete inventory and that it was not writing off obsolete inventory as it should have.

114. The defendants knew or ought to have known that inventory levels were distorted by failing to properly record inventory including new inventory and holding substantial inventory off site.

115. The defendants knew or ought to have known that Celestica was falsely recording revenues and that it was delaying the payment of expenses in order to inflate earnings.

116. The defendants knew or ought to have known that the restructuring was not proceeding according to the plan they had disclosed, that its costs were far in excess of those disclosed and that it would not be completed in the time repeatedly promised. From the beginning of the Class Period (in January 2005), the defendants knew the Monterrey facility was suffering from significant inventory and production problems. They knew or ought to have known that it was unsuitable as a focal point for a massive restructuring involving multiple facilities across North America. The defendants' representations with respect to the time it would take to complete restructuring activities, the costs involved and its successful implementation were not objectively reasonable in the circumstances.

117. Celestica's quarterly and annual reports, management discussion and analysis, press releases and other public statements created a materially misleading and distorted picture of Celestica's revenue, expenses, the nature of its inventory, its inventory levels, its inventory turnover ratio and the success of its restructuring. The defendants' manipulation of how Celestica's inventory was recorded allowed Celestica to show a better picture of Celestica's financial circumstances during the Class Period. Given the significance of inventory control to Celestica's business, this manipulation was materially misleading.

118. Further, the defendants' misrepresentations about its restructuring were material. Celestica's restructuring was critical to its future and its ability to retain customers and generate earnings.

## E. FACTUAL BACKGROUND

### 1. The Parties

[42] Celestica is an Ontario corporation that develops and manufactures electronics. Its shares trade on the Toronto Stock Exchange, and it is a reporting issuer.

[43] Stephen W. Delaney was Celestica's chief executive officer from January 2004 until his resignation and replacement on November 27, 2006. Anthony P. Puppi was the chief financial officer of Celestica from January 1994 until April 2007.

[44] Mr. Berzi purchased 4700 Celestica shares over the TSX between July 22, 2005 and August 17, 2006, and continued to hold 1000 of those shares as of January 31, 2007.

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[45] Mr. Berzi made his own investment decisions. In deciding to invest in Celestica, he relied on Yahoo online business news and pricing information. He did not review Celestica's annual or quarterly reports, financial statements or any other documents, and he did not review analyst reports. Mr. Berzi could not recall and had no records of what particular news or pricing information he reviewed, when he reviewed them relative to his purchases, or what he learned that affected his decisions to purchase Celestica shares.

[46] Mr. Xing purchased 1000 Celestica shares over the TSX on August 24, 2006 and continued to hold those shares as of January 31, 2007.

[47] Mr. Xing made his own investment decisions and with respect to Celestica, he reviewed its quarterly financial statements for revenue, margin and costs, and he accessed analyst reports from financial institutions. However, he could not recall which reports and how the reports affected his decisions to purchase Celestica shares.

[48] The Millwrights purchased 40,300 Celestica shares over the TSX between September 30, 2005 and November 28, 2006.

[49] In making investment decisions, the Millwrights relied on their advisors, Foyston, Gordon & Payne, who did review Celestica's disclosures, but also relied on other information, such as the portfolio manager's previous experience and knowledge, analyst reports of sell-side analysts dealing with Celestica and the industry generally, investment reports on Celestica's competitors, and discussions with Celestica management.

[50] Foyston, Gordon & Payne performed its own independent analysis of Celestica and continuously updated it throughout the class period, including using models and research reports by its own analyst, Mohammad Ahmad, who reviewed Celestica's financial statements and other public documents, company and industry reports by sell-side research analysts, and investment reports on Celestica's competitors. He also had discussions with Celestica management. Mr. Ahmad noted further restructuring as a material risk in any decision to purchase Celestica shares.

[51] The Defendants submit that in light of Mr. Ahmad's evidence, even if the Millwrights could establish that the Defendants made misrepresentations about the cost or duration of the 2005 restructuring neither the Millwrights nor their investment advisor relied on any such misrepresentations.

## 2. Public Disclosures and the Restructuring of Celestica

[52] On January 27, 2005 (the start of the Class Period), Celestica released its Q4 2004 results, and in a press release, it announced a restructuring plan that it expected to complete in 15 months at a cost in the range of $225- $275 million. The plan was to relocate some operations from high cost locations to a plant in lower cost Monterrey, Mexico. The same day, Mr. Delaney and Mr. Puppi described the restructuring plan in an earnings call to investors and securities analysts.

[53] The January 2005 press release included a safe harbour and fair disclosure statement with respect to forward-looking statements:

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> This news release contains forward-looking statements related to our future growth, trends in our industry and our financial and operational results and performance that are based on current expectations, forecasts and assumptions involving risks and uncertainties that could cause actual outcomes and results to differ materially. These risks and uncertainties include, but are not limited to: variability of operating results among periods; inability to retain or grow our business due to execution problems resulting from significant headcount reductions, plant closures and product transfer associated with major restructuring activities; the effects of price competition and other business and competitive factors generally affecting the EMS industry; the challenges of effectively managing our operations during uncertain economic conditions; our dependence on a limited number of customers; our dependence on industries affected by rapid technological change; the challenge of responding to lower-than-expected customer demand; our ability to successfully manage our international operations; component constraints; our ability to manage our restructuring and the shift of production to lower cost geographies.

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[54] Pausing here, as will appear below in the discussion portion of these Reasons, the Defendants submit that the announcement was of a new or discrete restructuring plan following previous rounds of restructuring.

[55] On March 7, 2005, there was a conference at Morgan Stanley, where Mr. Delaney stated that Celestica's restructuring would cost $225 to $275 million. At the conference, Mr. Delaney was asked: "What could go wrong after this restructuring where you think it would require even another additional round…?" Mr. Delaney responded: "What could go wrong? We could be 15% off, I guess."

[56] To foreshadow their argument, noted below, the Defendants rely on Mr. Delaney's comment that there could be further restructuring at further expense and with further passage of time as part of their argument that there were no misrepresentations.

[57] On March 21, 2005, Celestica released its 2004 Annual Report, which included a discussion of the restructuring. The Report indicated that the restructuring would take 15 months to complete and would involve charges in the range of $225 million to $275 million.

[58] The 2004 Annual Report included several cautions. It noted, among other things, that there were operating losses and significant restructuring charges that might reoccur in future periods. In the Report, Celestica indicated that there was the prospect that there would be a loss of customers, and the Report noted that restrictions on its ability to restructure quickly enough in some key manufacturing regions, such as Europe and the Americas, could affect the timing and effectiveness of restructuring efforts.

[59] The 2004 Annual Report includes an opinion from the Celestica's auditors, KPMG LLP that the statements presented fairly, in all material respects, the financial position of the Company as at December 31, 2003 and 2004, the results of its operations, and its cash flows for each of the years in the three-year period ended December 31, 2004 in accordance with GAAP.

[60] On April 21, 2005, in a press release, Celestica announced its Q1 2005 results and stated that there had been $31.9 million in restructuring charges for the quarter. The press release, the notes to the financial statements for Q1 2005, management's discussion and analysis ("MD&A"), and Messrs. Delaney and Puppi in an earnings call with investors and analysts stated that Celestica expected to incur restructuring charges in the range of $225 million to $275 to be recorded in 2005 and Q1 2006.

[61] Celestica's Q1 2005 financial statements detailed the results of Celestica's restructuring programs from each of 2001, 2002, 2003, and 2004, together with the results to date from the restructuring announced in January 2005. The MD&A stated that the recognition of the restructuring charges required management to make certain judgments and estimates regarding the nature, timing and amount associated with the plans. The MD&A stated that Celestica would continue to evaluate its operations and could propose future restructuring actions as a result of changes in the marketplace and its exit from less profitable operations.

[62] On July 21, 2005, in a press release, Celestica announced its Q2 2005 results. Celestica's July 21, 2005 press release detailed the results of Celestica's restructuring programs from each of 2001, 2002, 2003, and 2004, together with the results to date from the 2005 restructuring. The press release, the notes to the financial statements for Q2 2005, the MD&A, and Messrs. Delaney and Puppi in an earnings call with investors and analysts indicated that Celestica expected to incur restructuring charges in the range of $225 million to $275 million to be recorded in 2005 and Q1 2006.

[63] On October 20, 2005, in a press release, Celestica announced its Q3 results. Celestica's financial statements detailed the results of Celestica's restructuring programs from each of 2001, 2002, 2003, and 2004, together with the results to date from the 2005 restructuring. The press release, the notes to the financial statement, the MD&A, and Messrs. Delaney and Puppi in an earnings call with investors and analysts indicated that the restructuring would be completed in 2006 and the costs would be limited to between $225 to $275 million to be recorded throughout 2005 and 2006.

[64] It is to be noted that there was a change here because the charges were now to be taken throughout 2006 and not just Q1 2006.

[65] As of September 30, 2005, Celestica disclosed that it had recorded restructuring charges totaling $104.8 million. Celestica's MD&A stated that "the recognition of these [restructuring] charges requires management to make certain judgments and estimates regarding the nature, timing and amount associated with these plans."

[66] In an earnings call with investors and analysts on October 20, 2005, Mr. Delaney was asked whether "another round of restructuring is potentially in the cards for 2006," and he answered: "I don't really see any need to make any major adjustments beyond the restructuring plan that we have in place, although as [Mr. Puppi] said earlier we'll probably be to the high end of that range."

[67] On January 26, 2006, in a press release, Celestica announced its Q4 results. Celestica's financial statements detailed the results of Celestica's restructuring programs from each of 2001, 2002, 2003, and 2004, together with the results to date from the 2005 restructuring. The press release and the notes to the financial statements indicated that Celestica expected to complete the restructuring in 2006 with expected costs of between $225 to $275 million to be recorded throughout 2005 and 2006 with the majority of these to be employee termination costs.

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[68] In an earnings call with investors and analysts, Mr. Puppi stated that there was $160 million in restructuring charges for 2005 and that the balance of the $275 million restructuring costs would be incurred in 2006. He stated that three plants in the Americas were closed and the last three plants would close by the end of Q2 2006, only one of which was in the Americas. He said that the current restructuring program would be completed by the end of Q3 2006.

[69] In the earnings conference call on January 26, 2006, Messrs. Delaney and Puppi both discussed the difficulties that Celestica was experiencing at the Monterrey, Mexico facility in the fourth quarter of 2005. Mr. Puppi stated:

> Despite our revenue increases and some incremental benefits from our restructuring, our profitability was severely impacted as a result of higher than expected costs incurred in one of our America's plants. These additional costs were as a result of significant transfer activities, new program ramps, and changes in customer demand later in the quarter. These factors severely impacted our efficiency in labor and equipment, as well as causing premiums to be incurred to execute higher demand. Furthermore, we had to delay the completion of some of the restructuring to the first quarter in order to assist with capacity relief in the month of December.

[70] Pausing here, the Defendants submit that based on Messrs. Delaney's and Puppi's comments, it was known in the marketplace by January 2006 that the restructuring would take longer than initially anticipated, and that there were difficulties at the Monterrey facility due to the transfer activities associated with the restructuring.

[71] On March 14, 2006, at the Deutsche Bank Securities Technology Conference, Mr. Puppi acknowledged that the restructuring was causing a loss of some customers. With respect to the estimated restructuring charges, he said that Celestica was taking charges of close to $275 million.

[72] On March 21, 2006, Celestica filed its 2005 Annual Report, which Messrs. Delaney and Puppi certified as accurate. It reported a $46.8 million loss. The Annual Report stated that the focus for 2005 and into 2006 was to complete the restructuring by the end of 2006. The Annual Report stated that there were $160.1 million in restructuring charges for 2005 and stated that Celestica expected to incur restructuring charges in the range of $225 million to $275 million through 2006. In his "Letter to Shareholders," Mr. Delaney stated that Celestica had commenced a $275 million restructuring in 2005 that would be complete by the end of 2006.

[73] The 2005 Annual Report included several cautions. It noted, among other things, that: Celestica had had significant restructuring charges and losses for several years and might experience restructuring charges and losses in future periods; Celestica might propose future restructuring activities; the complexity of moving its operations could have adverse effects; there was a risk of not retaining customers; and restrictions on Celestica's ability to restructure quickly enough could delay the benefits of restructuring.

[74] The 2005 Annual Report includes an opinion from Celestica's auditors, KPMG LLP that the statements presented fairly, in all material respects, the financial position of the Company as at December 31, 2004 and 2005 and the results of its operations and its cash flows for each of the years in the three-year period ended December 31, 2005 in accordance with GAAP.

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[75] On April 27, 2006, Celestica announced its results for Q1 2006. Revenues and net earnings had decreased. The notes to the financial statements stated that Celestica expected to complete the restructuring by the end of 2006 with charges of approximately $250 to $275 million to be recorded in 2005 and 2006, with the majority of the charges to be employee termination costs. The MD&A in the Q1 2006 report disclosed $160 million in restructuring charges in 2005, $17 million in Q1 2006 and stated that Celestica expected to incur further charges of between $75 million and $100 million to complete the restructuring by the end of 2006. The MD&A indicated that management might propose future restructuring actions. In his meeting with investors and analysts, Mr. Delaney indicated that that Celestica was in the final phases of its very aggressive restructuring program. He attributed the poor financial results to, among other things, "substantial investments being made to support our new program launches and growth in our low-cost facilities" such as the Monterrey, Mexico facility.

[76] On July 27, 2006, Celestica announced its results for Q2 2006. The notes to the financial statements and the MD&A stated that Celestica expected to complete the major components of the restructuring actions by the end of 2006 with total restructuring charges of approximately $250 to $275 million to be recorded in 2005 and 2006, with the majority of these charges to be employee termination costs. The MD&A stated that the focus for 2006 was to complete the restructuring and that Celestica had completed the transfer to the Monterrey facility and that, despite some inefficiencies in the short-term, Celestica anticipated improved cost performance going forward. The MD&A reported restructuring costs at between $250 and $275 million and stated that $160.1 million was recorded in 2005 and $37.2 million in the first half of 2006. Further charges to complete the restructuring were expected to be between $50 million and $75 million. The MD&A indicated that management might propose future restructuring actions. In his meeting with investors and analysts Mr. Delaney stated that the restructuring was entering into its final phase and Celestica was confident of completion by year-end 2006.

[77] On October 26, 2006, Celestica released its Q3 2006 results. The notes to the financial statement stated that Celestica expected to complete the restructuring by year end 2006. The notes stated that the cost had been $256.9 million for the 2005 restructuring or $279.7 million if the cost from past restructurings were also included, with $15 million to come in restructuring costs for all the programs. The MD&A indicated that the restructuring would be completed by year end 2006. Mr. Delaney told investors and analysts that Celestica had largely completed the restructuring.

[78] In the earnings conference call on October 26, 2006, Mr. Delaney discussed operational issues at the Monterrey, Mexico facility. He also discussed inventory control issues and identified a $6 million inventory control problem that would be sorted out and stabilized in the next few quarters. He said that Celestica was "in containment mode to make sure that our customers don't suffer from any of this" because "certainly during the first half of the year, we had impacted customers."

[79] On November 27, 2006, Mr. Delaney resigned as CEO and was replaced by Craig H. Muhlhauser.

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[80] On December 12, 2006, Celestica issued a pre-announcement press release warning it would not be meeting the operational targets for the fourth quarter. It explained that lower than estimated revenues and earnings per share was due to recent demand reductions from several customers. It also explained that the lowered adjusted net earnings included a net charge of $0.08 to $0.12 per share resulting predominantly from an increase in inventory provisions at the Monterrey, Mexico facility.

[81] On January 30, 2007, Celestica released its Q4 2006 results. It reported a net loss of $150.6 million.

[82] Mr. Muhlhauser explained that decreased demand and the impact of the inventory provision taken in Mexico significantly impacted operating margins. Mr. Muhlhauser announced that the restructuring would not be complete until the end or 2007, the restructuring had cost $314 million and would cost an additional $20-40 million to complete, and the operation of the Monterrey Mexico facility had adversely impacted Celestica.

[83] Mr. Muhlhauser disclosed there would be an additional $60 to $80 million of restructuring charges, $40 million of which had been recorded in the fourth quarter, with the remaining charges to be incurred during 2007. He explained that $30 million of the $40 million in charges related to the "increased inventory provision" at the Monterrey facility.

[84] The Plaintiffs submit that there were $314 million in restructuring charges to the end of 2006, $57 million of which was recorded in Q4 2006, which was almost four times the Defendants' representation on October 26, 2006 that it would require only $15 million to complete the restructuring. In addition, with the additional $20 to $40 million in restructuring charges for 2007, the total for restructuring would be between $334 and $354 million.

[85] On January 31, 2007, in an an earnings conference call, Mr. Muhlhauser explained that the restructuring had not succeeded because Celestica's Monterrey facility could not absorb the massive influx of customers from other facilities and had resulted in a loss of customers.

[86] The Plaintiffs submit that these revelations by Celestica and Mr. Muhlhauser corrected the earlier misrepresentations and disclosed that: (a) Celestica had significantly understated the timing and cost of the restructuring; (b) the restructuring and its implementation had not succeeded as previously claimed; (c) the Monterrey facility did not have the capacity to accommodate the transfer of operations that the restructuring involved; and (d) Celestica was losing customers.

[87] However, the Defendants characterize the restructuring charges as a new round of restructuring to reduce overhead, downsize Celestica's workforce, and to disengage from unprofitable and non-strategic customers.

[88] The Defendants submit that Celestica's announcement was clear that the additional restructuring was not an extension of the 2005 Restructuring but was a new initiative. They submit that of the $178.1 million in restructuring charges recorded in 2006, $138.1 million was related to the 2005 Restructuring and $40 million was related to restructuring actions initiated in the fourth quarter of 2006.

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[89] The Plaintiffs plead that in response to Celestica's announcement of new information Celestica's shares fell 23%, from $7.73 on January 30, 2007 to $5.96 on January 31, 2007, and overall from October 26, 2006 to January 31, 2007, Celestica's share price dropped from $11.74 to $5.96, a nearly 50% drop, wiping out more than $1.3 billion in market capitalization. The Plaintiffs allege that these losses resulted from the Defendants' misrepresentations.

[90] The Plaintiffs claim damages of $300 million.

### 3. The Evidence of Frank C. Torchio

[91] The Plaintiffs retained an economist, Frank C. Torchio. He was asked to opine as to whether Celestica shares traded in an "efficient market" during the proposed class period, and to provide a preliminary estimate of the potential aggregate damages pursuant to section 138.5(1) of the Ontario *Securities Act*.

[92] Mr. Torchio proposed a mathematical model called a "multi-trader" model that uses algorithms and statistical analyses to approximate the number of shares purchased during the class period and held to the end of the class period. The Plaintiffs' model incorporates varying turnover rates for different types of investors, based on the idea that different types of investors purchase and sell shares at different rates.

[93] The Plaintiffs estimate damages for the class using the trading model and the prescribed formula in section 138.5 of the Ontario *Securities Act* for Part XXIII.1 claims at $433 million for shares purchased during the class period and held as of the close of trading at the end of the class period.

[94] The Defendants criticize Mr. Torchio's evidence because it does not isolate the effect of the alleged misrepresentations, if any, from the other information that was disseminated on January 30, 2007 and because it does not take into account the liability limits imposed by s. 138 (7) or the difficulties of proving causation for the common law negligent misrepresentation claim. The Defendants submit that Mr. Torchio's evidence of the misrepresentations causing a price change wants for any analysis of whether the alleged misrepresentations were material; i.e. of a nature that might influence market prices. Mr. Torchio, for instance, made no investigation of the views of equity analysts about the materiality of the alleged misrepresentations.

[95] The Defendants submit that the Plaintiffs are asking the Court to assume that the drop in the price of Celestica shares which occurred after January 30, 2007 was caused by a "corrective disclosure" without adducing any evidence to show a correspondence between the price decline on that date and the alleged misrepresentations. The Defendants submit that other information disclosed on the January 30, 2007 could account for a price drop including the Q4 2006 financial results, a drop in customer demand in the telecommunications industry, more restructuring, and the retirement of Mr. Puppi.

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## 4. Compliance with GAAP

[96] The Plaintiffs also allege the Defendants wrongly stated that Celestica's financial statements complied with Generally Accepted Accounting Principles ("GAAP"). The Millwrights allege that the Defendants improperly recorded obsolete inventory as current inventory, delayed recording new inventory until after quarter-end reporting periods, failed to record inventory by physically removing it from its facilities, recorded revenue that it had not and would not receive, and improperly reported expenses.

[97] Mr. Froese, an investigative and forensic accountant, was retained by the Plaintiffs to review publicly available information in order to provide "preliminary comments and opinions" to Plaintiffs' counsel "related to possible material financial accounting and reporting errors in Celestica's consolidated annual and interim financial statements."

[98] The Plaintiffs rely on the evidence of Mr. Froese that the following practices would be non-compliant with GAAP: (1) improperly recording obsolete inventory as current inventory, falsely overstating the value of that inventory; (2) failing to record charges for excess and obsolete inventory; (3) delaying recording new inventory; (4) failing to record inventory removed from Celestica's facilities; (5) recording revenue that Celestica had not and would not receive; (6) improperly reporting expenses; and (7) unreasonably estimating the cost and duration of the restructuring. In other words, the thrust of Mr. Froese's opinion is that assuming the Defendants' misrepresented its inventory, revenue, and the nature of the restructuring, then Celestica's financial statements would not comply with GAAP.

[99] The Plaintiffs state that Mr. Froese, however, could not opine about whether GAAP had actually been breached without documentary and oral discovery of Celestica's representatives, which had not been forthcoming.

[100] Mr. Froese agreed on his cross-examination that KPMG had provided an unqualified audit report in respect of Celestica's financial statements for the years ending December 31, 2004, December 31, 2005 and December 31, 2006 and that the financial statements issued during the proposed class period had never been restated. Mr. Froese agreed that, as part of its audit, KPMG would have independently assessed in accordance with GAAP: (a) the reasonableness of Celestica's estimates of the duration and cost of restructuring; (b) the reasonableness of Celestica's levels of inventory; (c) the reasonableness of Celestica's revenue recognition.

[101] The Plaintiffs concede that they do not have internal evidence from Celestica to prove the GAAP allegations because Celestica did not provide any evidence for the leave motion and because it refused to disclose the information it disclosed in the United States proceedings. Without internal evidence, the Plaintiffs rely on the fact from the public disclosures that Celestica wrote down $36 million in inventory in less than 7 weeks; i.e., $6 million on October 26, 2006 and $30 million on December 12, 2006.

[102] The Defendants submit that since the regulators had not intervened and Celestica's auditors had provided a clean audit opinion on Celestica's financial statements for all periods at issue, and the Plaintiffs have not named the auditors as a defendant or otherwise challenged the quality of the audits, it therefore falls to the Plaintiffs to adduce the evidence (and not mere

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argument) that demonstrates a reasonable possibility of establishing a misrepresentation at trial. The Defendants submit that the Plaintiffs have failed to adduce any evidence and, therefore, the motion for leave under the Ontario *Securities Act* should be dismissed.

## F. ANALYSIS AND DISCUSSION

### 1. Introduction and Methodology

[103] In this combined motion for certification of the Plaintiffs' action under the *Class Proceedings Act, 1992* and for leave under Part XXIII.1 of the Ontario *Securities Act*, the Plaintiffs advance: (1) a statutory claim for written and oral misrepresentations pursuant to ss.138.3(1) and (2) of the Ontario *Securities Act*; (2) a statutory claim for a failure to make timely disclosure of material changes pursuant to s. 138.3(4) of the Ontario *Securities Act*; and (3) a claim for common law negligent misrepresentation.

[104] The Plaintiffs' statutory and common law misrepresentation claims can be categorized into three categories: (1) misrepresentations about the 2005 restructuring program; (2) misrepresentations about Celestica's inventory and reporting of revenue; and (3) misrepresentations about whether Celestica's financial statements complied with GAAP.

[105] In order to resolve the motion, using these three categories of misrepresentations, I will first consider whether leave should be granted for the statutory claims and whether the statutory claims should be certified for a class action.

[106] To foreshadow the outcome, as noted at the outset, in my opinion, only the misrepresentation claims associated with the 2005 restructuring should be granted leave and certified. Having granted leave for these statutory claims, it automatically follows that these claims should be certified as a class action. The Defendants conceded that if leave to proceed with the statutory claims under Part XXIII.1 were granted, certification of those claims would be the inevitable result.

[107] To further foreshadow the outcome, I will not grant leave for the statutory misrepresentation claims based on misrepresenting inventory and revenue and based on non-compliance with GAAP. If further follows that with the denial of leave for these statutory misrepresentation claims, these claims should not be certified for a class action. In addition to the circumstance that leave has not been granted, the reason for non-certification is evidentiary; there is no basis in fact for these misrepresentation claims.

[108] Having dealt with the statutory claims, I will turn to the common law negligent misrepresentation claims and analyze whether certification having been granted only for the 2005 restructuring statutory claim of misrepresentation, the common law negligent misrepresentation claims should be certified.

[109] My conclusion is that the common law negligent misrepresentation claim should not be certified because attached to the statutory claim or detached from the statutory claim, the common law negligent misrepresentation claim does not satisfy the preferable procedure criterion.

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[110] Further, as already noted, there is no basis in fact for the misrepresentation claims based on misrepresentations associated with inventory and the reporting of revenue or based on non-compliance with GAAP.

## 2. Should Leave be Granted under Part XXIII.1 of the Ontario *Securities Act*?

### (a) The Test for Leave under the Ontario *Securities Act*

[111] The statutory claims require leave to proceed. Section 138.8 of the Ontario *Securities Act* provides that leave is granted where: (a) the action is brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[112] The leave requirement is a threshold test intended to prevent plaintiffs from advancing non-meritorious claims. The leave test is meant to be a genuine screening mechanism, and it requires the court to assess and weigh the evidence and to determine whether the plaintiff's chance of success is a reasonable possibility.

[113] See: *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864; *Dugal v. Manulife Financial Corp.*, 2013 ONSC 4083; *Green v. CIBC*, 2012 ONSC 3637, reversed but not on this point, 2014 ONCA 90; *Gould v. Western Coal Corp.*, 2012 ONSC 5184; *Canada Inc. v. Theratechnologies Inc.*, 2012 QCCS 699; *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25; *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, aff'd 2012 BCCA 456; *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (S.C.J.), leave to appeal refused, 2011 ONSC 1035 (Div. Ct.); *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (S.C.J.).

[114] The good faith requirement under section 138.8 is met where a plaintiff has brought its action in the honest belief that it has an arguable claim and genuine intention and capacity to prosecute the claim if leave is granted: *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (S.C.J.) at para. 308, leave to appeal refused, 2011 ONSC 1035 (Div. Ct.); *Green v. CIBC*, 2012 ONSC 3637 at paras. 354-356, reversed but not on this point, 2014 ONCA 90.

[115] It is not disputed that the Plaintiffs satisfy the good faith requirement of the leave test.

[116] In *Bayens v. Kinross Gold Corp.*, *supra* at paras. 16-55, I did a lengthy analysis of the jurisprudence about the test for determining whether "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff." I will not repeat that analysis here. Rather, I will simply set out the operative or determinative part of my analysis and then update it by adding the lessons learned from the Court of Appeal's recent decision in *Green v. CIBC*, 2014 ONCA 90.

[117] My key conclusions about how the leave test should operate are set out in paragraphs 42-45 of *Bayens v. Kinross Gold Corp.* as follows:

> 42. At this juncture of the jurisprudence, it is somewhat easier to define what is "not" a reasonable possibility of success at trial, and approaching the test in this negative way does provide some insight into defining the parameters of the leave test under Part XXIII.1 of the Ontario *Securities Act*.

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43. Thus, to properly borrow from the s. 5 (1)(a) analysis of the *Class Proceedings Act, 1992*, if notwithstanding a finding that the facts of the plaintiff's claim are true, it is plain and obvious that the plaintiff could not succeed at trial, then the plaintiff does not have a reasonable possibility of success. Further, if the plaintiff fails to provide any admissible or believable evidence of the material facts of his or her claim, then the plaintiff does not have a reasonable possibility of success. Further still, if the plaintiff's case is so manifestly weak that it cannot possibly succeed, then the plaintiff does not have a reasonable possibility of success. (This last articulation of the test shows that the bar is higher than the some basis in fact test used for certification.) Further still, if the defendant demonstrates that the plaintiff's claim is frivolous, scandalous, vexatious, or an abuse of process, then the plaintiff does not have a reasonable possibility of success. Further still, if the defendant shows that the plaintiff's claim is based purely on speculation or suspicion rather than evidence, then the plaintiff does not have a reasonable possibility of success. (This is what occurred in *Gould v. Western Coal Corp*., *supra*.) Further still, if the defendant on the motion for leave meets the heavy burden: (a) of actually disproving the truth of the facts of the plaintiff's claim; or (b) of indisputably proving a statutory defence, then the plaintiff does not have a reasonable possibility of success.

44. Expressed as a rule, this negative formulation of the test for leave would be as follow:

> There is not a reasonable possibility that an action will be resolved at trial in favour of the plaintiff, if:
>
> (a) assuming the material facts of the plaintiff's claim are true, it is plain and obvious that the plaintiff could not succeed at trial;
>
> (b) the plaintiff fails to provide any admissible or believable evidence of the material facts of his or her claim;
>
> (c) the plaintiff's case is so manifestly weak that it cannot possibly succeed;
>
> (d) the defendant demonstrates that the plaintiff's claim is frivolous, scandalous, vexatious, or an abuse of process;
>
> (e) the defendant shows that the plaintiff's claim is based purely on speculation or suspicion rather than evidence;
>
> (f) the defendant disproves the truth of the facts of the plaintiff's claim; or
>
> (g) the defendant proves a statutory defence.

45. In all events, the court must assess the evidentiary record provided by both parties and measure that evidence against a substantive but low threshold test of probity. In *Green v. CIBC*, *supra* at paragraph 377, Justice Strathy suggested the following analytical framework:

> 377. I begin with the observation that although s. 138.8(1) speaks of whether the action has a reasonable possibility of success, each representation must be examined, in relation to each defendant, to determine whether the plaintiff's claim in respect of that representation, has a reasonable possibility of success against that defendant. That analysis also requires that I determine whether there is a reasonable possibility that the defendant will not be able to establish the reasonable investigation defence - i.e., that the person conducted a reasonable investigation and had no reasonable grounds to believe that the document or statement contained a misrepresentation. The analysis should therefore proceed as follows:
>
> (a) Identify the representation at issue;
>
> (b) Determine whether it was a core document or a non-core document or public oral statement;

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> (c) Determine whether there is a reasonable possibility that the plaintiff will establish at trial that the document or statement contains a misrepresentation of material fact;
>
> (d) Determine, in the case of each individual defendant, whether there is a reasonable possibility that the plaintiff will establish at trial that the defendant authorized, permitted or acquiesced in the release of the document or the making of the statement;
>
> (e) In the case of non-core documents or public oral statements, determine whether there is a reasonable possibility that the plaintiff will establish at trial that each individual defendant knew of the misrepresentation, deliberately avoided acquiring knowledge, or was guilty of gross misconduct in connection with the release of the document or the making of the misrepresentation;
>
> (f) Determine whether there is a reasonable possibility that the defendant will not establish the reasonable investigation defence with respect to the misrepresentation - that is, that they conducted a reasonable investigation and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

[118] On the issue of the leave test under Part XXIII.1 of the Ontario *Securities Act*, earlier in my judgment in *Kinross* at paras. 31-34, I described Justice Strathy's approach and his decision in *Green v. CIBC* as follows:

> 31. In *Green v. Canadian Imperial Bank of Commerce, supra,* Justice Strathy ultimately agreed with Justices van Rensburg in *Silver v. Imax, supra* and Justice Tausenfreund in *Dobbie v. Arctic Glacier Income Fund, supra,* that the threshold for leave was low, and Justice Strathy stated at paragraph 373:
>
> > 373. I respectfully agree with van Rensburg J. and Tausenfreund J. that the leave requirement is a relatively low threshold. It is meant to screen out cases that, even though possibly brought in good faith, are so weak that they cannot possibly succeed. This is consistent with the purpose of the legislation - to screen out strike suits that are plainly unmeritorious. It is not meant to deprive *bona fide* litigants, with a difficult but not impossible case, from having their day in court. This interpretation is also consistent with the philosophy of our legal system that contentious issues of fact and law are generally decided after a full hearing on the merits.
>
> 32. At first blush, it would appear that Justice Strathy disagrees with the defendants' arguments that *Silver v. Imax, supra* and *Dobbie v. Arctic Glacier Income Fund, supra,* set the leave bar too low and thus make it too easy for a plaintiff to obtain leave. However, in analyzing a case, it is as important to consider both the judge's words and the judge's deeds, and in *Green v. Canadian Imperial Bank of Commerce,* Justice Strathy gave some teeth and bite to the reasonable possibility of success test.
>
> 33. In *Green v. Canadian Imperial Bank of Commerce,* although but for a limitation period defence, he would have granted leave with respect to several alleged misrepresentations, Justice Strathy concluded that there was no reasonable possibility: (1) that the plaintiffs would establish that the July 10, 2007 news release expressed a misrepresentation; (2) that the plaintiffs would establish that the August 13, 2007 news release expressed a misrepresentation; (3) that the plaintiffs would establish that the August 30, 2007 Earnings Conference Call expressed a misrepresentation; (4) that the December 6, 2007 Earnings Conference Call expressed a misrepresentation; and (5) that the December 19, 2008 News Release expressed a misrepresentation. Then, with respect to the three misrepresentations for which he might have granted leave, he ultimately denied leave because they had no reasonable possibility of success given that the plaintiffs' claims were time-barred.

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> 34. Justice Strathy's deeds in *Green v. Canadian Imperial Bank of Commerce* reveal that the leave test is not a mere "road bump" threshold and is not so low as to be redundant to the notoriously low bar used to test whether a plaintiff has disclosed a cause of action (the not plain and obvious test) under Rule 21 of the *Rules of Civil Procedure* or under s. 5 (1)(a) of the *Class Proceedings Act, 1992*. And, remembering that certification is not to be a test of the merits, in my opinion, the merits-based leave test under the Ontario *Securities Act* sets a higher evidentiary standard than the "some basis in fact" standard used to implement the test for certification under the *Class Proceedings Act, 1992*.

[119] On the appeal in *Green v. CIBC, supra* the Court of Appeal considered the question whether Justice Strathy erred in his interpretation and application of the test for granting leave. The Court concluded that there was no basis to interfere with Justice Strathy's decision.

[120] With respect to the test for leave under the Ontario *Securities Act*, Justice Feldman, who wrote the judgment for the 5-member panel of the Court, stated at paras. 84-91 as follows:

> 84. I do agree with the respondent that to properly interpret and apply the leave standard, a "reasonable possibility" that at trial the action will be resolved in the plaintiff's favour, it is essential to give full effect to the word "reasonable".
>
> 85. Fortunately, in the class action context, the reasonable possibility concept is very familiar because it is used for determining whether the pleading discloses a cause of action as required by the first part of the test for certification in s. 5(1)(a) of the CPA. As this court recently said in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, at para. 14:
>
> > Certification is to be denied on the basis that the requirement of s. 5(1)(a) is not met only "if, assuming the facts pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action, meaning that the plaintiff has no reasonable prospect of success": ….
>
> 86. The phrase "reasonable prospect of success" was used by McLachlin C.J. in *Knight v. Imperial Tobacco Canada Ltd*, 2011 SCC 42, … where, in reference to a motion to strike a claim, the Chief Justice stated the test to be whether "the claim has any reasonable prospect of success". She described its effect as "weeding out the hopeless claims and ensuring that those that have some chance of success go to trial" (para. 19). Again, at para. 20, she refers to claims that have "a reasonable prospect of success" and "a reasonable chance of success".
>
> 87. It is apparent that the terms "prospect" and "chance" are being used by the Chief Justice as synonyms, and I would include the term "possibility" as another one.
>
> 88. The purpose of the leave provision under Part XXIII.1 of the *Securities Act* is to discourage and eliminate bad faith strike suits that do not have a reasonable possibility of being successful. The statute asks the leave judge to first determine good faith, then whether there is a "reasonable possibility" that the action will be resolved at trial in favour of the plaintiff, i.e. that the plaintiff's case will be successful -- a reasonable possibility of success. In order to make that determination, the motion judge applies the same test that is used for determining whether the claim has a reasonable prospect of success for the purpose of certification. As the Chief Justice has described it, the purpose is to weed out hopeless claims and only allow those to go forward that have "some chance of success".
>
> 89. Of course, the evidentiary record for the leave and certification motions is quite different. For the leave motion, each side may file affidavit evidence upon which there can be cross-examination. But, as has been pointed out by both Strathy J. and van Rensburg J., the motion is brought before discovery and production of documents, with the result that the evidence may or may not be the same at the trial. In contrast, for the certification motion under s. 5(1)(a), there is

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> no evidentiary record, but the facts as pleaded in the statement of claim are taken to be true. In both cases, there is an evidentiary or deemed evidentiary record to which the test is applied.
>
> 90. The motion judge stated that he agreed with van Rensburg J. (in *Silver v. IMAX*) and Tausenfreund J. (in *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25, 3 C.P.C. (7th) 261) that the leave requirement is "a relatively low threshold". Perell J. in *Zaniewicz v. Zungai Haixi Corp*, 2012 ONSC 6061, at para. 37, described it as a "preliminary low-level merits based leave test". I agree with these descriptive characterizations. However, beyond that, it is not necessary, in my view, to try to further qualify the test. As discussed above, it has been effectively described by McLachlin C.J. in relation to the *Hunt v. Carey* test for determining if a claim should be struck as disclosing no cause of action, when deciding whether a class action can be certified.
>
> 91. In the securities class action context, there is also a significant procedural advantage to having the same test apply to the leave motion as to the certification motion. If the leave motion is heard before the certification motion and leave is denied, the claim is at an end. But if leave is granted, it will be unnecessary to reconsider the issue on the certification motion. Because the test is the same, and the evidentiary basis is the highest it can be for the plaintiff on the certification motion, once leave is granted on the record filed, the claim will also meet the cause of action criterion under s. 5(1)(a) of the CPA.

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[121] Since my judgment in *Bayens v. Kinross Gold Corp., supra* was, in part, based on Justice Strathy's decision and approach in *Green v. CIBC*, 2004 and since the Court of Appeal has approved of Justice Strathy's approach and since my decision foresaw the connection between the leave test and the certification test, I regard the Court of Appeal's decision as confirmatory of the negative test that I set out in paragraph 44 of my judgment in *Bayens v. Kinross,* which is the test that I intend to apply in the case at bar.

[122] I note that, in any event, in the case at bar, the contest between the parties is not so much about the rigours or lack thereof in the test for leave under the Ontario *Securities Act* and more about whether the Plaintiffs satisfied the low evidentiary standard for granting leave. The fundamental position of the Defendants is that the Plaintiffs have failed to provide any evidence of the material facts of their misrepresentation claims.

### **(b) The Misrepresentation Claims with Respect to the 2005 Restructuring**

[123] Section 1 (1) of the Ontario *Securities Act*, defines "material fact" and "misrepresentation" as follows:

> *Interpretation, other general matters*
>
> *Definitions*
>
> 1. (1) In this Act,
>
> "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;
>
> "misrepresentation" means,
>
> (a) an untrue statement of material fact, or
>
> (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made;

[124] The Defendants argue that there is no evidence of misrepresentations with respect to the 2005 restructuring. They submit that: that there were multiple restructuring programs; there were no misrepresentations as to the costs of restructuring or time required for restructuring; that by their very nature, restructuring estimates may need to be revised over time; and that while the estimates did change over time, the changes were appropriate and properly disclosed well in advance of January 30, 2007. Relying in part on the Supreme Court of Canada's decision in *Kerr v. Danier Leather Inc.*, 2007 SCC 44, the Defendants submit that the statements about the 2005 restructuring being estimates or opinions cannot as a legal and factual matter constitute a false statement if it simply turns out that the estimates are incorrect.

[125] Further, the Defendants argue that their alleged corrective announcement in January 2007 was nothing of the sort. They submit that no new information about the restructuring is to be found in the announcement, and rather the announcement conveyed new information about the departure of Celestica's CFO and gave notice of a brand new round of restructuring activities that were identified by Celestica in Q4 2006.

[126] Without proffering any evidence of their own, the Defendants submit that it is clear from the public record that the changes to management's estimates with respect to the 2005 restructuring were disclosed before January 2007 and that the disclosure in January 2007 provided no new information; i.e., the Defendants submit that the January 2007 communication was not a correction but was an announcement of a new round of restructuring.

[127] In my opinion, the Defendants' interpretation of the meaning of the documents and the public communications, which are a matter of argument applied to a factual record, may ultimately be correct, but it does not mean that the Plaintiffs' interpretation of the statements and the public record does not establish a reasonable prospect of success for their misrepresentation claim with respect to the 2005 restructuring.

[128] Put somewhat differently, ultimately, the Defendants' argument that there were no misrepresentations may ultimately be found to be correct, but for present purposes, the Defendants' arguments miss the point that their arguments are based on their interpretation of a factual record.

[129] Investors making a decision about investing in a corporation could be influenced by information that the corporation had a restructuring plan that it expected to complete in 15 months at a cost in the range of $225- $275 million. The Defendants submit, however, that in the case at bar, there is no evidence that the Defendants' estimate was a negligent misrepresentation. Thus, the Defendants say that the Plaintiffs have failed to produce any evidence of a negligent misrepresentation. However, upon analysis, it turns out to that the Defendants' argument is just their interpretation of the evidence that was produced by the Plaintiffs. The Defendants' arguments are based on interpreting a factual record that may show that there was a discrepancy between what was said about the time, expense, and success of the 2005 restructuring (a significant matter for investors) and the outcome of the restructuring as explained by the Defendants in January 2007.

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[130] The Defendants argue that when a speaker expresses an opinion as to the occurrence of a future events, for there to be liability for negligent misrepresentation, the speaker must have breached a duty of care in speaking at the time the statement was made. For liability, the mistaken opinion must be shown to have resulted from a lack of skill, competence or diligence at the time the statement was made: *Hodgins v. Nepean (Township) Hydro-Electric Commission*, [1976] 2 S.C.R. 501; *Kerr v. Danier Leather Inc.* The Defendants submit that there is no evidence that the estimates were false in the requisite sense at the time when they were made.

[131] In advancing their argument, the Defendants note and take comfort from the circumstances that Part XXIII.1 of the Ontario *Securities Act* provides defendants with a special, added defence in circumstances in which forward-looking information is found to constitute a misrepresentation. Subsection 138.4(9) states:

> *Forward-looking information*
>
> (9) A person or company is not liable in an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves all of the following things:
>
> 1. The document or public oral statement containing the forward-looking information contained, proximate to that information,
>
> i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and
>
> ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.
>
> 2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

[132] The Defendants submit that this statutory defence demonstrates that defendants are simply not held to the same standard of accuracy when it comes to projections, estimates, or other forward-looking information and the statute recognizes that forward-looking information involves a certain degree of judgment and opinion and that an issuer is not required to predict the future, but rather only to behave reasonably in formulating forward-looking statements.

[133] However, it may be noted that the existence of s. 138.4 (9) also undermines the thrust of the Defendants' argument on this leave motion because it presupposes that forward-looking information might constitute a misrepresentation, and then provides a special statutory defence to such claims. In my opinion, the existence of s. 138.4 (9) rather suggests that forward-looking statements are an important type of information to purchasers and sellers of corporate equity and debt instruments and that the statute imposes a balanced regulatory treatment precisely because the truth value of forward-looking statements is complex and cannot necessarily be determined by a simple after-the-fact determination of accuracy.

[134] For present purposes, the major point is that the Ontario *Securities Act* makes misrepresentations about estimates actionable if leave is granted and provides a special defence for these claims.

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[135] Upon analysis, once again, the Defendants' argument, which may ultimately succeed, does not go far enough in showing that at this juncture it can be said that the Plaintiffs' misrepresentation claim has no reasonable prospect of success. Given that the leave test is a low threshold merits test, unlike the situation that I will discuss below about the statements about inventory and the reporting of revenues, there is enough on the evidentiary record in the case at bar to satisfy the test that there is a reasonable possibility that the action about misrepresentations about the 2005 restructuring will be resolved at trial in favour of the Plaintiffs.

[136] In any event, it cannot be said that the Plaintiffs have failed to provide any admissible or believable evidence of the material facts of their claim. Although, it remains to be proven whether the Defendants failed to exercise due diligence when they expressed opinions about the time, expense, and anticipated success of the 2005 restructuring, there is enough on the record to suggest that there is a reasonable possibility that having regard to what the Defendants knew about their customers, the nature of supply and demand, and their own facilities and capabilities, their opinions or estimates about restructuring were negligently made and, therefore, a misrepresentation.

[137] In my opinion, the Plaintiffs have satisfied the test for leave with respect to the alleged misrepresentations associated with the 2005 restructuring.

### (c) The Misrepresentation Claims with respect to the Reporting of Inventory and Revenue

[138] The misrepresentation claims with respect to the reporting of inventory and revenue are a different matter from the misrepresentations claims with respect to the 2005 restructuring.

[139] I agree with the Defendants' arguments that these very serious allegations about false reporting made by the Plaintiffs do not have an evidentiary foundation.

[140] Putting it bluntly, the Plaintiffs are guessing and hoping that documentary discovery and the examinations for discovery will establish that the Defendants did not properly state Celestica's inventory and its revenues.

[141] The Plaintiffs admit that they do not have any evidence to establish these alleged misrepresentations, but they excuse this absence of evidence by arguing that the evidence is only available to the Defendants, who did not provide any evidence for the leave motion, and thus the Plaintiffs should be given the opportunity to prove their allegations.

[142] Having admitted that they do not have evidence at this juncture, however, is the end of the matter.

[143] Leave is not granted in order to determine whether leave should be granted.

[144] Unlike the situation for the alleged misrepresentations about the 2005 restructuring, the Plaintiffs are, in effect, seeking leave to find out whether there was a misrepresentation. Recalling that the financial statements were audited and there is no evidence that the statements

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have been recalled or repudiated by the auditors, there is no misrepresentation that has been identified and only speculation about what might be discovered at examinations for discovery.

[145] The Plaintiffs have not met the very low evidentiary burden of showing a reasonable possibility that the action about misrepresentation about inventory and revenues will be resolved at trial in their favour.

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### (d) The GAAP Claims

[146] As noted above, without any internal proof from Celestica and relying on a public disclosure of a $36 million write-down of inventory and Mr. Froese's expert opinion about what would be non-compliance with GAAP, the Plaintiffs submit that they have shown a reasonable possibility that the action about non-compliance with GAAP will be resolved at trial in their favour.

[147] The Defendants' counterargument is that the Plaintiffs have provided no evidence at all to support this claim.

[148] I agree with the Defendants' argument. The circumstances of the Plaintiffs' claims of non-compliance with GAAP are similar to the predicament of its claims about false reporting of inventory and revenues.

[149] For the GAAP claims, the Plaintiffs have not met the very low evidentiary burden of showing a reasonable possibility that the action will be resolved at trial in their favour.

### (e) Conclusion re Leave under the Ontario *Securities Act*

[150] For the above reasons, I grant leave with respect to the alleged misrepresentations about Celestica's restructuring and I dismiss the motion for leave with respect to the alleged misrepresentations about Celestica's inventory and reporting of revenue and with respect to non-compliance with GAAP.

## 3. Should the Statutory and the Common Law Misrepresentation Claims be Certified under the *Class Proceedings Act*, 1992?

### (a) Introduction to Certification

[151] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[152] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial

economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[153] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[154] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26 to 29; *Hollick v. Toronto (City)*, *supra* at paras. 15 and 16.

[155] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, *supra* at paras. 28 to 29.

**(b) Cause of Action Criterion**

[156] As noted above, in October 2012, as a part of deciding the Defendants' motion to have the Plaintiffs' action dismissed, I granted the Plaintiffs leave to amend their Statement of Claim to plead reliance as an element of their common law negligent misrepresentation claim, and I decided that the Plaintiffs had satisfied the cause of action criterion for certification.

[157] I have now decided that leave should be granted to advance the statutory misrepresentation claim with respect to the 2005 restructuring.

[158] The cause of action criterion is, therefore, satisfied.

**(c) Identifiable Class Criterion**

[159] The second criterion for certification is that there be an identifiable class.

[160] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[161] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[162] The proposed class definition is as follows:

> All persons, other than Excluded Persons, who acquired Celestica shares during the period from January 27, 2005 through and including January 30, 2007 (the "Class Period") by either a primary distribution in Canada or an acquisition on the Toronto Stock Exchange or other secondary market

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> in Canada and who held some or all of those shares at the close of trading on the Toronto Stock Exchange on January 30, 2007.
>
> Excluded from the Class are Celestica's past and present subsidiaries, affiliates, officers, directors, employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the individual defendants' families, and any entity in which they have or had during the Class Period any legal or de facto controlling interest, as well as Onex Corporation and past and present subsidiaries, affiliates, officers, directors, employees, legal representatives, heirs, predecessors, successors and assigns (the "Excluded Persons").

[163] The evidence of Robert Patton, a Senior Consultant at NERA Economic Consulting, is that a rough but conservative estimate of the number of members in the proposed Canadian class ranges from 21,212 to 33,408.

[164] The Defendants challenged the proposed class definition because they say that in correspondence between the parties, the Plaintiffs appeared to take the position that under the proposed definition early sellers were not excluded from class membership. The Defendants argue that early sellers must be excluded or the class definition would not satisfy the class identification criterion.

[165] In *Carom v. Bre-X Minerals Ltd.*, [1999] O.J. No. 1662 (S.C.J.) at para. 18, affirmed, [1999] O.J. No. 5114 (S.C.J.), Justice Winkler (as he then was) found that a proposed class definition, which included early sellers, was over-inclusive because there was no rational connection between the class definition and the common issues; he stated:

> [T]hose who purchased and sold the shares prior to the disclosure of the fraud, regardless of whether or not they suffered a loss, must also be excluded from the class. Their losses do not arise from the causes of action pleaded and, thus, they cannot be included in the class.

[166] In *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at para. 121, Justice Strathy found that as a general rule, it may be appropriate to exclude early sellers because no damages are suffered until the misrepresentation is disclosed and shareholders who dispose of their securities before the disclosure date cannot suffer a loss as a result of the misrepresentation.

[167] In the case at bar, I do not see the proposed class definition as including early sellers as class members, save for those early sellers who purchased shares during the class period and did not sell all of those shares by January 30, 2007.

[168] As I understand the proposed class definition, these early sellers would have claims with respect to the shares that they continued to hold but not for the shares that they sold before January 30, 2007. There is nothing objectionable to including these early sellers as members of the class.

[169] In my opinion, the identifiable class criterion is satisfied.

**(d) Common Issues Criterion**

[170] For an issue to be a common issue, it must be a substantial ingredient of each Class member's claim and its resolution must be necessary to the resolution of each Class member's claim: *Hollick v. Toronto (City), supra* at paragraph 18.

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[171] The Plaintiffs propose the following common issues:

(a) Did the Defendants make representations that were untrue, inaccurate or misleading, including omissions, and if so, what are the misrepresentations, who made these representations, when, where and how?

(b) If the answer to (a) is yes, do the misrepresentations constitute misrepresentations within the meaning of the *OSA*?

(c) Did the Defendants fail to make timely disclosure within the meaning of the *OSA*?

(d) If the answers to (b) or (c) are yes,

(i) Did the individual Defendants authorize, permit or acquiesce in the release of documents containing such misrepresentations, in the making of a public oral statement containing such misrepresentations or in the failure to make timely disclosure?

(ii) For public oral statements containing such misrepresentations, did the person who made the statement do so with actual implied or apparent authority to speak on behalf of Celestica?

(iii) For misrepresentations regarding forward-looking information (other than those in a financial statement), did the Defendants have a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information and did the defendants provide reasonable cautionary language and a statement of material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking statement?

(iv) For the misrepresentations in non-core document or in a public oral statement, did the Defendants know of the misrepresentations at the time they were made? If not, did the Defendants deliberately avoid acquiring such knowledge or were they guilty of gross misconduct in connection with the misrepresentations?

(v) Before the release of the documents and the public oral statements containing misrepresentations and before the failure to make timely disclosure first occurred, did the Defendants conduct or cause to be conducted a "reasonable investigation" in accordance with subsection 138.4(6) of the *OSA*?

(vi) At the time of the release of the document and public oral statements containing misrepresentations or at any time for a failure to make timely disclosure, as they case may be, did the Defendants have reasonable grounds to believe that the documents or oral statement contained the misrepresentations or that the failure to make timely disclosure would occur?

(e) If the answer to (a) is yes, did the Defendants owe a duty of care to the class members?

(f) If the answer to (e) is yes, did the Defendants act negligently in making the misrepresentations?

(g) If the answer to (f) is yes, can each class member's reliance be inferred from the fact of the class member having acquired Celestica shares in an efficient market?

(h) Can the amount of damages for negligent misrepresentation or the statutory claims under Part XXIII.1 of the *OSA* be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

(i) What are the applicable limits on damages, if any, for each Defendant under section 138.7 of the *OSA*?

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(j) For each Defendant found liable for claims under Part XXIII.1 of the *OSA*, what is the Defendant's respective responsibility for assessed damages?

(k) Is Celestica vicariously liable or otherwise responsible for the acts of the individual Defendants?

[172] In light of my conclusions that only the statutory misrepresentation claim about the 2005 restructuring should be certified, the proposed common issues must be revised to remove statutory misrepresentation issues that will not be certified.

[173] Pausing here, I note here that apart from the fact that the alleged misrepresentations about Celestica's inventory and revenue and about non-compliance with GAAP did not satisfy the evidentiary burden for leave under Part XXIII.1 of the Ontario *Securities Act*, these allegations of misrepresentation also did not satisfy the low evidentiary burden of some basis in fact under the *Class Proceedings Act, 1992*.

[174] In the next part of these reasons, I conclude that the common law misrepresentation action does not satisfy the preferential procedure for a class action. It follows that the common issues associated with the common law negligence claim should also be removed from the list of certifiable common issues.

[175] With the necessary deletions, I am satisfied that the following revised list of common issues satisfies the common issues criterion.

(a) Did the Defendants' statements during the Class Period about restructuring its operations constitute misrepresentations within the meaning of the *OSA*?

(b) Did the Defendants fail to make timely disclosure during the Class Period about restructuring its operations within the meaning of the *OSA*?

(c) If the answers to (a) or (b) are yes,

(i) Did the individual Defendants authorize, permit or acquiesce in the release of documents containing such misrepresentations, in the making of a public oral statement containing such misrepresentations or in the failure to make timely disclosure?

(ii) For public oral statements containing such misrepresentations, did the person who made the statement do so with actual implied or apparent authority to speak on behalf of Celestica?

(iii) For misrepresentations regarding forward-looking information (other than those in a financial statement), did the Defendants have a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information and did the Defendants provide reasonable cautionary language and a statement of material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking statement?

(iv) For the misrepresentations in non-core document or in a public oral statement, did the Defendants know of the misrepresentations at the time they were made? If not, did the Defendants deliberately avoid acquiring such knowledge or were they guilty of gross misconduct in connection with the misrepresentations?

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> (v) Before the release of the documents and the public oral statements containing misrepresentations and before the failure to make timely disclosure first occurred, did the Defendants conduct or cause to be conducted a "reasonable investigation" in accordance with subsection 138.4(6) of the *OSA*?
>
> (vi) At the time of the release of the document and public oral statements containing misrepresentations or at any time for a failure to make timely disclosure, as they case may be, did the Defendants have reasonable grounds to believe that the documents or oral statement contained the misrepresentations or that the failure to make timely disclosure would occur?
>
> (d) Can the amount of damages under Part XXIII.1 of the *OSA* be determined on an aggregate basis? If so, in what amount and who should pay it to the class?
>
> (e) What are the applicable limits on damages, if any, for each Defendant under section 138.7 of the *OSA*?
>
> (f) For each Defendant found liable for claims under Part XXIII.1 of the *OSA*, what is the Defendant's respective responsibility for assessed damages?
>
> (g) Is Celestica vicariously liable or otherwise responsible for the acts of the individual Defendants?

[176] Because there may be an appeal, I note that had I been satisfied that the common law negligence claim satisfied the preferable procedure criterion, I would not have certified the following questions from the original list because, in my opinion, these questions do not satisfy the commonality criteria but rather are individual issues:

> (g) If the answer to (f) is yes, can each class member's reliance be inferred from the fact of the class member having acquired Celestica shares in an efficient market?
>
> (h) Can the amount of damages for negligent misrepresentation … be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

### **(e) Preferable Procedure Criterion**

[177] Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at paragraph 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

[178] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paragraphs 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[179] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

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[180] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc*. (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[181] The Defendants submitted that if leave were granted for the statutory claims, then certifying parallel common law claims would be unmanageable and would undermine the purpose of Part XXIII.1 of the Ontario *Securities Act* by impeding the efficient resolution of the statutory claims. Therefore, the Defendants submit that the common law misrepresentation claim does not satisfy the preferable procedure criterion.

[182] I agree with the Defendants' argument. And, I agree with the Defendants' second argument that leads to the conclusion that the common law misrepresentation claim does not satisfy the preferable procedure criterion.

[183] The Defendants argue, and I agree, that where there is a statutory misrepresentation claim and also a common law misrepresentation claim for the same misrepresentation, the statutory claim is the preferable way to resolve the Class Members' claims; indeed, the statutory claim was introduced precisely to overcome the difficulties of a class action for negligent misrepresentation with respect to the distribution of debt and equity instruments in the primary and secondary market for securities.

[184] Part XXIII.1 of the Ontario *Securities Act* was designed to be the preferable procedure for misrepresentation claims in the marketplace for shares.

[185] A common law misrepresentation class action with respect to the sale of securities, unless it settles, may lead to economically unfeasible or non-viable individual issues trials where the Class Members are confronted with the enormous difficulty of proving reliance, (the surrogate of causation) and damages.

[186] In the immediate case, the Plaintiffs' Litigation Plan does not adequately address how the individual issues are to be determined or what effect they will have on the resolution of the statutory claims. The proposed plan does not address who will represent the individual Class Members and who would cover the cost of that representation or other costs associated with the individual trials.

[187] While the resolution of the common issue of whether the Defendants made a misrepresentation would undoubtedly be productive for Class Members with a parallel common law negligent misrepresentation claim, it is doubtful that many would be motivated, willing, or able to perfect their common law claims at an individual issues trial especially when Class Counsel may no longer be acting on their behalf.

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[188] Significantly and ironically, in the case at bar, a common law negligent misrepresentation class action would be preferable only for those persons with significant enough claims that it would be worthwhile for them to opt out of the statutory misrepresentation class action.

[189] My conclusion is that in the circumstances of the case at bar, the common law misrepresentation claim does not satisfy the preferable procedure criterion.

### (f) Representative Plaintiff Criterion

[190] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[191] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[192] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact*: Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[193] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41.

[194] In my opinion, the Representative Plaintiff Criterion is satisfied for the claims that have been certified.

### (g) Conclusion on Certification

[195] For the above reasons, I certify the statutory misrepresentation claim with respect to the 2005 restructuring as a class action under the *Class Proceedings Act, 1992*.

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## G. CONCLUSION

[196] For the above reasons, I grant the Plaintiffs' motion with respect to the statutory claim for alleged misrepresentations about the 2005 restructuring.

[197] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within 20 days of the release of these Reasons for Decision, followed by the Defendants' submissions within a further 20 days.

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Perell, J.

Released: February 19, 2014

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**CITATION:** Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc., 2014 ONSC 1057
**COURT FILE NO.:** 11-CV-424069CP
**DATE:** 20140219

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION TRUST FUND

Plaintiff

**- and -**

CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI

Defendants

**AND BETWEEN:**

NABIL BERZI

Plaintiff

**- and -**

CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI

Defendants

**AND BETWEEN:**

HUACHENG XING

Plaintiff

**- and -**

CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI

Defendants

Proceedings under the *Class Proceedings Act, 1992*

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**REASONS FOR DECISION**

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Perell, J.

Released: February 19, 2014

2014 ONSC 1057 (CanLII)

# Tab 22

**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**

2021 ONSC 5405 (CanLII)

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| **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.

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## 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

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[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.

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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.

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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*?

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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

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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 XXIII.1 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 Act*?

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?

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**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.

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- 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.

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- 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.

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## 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

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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

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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.

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[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. <u>The Discontinuance of the Common Law Misrepresentation and the Oppression Remedy Claims and the Claims against Mr. Merton</u>

[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.

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*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.

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[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

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> 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.

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## 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*.

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## 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.

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[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

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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.).

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> 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.

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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.

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[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.

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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.

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*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;

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(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:

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> 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

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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.

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[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.).

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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]

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> 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.)

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> 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.

[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.

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[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.

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*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

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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

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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.

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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.

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### 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

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

2021 ONSC 5405 (CanLII)

**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

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**REASONS FOR DECISION**

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PERELL J.

**Released:** August 6, 2021

# Tab 23

# COURT OF APPEAL FOR ONTARIO

CITATION: Wong v. Pretium Resources Inc., 2022 ONCA 549
DATE: 20220722
DOCKET: C69140

2022 ONCA 549 (CanLII)

van Rensburg and Roberts JJ.A. and Tzimas J. (*ad hoc*)

BETWEEN

David Wong

Plaintiff (Appellant)

and

Pretium Resources Inc., and Robert A. Quartermain

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

Michael Spencer, Andrew Morganti, Albert Pelletier and Charlotte K.B. Harman, for the appellant

H. Michael Rosenberg and Amanda Di Gesù Iarusso, for the respondents

Heard: November 24 and 25, 2021

On appeal from the judgment of Justice Edward P. Belobaba of the Superior Court of Justice, dated February 2, 2021, reported at 2021 ONSC 54.

**van Rensburg J.A.:**

## I. OVERVIEW

[1] The appellant is the representative plaintiff in a common law and statutory secondary market misrepresentation class action. The respondents are Pretium

Resources Inc. (“Pretium”), a mineral exploration company which was and is a reporting issuer under the *Securities Act*, R.S.O. 1990, c. S.5 (the “OSA”), and its former CEO, Robert Quartermain. The appellant asserted that the respondents failed to publicly disclose concerns about Pretium’s Brucejack mining project in northwestern British Columbia (the “Brucejack project”), that had been conveyed to Pretium in writing by Strathcona Mineral Services Ltd. (“Strathcona”), a mining expert Pretium had retained to perform certain work. Strathcona resigned from the Brucejack project in the face of Pretium’s refusal to publicly disclose its concerns. When Pretium issued news releases disclosing the resignation, and later, the reasons for Strathcona’s resignation, its stock price fell by over half. The appellant’s claim alleged common law and statutory (under s. 138.3 of the OSA) misrepresentations by omission in Pretium’s continuing disclosure: the failure of the respondents to disclose what were alleged to have been material facts in seven of its public disclosure documents between July and October, 2013. The appellant appeals the summary dismissal of the action by Belobaba J. (the “motion judge”).

[2] In July 2017, on a contested motion, the motion judge, pursuant to s. 138.8 of the OSA, had granted the appellant leave to proceed with a statutory secondary misrepresentation claim, after concluding that there was a reasonable possibility that the action would be resolved in favour of the appellant at trial. The action was certified as a class proceeding on consent in 2019, and in 2020 the parties brought competing summary judgment motions. In dismissing the action, the motion judge

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concluded that there had been no actionable misrepresentations by the respondents when they failed to disclose what is referred to in this litigation as "Strathcona's concerns", and that in the alternative (with respect to the statutory claim), the respondents had conducted a reasonable investigation, pursuant to s. 138.4(6) of the OSA. The appellant seeks an order setting aside the dismissal of the class proceeding and directing a trial of the issues.

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[3] For the reasons that follow, I would dismiss the appeal. First, I disagree with the appellant that the motion judge erred in law in his characterization of what constituted an actionable "misrepresentation", and in concluding that Strathcona's concerns were not a material fact that required disclosure because they were "unsolicited, inexpert, premature, and unreliable". Nor has the appellant established any misapprehension of the evidence or palpable and overriding error in the motion judge's factual findings with respect to the alleged misrepresentations. The motion judge's decision was fact-driven and properly took into account the entire context in which the misrepresentations were alleged to have been made. Second, and contrary to the appellant's arguments, the motion judge's decision did not depend on his acceptance of the respondents' *post hoc*, subjective views, or defer to Pretium's business judgment concerning its disclosure obligations. Third, the motion judge did not err in failing to find a misrepresentation based on the drop in the price of Pretium's shares in October 2013. The motion judge's conclusions reveal no reversible error: they reflect the application of the

correct legal standard to a set of facts, based on a proper assessment of all of the evidence.

[4] I will begin by setting out a brief summary of what transpired, that is sufficient to understand the issues on this appeal. To put the appellant's submissions in their proper context, I will provide a somewhat detailed summary of the motion judge's reasons on each of the leave and summary judgment motions. I will then discuss the arguments raised on appeal and explain why, in my view, there was no reversible error.

[5] My determination that there was no error in the motion judge's conclusion on the misrepresentation issue is sufficient to dispose of the appeal. As such, it is unnecessary to address the appellant's alternative argument: that the motion judge erred in giving effect to the reasonable investigation defence, which was, in any event, touched on only briefly by the parties on appeal. These reasons should not be read as taking any position on the motion judge's reasonable investigation analysis.

## II. THE FACTUAL BACKGROUND

### (1) The Bulk Sample Program

[6] The respondent Pretium is a mineral exploration company based in British Columbia. It is a reporting issuer in all Canadian provinces and territories, and a registrant with the U.S. Securities and Exchange Commission. At all material times

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its common shares were listed for trading on the Toronto and New York Stock Exchanges. The respondent Robert Quartermain was Pretium's Chairperson and Chief Executive Officer.

[7] During 2011 and 2012, Pretium conducted a mineral exploration program at Brucejack that involved surface mapping and exploratory drilling. It hired Snowden Mining Industry Consultants ("Snowden"), a well-known mining consultant, to review the results and to prepare a mineral resource estimate. After preparing two earlier estimates in February and April 2012, Snowden produced the November 2012 Mineral Resources Update Technical Report (the "Resource Estimate"), which was used by another contractor, Tetra Tech Inc., as the basis for a June 2013 feasibility study (the "Feasibility Study"). The validity of the Feasibility Study was thus dependent on the validity of the underlying Resource Estimate, which took into account the unique style of mineralization in the Valley of the Kings ("VOK") section of the Brucejack mine. The Feasibility Study concluded that Brucejack contained economically recoverable mineral reserves capable of supporting a successful bulk-mining operation.

[8] In order to test and verify the accuracy of its Resource Estimate (and by extension the Feasibility Study) Snowden recommended that Pretium extract a 10,000-tonne bulk sample for milling and testing. In November 2012, Pretium retained another well-known mining consulting firm, Strathcona, to oversee and report on the Bulk Sample Program (the "BSP").

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[9] There were two components of the BSP: the excavation of a 10,000-tonne bulk sample, and a 15,000-meter underground drill program in areas around the bulk sample. The original intention was to process the bulk sample in its entirety at a custom mill, as this was the most reliable means of determining the mineral content. However, in light of the difficulty in finding an available custom mill, Pretium agreed with Strathcona's use of a "sample tower", in which it would test a small fraction of the mined material, and send the balance to a mill in Montana. The intention was for Strathcona to compile the results and to provide them to Snowden, who would update the Resource Estimate.

[10] Pretium announced in a May 8, 2013 news release that the BSP and associated underground drilling were ready to begin. The news release described the work and anticipated reporting as follows:

> *Underground Drilling*
>
> Approximately 15,000 meters of underground drilling will be completed as part of the Bulk Sample Program. After the initial cross-cut along section 426600, the north drill drift will be developed, and drilling will be conducted at 7.5-meter and 15-meter centres along 120 meters of strike length, and at 15-meter centres vertically for 60 meters above and 60 meters below the 1345-meter level of the Valley of the Kings. Drilling is planned to commence later this month, prior to excavating the bulk sample, and will run concurrently with the excavation of the bulk sample. Results from drilling will be reported as they are received.

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*Bulk Sample Program*

> The sample tower and related equipment for the Bulk Sample Program in the Valley of Kings has been transported over the recently-completed all-weather access road into Brucejack camp and is now on site. Strathcona Mineral Services Ltd. of Toronto has been engaged as the independent Qualified Person to oversee and report on the 10,000-tonne bulk sample.
>
> The 1345-meter level at the 426600 cross-section of the Valley of the Kings was selected as the bulk sample location based on Strathcona's requirements that the bulk sample be excavated from an area representative of the (a) drillhole density that informs the Indicated Mineral Resource, (b) average grade of the Indicated Mineral Resource and the global resource for Valley of the Kings, (c) proportion of low-grade, high-grade and extreme grade populations in the overall Indicated Mineral Resource and (d) style of stockwork gold mineralization characteristic of the Valley of the Kings. Excavation of the bulk sample is scheduled to begin in early June, with the final report expected later in the year after compilation of all bulk sample data. [Emphasis added.]

[11] In a May 28, 2013 news release, Pretium provided more information about the BSP and the anticipated reporting, stating in part:

*Sample Tower and Mineral Processing*

> The 10,000-tonne bulk sample will be excavated in approximately 100-tonne rounds. Each round will be crushed and run through a sample tower currently assembled on site. The sample tower has been designed and constructed to extract two 30-kilogram representative samples from each 100-tonne round processed by the sample tower. The representative samples extracted by the sample tower will be assayed, and the assay results will be reported by Strathcona in their report on the Program.

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> The remainder of the 10,000-tonne bulk sample will be shipped to a mill for processing. The mill will use a similar circuit, gravity and flotation, to extract gold and silver from the bulk sample as contemplated in the feasibility study for the Brucejack Project currently underway. The bulk sample remainder is expected to be milled in the third and fourth quarters of this year.
>
> *Bulk Sample Drilling*
>
> Approximately 15,000 meters of underground drilling in 190 holes will be completed as part of the Program. The drilling will define the portions of the two domains of mineralization being tested by the Program along 120 meters of strike length, and vertically for 60 meters above and 60 meters below the 1345-meter level of the Valley of the Kings. The drilling will be completed on sections 7.5 meters apart along the 120 meters of strike length. Each section will be drilled from the north or south, with drill holes at 15-meter centers vertically at the margins of the mineralized domains. The supporting infrastructure will include an initial cross-cut through the Valley of the Kings along section 426600, and the north exploration drill drift. The drill program will run concurrently with the mining of the bulk sample. …
>
> *Program Reporting*
>
> Assay results from underground drilling will be reported as they are received. Strathcona's report on the Program is expected later in the year after compilation of all data. The amount of gold and silver produced by the mill will be reported following the completion of the milling of the bulk sample. [Emphasis added.]

[12] In June 2013, Pretium received the Feasibility Study, prepared by Tetra Tech. On June 11, 2013, it issued a news release stating that the Feasibility Study had predicted a mine life of 22 years, producing an estimated 7.1 million ounces of gold, and indicating that the mineral reserves resulting from the Feasibility Study

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were based on the Resource Estimate, and that the results of the 10,000-tonne BSP currently underway were expected later in the year.

**(2) Strathcona's Concerns**

[13] At the heart of the litigation is a disagreement between Pretium and Strathcona about the accuracy and reliability of the Resource Estimate, and in turn, the predictions in the Feasibility Study, based on Strathcona's observations during its work on the BSP. Over a three-month period from July 23 to October 21, 2013 (the "Class Period"), Strathcona, based on the assays of the samples processed at the sample tower, and before the entire bulk sample had been excavated, milled and tested, expressed the view that the Feasibility Study was premised on inaccurate and unreliable information, and urged Pretium to make certain disclosures. Pretium disagreed, countering that Strathcona's concerns were premature and that the disclosures proposed by Strathcona would be inappropriate.

[14] The record of what transpired during this period is voluminous. It is sufficient to set out some of the communications of Strathcona's concerns and Pretium's responses, and the relevant public disclosure during the Class Period.

[15] The first relevant event took place on July 11, 2013, when Henrik Thalenhorst, the Independent Qualified Person ("QP") from Strathcona overseeing the BSP, sent an email to Ken McNaughton, Pretium's Chief

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Exploration Officer. Dr. Thalenhorst expressed disappointment with the BSP results to date, and stated that the "feasibility study at least for this part of the [mine] is based on unreliable grade interpolation" and that "[t]hese developments have profound implications for the project". He cautioned that Pretium "[would] have to consider how and when to inform the public on these developments".

[16] Mr. McNaughton replied to the email the next day, stating that it was "premature to come to conclusions based on the limited number of drill data and without reliable sample tower results or processing results". He noted that there needed to be "a complete dataset" before coming to any conclusions, and he concluded: "Reacting to incomplete data is not in the best interests of our shareholders or the public".

[17] Pretium's first public disclosure following this exchange was a July 23 news release, which marks the start of the certified Class Period. (This is the first of seven documents alleged to have contained a misrepresentation.) The news release reported on additional underground drill results, and the amount of material that had been processed through the sample tower. The news release reiterated that drilling results would continue to be reported as they are received (indeed, Pretium's disclosure throughout the Class Period reported all assay results from the underground drilling that was part of the BSP), and, with respect to the BSP, stated that "Strathcona's report on the [BSP] is expected later in the year after compilation of all data". (A draft of this news release had been provided to

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Dr. Thalenhorst, who proposed some edits that were incorporated into the final version, but did not repeat the concerns raised in his July 11 email.)

[18] Pretium's Management Discussion & Analysis ("MD&A") for the six months that ended June 30, 2013 was released on August 1, 2013. (This is the second document alleged to have contained a misrepresentation.) It described in some detail the BSP and the excavation of the bulk sample. Under the heading "Sample Tower and Mineral Processing", the MD&A stated:

> The 10,000-tonne bulk sample is being excavated in approximately 100-tonne rounds. Each round is crushed and run through a sample tower on site. The sample tower has been designed and constructed to extract two 30-kilogram representative samples from each 100-tonne round processed by the sample tower. The representative samples extracted by the sample tower will be assayed, and the assay results will be reported by Strathcona in their report on the Program.
>
> We have begun shipping the remainder of the 10,000-tonne bulk sample to a mill for processing. The mill will use a similar circuit, gravity and flotation, to extract gold and silver from the bulk sample as contemplated in the feasibility study for the Brucejack Project. The bulk sample remainder is expected to be milled in the third and fourth quarters of this year. [Emphasis added.]

[19] I pause here to note that the appellant acknowledged in oral argument that at this point, Strathcona's concerns had not yet "crystallized", and that this only occurred after Strathcona expressed concerns that were not "retracted", beginning with a letter, dated August 14, 2013, from Dr. Thalenhorst to Mr. McNaughton, copied to Mr. Quartermain.

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[20] The August 14 letter stated, in part, that:

> [T]he results of sufficient drill-hole and bulk-sample assay data…show that the resource block model developed and reported on in the [Resources Estimate], and used for the recent [Feasibility Study] is not reliable. The resource model greatly over-estimates the gold grade of the bulk-sample area which was estimated to be bulk-mineable with a gold grade of between 10 and 15 g/t.

Dr. Thalenhorst continued: "Since it is now obvious that the Feasibility Study … is no longer valid, and since this represents a material change for Pretium, we strongly recommend that Pretium make these findings known to the public so that investors are no longer relying on the invalid results of the [Feasibility Study] and the [Resource Estimate]".

[21] The following day, Pretium's Vice President and Chief Development Officer, Joe Ovsenek, replied to the Strathcona letter, stating in part that "[t]he purpose of the [BSP], amongst other things, is to assess whether the current resource estimate reconciles with the bulk sample. One of the possible outcomes of the [BSP] is that the resource estimate does not reconcile with the bulk sample", and that this was "public knowledge". Mr. Ovsenek reminded Dr. Thalenhorst that the parties had agreed that the bulk sampling results would not be disclosed until Strathcona had completed its work, and concluded that, accordingly, the disclosure that "Strathcona's report on the Program is expected later in the year after compilation of all data" was satisfactory.

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[22] On August 15 and August 23, 2013, respectively, Pretium issued a news release and a material change report, in which it: (i) reported additional underground drill results from the BSP, stating that "[a]ssays from the Program continue to confirm the projection of high-grade gold mineralized domains, and visible gold continues to be encountered" (setting out the assay results in table form)[1]; (ii) provided an update on the progress of the BSP, including that 8,600 tonnes of material had been excavated to date and that the program was expected to conclude in early September; and, (iii) reiterated that Strathcona's report on the BSP was expected later in the year, after compilation of all data, with the amount of gold and silver produced by the mill to be reported following the completion of the milling of the bulk sample. (These are the third and fourth documents alleged to contain misrepresentations.)

[23] On August 16, Pretium forwarded the August 14 Strathcona letter to Ivor Jones at Snowden, the QP overseeing the resource at the Brucejack project. Mr. Jones responded, expressing his "serious concerns about the validity of the sample tower results with respect to the Brucejack mineralisation", and his view that it was "too early to form any opinion on the meaning of any results of the bulk

[1] As confirmed by the appellant's counsel in argument on the appeal, there is no issue in this case about the reporting of the actual drilling assay results, and their treatment in the disclosures. The focus is on the failure to disclose Strathcona's concerns about the reliability of the Resource Estimate and Feasibility Study, which it based on its field observations, the drilling assay results and the interim sample tower results produced by the BSP.

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sample". He noted that he would be "very concerned about making any conclusions with respect to the bulk sample and the validity of the mineral resource and subsequent studies".

[24] On August 20, there was a presentation to the Pretium board of directors about Strathcona's concerns that included an outline of Snowden's response. The issues of the sample tower representativity, the validity of the Feasibility Study, and market disclosure were discussed. The following day, Mr. Ovsenek reported to the Board that he met with Dr. Thalenhorst, who was still of the view that the sample tower results were representative, that Strathcona's main concern was disclosure, and that they "definitely intended to finish the bulk sample program".

[25] On August 22, following a meeting between the parties the previous day, Mr. Ovsenek sent a letter to Dr. Thalenhorst for the express purpose of addressing the issues raised in Strathcona's letter and to reinforce Pretium's "efforts to make full and timely disclosure to the investment community". The letter noted that the framework for Pretium's disclosure of the BSP was consistent: "the results of the underground drilling will be disclosed as received throughout the program and the results of the sampling of the bulk sample by the sample tower will not be disclosed until all data have been compiled and we have received [Strathcona's] report on the [BSP]". The letter concluded that Pretium had been advised by the QP responsible for the VOK resource estimate (Mr. Jones) that it was too early to form any opinion on the meaning of any results of the bulk sample, and that Pretium

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believed that the best approach was “to complete the underground drilling, to excavate the bulk sample and to mill the bulk sample material after it has passed through the sample tower, with reporting to follow as we have advised the investment community”.

[26] On September 5, Dr. Thalenhorst sent Pretium an “Interim Technical Report”, after having visited the mine between August 16 and 20. The stated purpose of the report was to reiterate Strathcona’s “strong conviction, now based on additional data and deeper geological insight, that the technical and economic information about the…project currently in the public domain as a result of the June 2013 Feasibility Study…is materially inaccurate”. Dr. Thalenhorst noted that, while the bulk sample results were not for all of the material, “they are nonetheless significant, relevant and indisputable”. Again, he urged that “Pretium should make public, without further delay, this very material change of the gold grade and gold content of the VOK deposit as a result of the very obvious conclusions to be drawn from the bulk sample program”.

[27] Three further news releases went out from Pretium on September 9, September 23 and October 3, 2013, essentially maintaining the *status quo*: reporting that drilling was underway and continuing to intersect high-grade gold, and that Strathcona was undertaking the 10,000-tonne BSP and would provide a report, now expected in early 2014, after compilation of all data. The September 9 news release also included information on the Feasibility Study, indicating that the

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"updated Mineral Resource estimate for the Valley of the Kings will incorporate all 2013 underground and surface drilling and will be prepared following receipt of all assays of the 2013 drill program". (All three news releases are alleged to have contained misrepresentations.)

[28] In the interim, Dr. Thalenhorst continued to email Mr. Ovsenek, asserting that the assay results for the bulk-sample tonnage continued to disprove the current block model, which projected wide zones of mineralization, and advising public disclosure, while Mr. Ovsenek responded that the Interim Technical Report had been sent to Mr. Jones at Snowden, that any disclosure prior to his response would not be appropriate, and that the "theme in current market commentary about Pretium is to 'wait-and-see' if the final results of the bulk sample are reconcilable with the resource estimate".

[29] On October 7, 2013, Strathcona resigned from its engagement in the BSP, with a letter to Pretium management, noting that it "has become apparent that there is a substantial difference between what information on the VOK program that Pretium believes should be disseminated to public markets, and what emphasis there should be on the interpretation of results, as compared with that which Strathcona believes to be appropriate". Strathcona stated that the factor causing it the most concern was the content of Pretium's news releases in July, August and September, which contained "erroneous and misleading" statements. Pretium

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urged Strathcona to await the bulk sample mill data which were expected within a few days, but Strathcona refused to reconsider its decision.

[30] In an October 9 news release, Pretium announced Strathcona's resignation and in a further news release on October 22, Pretium provided a detailed summary of the reasons provided by Strathcona for its withdrawal, setting out its own views and those of Snowden, responding to the concerns.

[31] Over these 13 days in October 2013, the Pretium share price dropped from $7.01 to $3.45. The appellant represents a class of Pretium shareholders who, during the Class Period, purchased Pretium common shares listed on the TSX (or on the NYSE, if the shareholder resided in Canada during the Class Period), and held some or all of those common shares at the close of trading on October 8, 2013 or October 21, 2013.

[32] On December 13, 2013, following the Class Period, Pretium released the final processing results from the bulk sample program. The mill results confirmed the validity of the Resource Estimate: the 10,302 tonnes of bulk sample yielded 5,865 ounces of gold, which was about 42% more than had been predicted. Using these results, Snowden prepared an updated Resource Estimate, which was in turn used to update the Feasibility Study in 2014. The Brucejack mine entered commercial production in 2017.

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## III. LEAVE AND CERTIFICATION

[33] The appellant brought a proposed class proceeding for common law and statutory secondary market misrepresentation. The action was commenced by Statement of Claim issued on October 29, 2013, which was subsequently amended, with the final version being the Second Fresh as Amended Statement of Claim (the "Claim").[2]

### (1) The Leave Decision

[34] The statutory claim was brought pursuant to Part XXIII.1 of the OSA, which provides under s. 138.3 for a claim in respect of a document issued by a "responsible issuer" (which includes a reporting issuer), where that document contains a misrepresentation, by a person who acquired or disposed of the issuer's security between the time the document was released and the time when the misrepresentation was publicly corrected. A "misrepresentation" is defined as (a) an untrue statement of a material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made. "Material fact when used in relation to securities issued or proposed to be issued" is defined as

[2] The appellant's motion to further amend his Statement of Claim was refused in part by the motion judge on July 22, 2020. The appeal record refers only to the Second Fresh as Amended Statement of Claim, and not to any subsequent amended pleading.

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"a fact that would reasonably be expected to have a significant effect on the market price or value of the securities". Section 138.4 provides for a number of defences to the statutory claim, including the defence of reasonable investigation.

[35] Section 138.8 sets out a leave requirement, which requires the court to be satisfied that (1) the action is brought in good faith, and (2) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[36] The motion judge framed the first issue as whether there was a reasonable possibility that the appellant's claim that Strathcona's concerns were material and should have been disclosed (such that the failure to do so in the various impugned documents amounted to a misrepresentation by omission) would succeed at trial. The motion judge accepted that Pretium genuinely believed that Strathcona's concerns were based on faulty data which, in Pretium's judgment, were inherently unreliable. He also accepted that Pretium was ultimately proven right: the mill results after completion of the BSP were positive and confirmed the validity of the Resource Estimate. The issue was, however, whether there were misrepresentations by omission by virtue of the failure to disclose material information.

[37] Citing the Supreme Court's guidance in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (an authority relied on by both sides at all stages of these proceedings, including on appeal), the motion

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judge observed that the materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision, and that materiality is determined objectively from the perspective of the reasonable investor, and not based on the subjective views of the issuer.

[38] In determining at the leave stage that Strathcona's concerns were material, the motion judge noted the following:

- Pretium publicly announced the fact that Strathcona was hired to oversee and report on the BSP and described Strathcona as a "reputable firm" and a "recognized expert." It continued to "tout Strathcona's involvement" in various press releases, such that Strathcona's involvement was "obviously newsworthy".
- Pretium confirmed in its MD&A of August 1, 2013 that the sample tower was an integral part of the testing procedure.
- Strathcona, a well-known mining consultant (indeed a "recognized expert" according to Pretium) genuinely believed in the integrity and reliability of the sample tower testing method.

[39] While the motion judge accepted that Pretium would eventually "win the debate" on the reliability of the sample tower method, he held that, during the relevant time period, it could not be said that "the unreliability of the sample tower [data] was so obvious and self-evident and Strathcona's concerns so wrong-

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headed that Strathcona's findings and views were not material and that no reasonable investor would want to know what Strathcona was saying": at para. 36. He concluded that "by any objective measure, reasonable investors would have considered it material that two respected mining consultancies retained by Pretium – Snowden and Strathcona – fundamentally disagreed as to whether there were valid mineral resources in the VOK zone of the Brucejack mine, a question that went to the very heart of Pretium's entire business model": at para. 37.

[40] The motion judge turned to the second issue: whether there was a reasonable possibility that the defendants would not be able to establish one or both branches of the reasonable investigation defence. Section 138.4(6) provides that a person or company is not liable in a Part XXIII.1 misrepresentation action if that person or company proves: (1) that it conducted or caused to be conducted a reasonable investigation before the document containing the misrepresentation was released; and (2) that at the time of the document's release, it had "no reasonable grounds to believe that the document … contained the misrepresentation".

[41] The motion judge accepted that Pretium took Strathcona's concerns seriously and discussed them both internally and with Snowden, and that Pretium had accordingly conducted a reasonable investigation into the reliability of Strathcona's findings and concerns, thereby satisfying the first branch of s. 138.4(6). He concluded, however, that there was a reasonable possibility the

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respondents would not be able to satisfy the second branch: “that when they decided to omit Strathcona’s findings and concerns they had no reasonable grounds to believe that this was an omission of a material fact that a reasonable investor in all the circumstances already noted would find important”. He held that the surrounding circumstances, viewed objectively, favoured disclosure and Pretium could easily have satisfied both the disclosure obligations under the OSA and its own desire to make clear that Strathcona’s findings were unfounded by doing what it did in the October 22 news release. As such, he concluded that there was a reasonable possibility that the defendants would not be able to establish the second branch of the reasonable investigation defence at trial.

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**(2) Certification as a Class Proceeding**

[42] The class proceeding was certified on consent, by order dated January 23, 2019 (the “Certification Order”). The certified common issues included: “(a) Did Pretium release core documents on July 23, August 1, August 15, September 9, September 23, October 3 or October 9, 2013 that contained misrepresentations as pleaded in the Claim”; and “(k) If the answer to common issue (a) is yes, are the Defendants relieved of liability pursuant to [s. 138.4(6)] of the [OSA], which provides a defence of reasonable investigation”.

[43] According to the Claim, the respondents made misrepresentations in each of the impugned documents by omitting Strathcona’s concerns that “the Bulk

Sample Program was failing to confirm the validity of the [Resource Estimate], including the grade distribution and classification of Mineral Resources contained in the [Resource Estimate], and by necessary extension the validity of the Feasibility Study".

[44] The parties exchanged affidavits of documents and conducted examinations for discovery.

## IV. THE SUMMARY JUDGMENT MOTIONS

[45] In 2020, the parties brought cross-motions for summary judgment on the certified common issues. The principal focus was on certified common issues (a) and (k). The motion judge dismissed the appellant's action after concluding that the appellant had been unable to prove that Pretium's failure to disclose Strathcona's concerns was an omission of material fact constituting a misrepresentation. In the alternative, he was satisfied that the respondents had made out the defence of reasonable investigation under s. 138.4(6) of the OSA.

[46] In arriving at this decision, the motion judge recognized that the result appeared contrary to what he had decided in respect of the leave motion, which he explained by reference to the different evidentiary records that were before him on each occasion, and the different standards the appellant was required to meet: proving only a reasonable possibility of success in the leave motion and proving the case on a balance of probabilities on summary judgment.

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**(1) The Evidence**

[47] The respondents had filed affidavit evidence from Pretium representatives Quartermain, Ovsenek and McNaughton. The motion judge noted that, although participant affidavits submitted seven years after the relevant time might be self-serving, these affidavits re-stated and expanded on the evidence adduced at the leave stage. He emphasized that this evidence was reinforced by the evidence of "independent witnesses": Mr. Jones; Simon Dominy, Snowden's bulk sampling expert; and Herbert Smith, a mining engineer who had peer-reviewed the 2013 and 2014 Feasibility Studies.

[48] The motion judge noted that, by contrast, the appellant led substantive evidence only from Mohan Srivastava, who was described by the motion judge as an "otherwise…well-credentialed mining expert who, by his own admission, had no involvement in the relevant events". The motion judge noted that Mr. Srivastava had not spoken with any of the witnesses who participated in the relevant events, and that he offered no opinion on whether Strathcona's concerns were even reasonable. Rather, for the most part, he had reviewed an incomplete selection of documents prepared by class counsel and he did not review Snowden's Resource Model. Instead, Mr. Srivastava paraphrased Strathcona's concerns, and "explicated" them from his own point of view. The motion judge concluded that "much, if not all, of this evidence – if indeed admissible – is less than compelling and should probably be given little weight": at para. 18.

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[49] The motion judge considered important the appellant's failure to provide evidence from Strathcona (including by compelling its representatives as third-party witnesses).[3] Indeed, the motion judge observed that the appellant's evidence left "a lot to be desired" and that "actual evidence from Strathcona's principals may have resulted in a more balanced assessment of its expertise in mineral resource estimation or its understanding of the VOK mineralization and appropriate measurement techniques". Instead, the appellant relied almost exclusively on its expert, "whose contribution to the issues in play was of minimal value at best": at paras. 19, 84.

**(2) The Motion Judge's Findings**

[50] The motion judge explained that, while in the original leave motion he had concluded that "reasonable investors would have considered it material that two respected mining consultancies retained by Pretium…fundamentally disagreed as to whether there were valid mineral resources in the VOK zone of the Brucejack mine", the initial characterization of Strathcona and Snowden as two equally skilled resource estimate consultants with equal expertise and qualifications, offering equally valid opinions, had now been dislodged by the evidence on the motions: "Strathcona was simply not as expert or as qualified as Snowden on the key issues

[3] The motion judge also noted that, while the appellant did not provide an affidavit, his examination for discovery transcript was filed, and confirmed that he did not rely on, nor was he even aware of, any of the impugned documents containing any of the alleged misrepresentations.

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in play and based its unsolicited and inexpert (contrary) opinions on deeply flawed estimation methodology and data". The motion judge was now satisfied on a preponderance of the evidence that Pretium acted properly throughout and was right in not disclosing what he characterized as "bad and misleading information": at paras. 13-15.

[51] The motion judge explained his findings of fact with reference to the evidence. First, he found that "[g]iven the unique mineralization, the 'only true test' of Snowden's 2012 Mineral Resource Estimate was the milling of the 10,000-tonne bulk sample". He explained that the gold deposit at Brucejack is characterized by high-grade veinlets that are not dispersed in any uniform or linear fashion and that some 82% of the gold can be found in 1% of the rock. The motion judge described how Mr. Jones, who "understood how to best estimate the resource value of this unusual mineralization", had explained how he prepared the Resource Estimate, and his recommendation that Pretium excavate and mill a 10,000-tonne sample in its entirety to test the estimate's validity. The motion judge noted that Pretium allowed Strathcona to run the excavated bulk sample through a sample tower of Strathcona's design and calibration, "but only on the understanding that the sample tower data would be disclosed together with the bulk sample mill results in Strathcona's final report". He noted that, in its public disclosures, Pretium repeatedly made clear that "the amount of gold and silver produced by the mill [would] be reported following completion of the milling of the bulk sample", and that

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"the representative samples extracted by the sample tower [would] be assayed and the assay results [would] be reported by Strathcona in their report on the [Bulk Sample] Program". The motion judge stated the "important point" that "[f]rom the outset and throughout the class period…Pretium agreed with Snowden and repeatedly conveyed the message to Strathcona that 'the only true test of the resource estimate' was the actual milling of the entire 10,000-tonne bulk sample": at paras. 26-33.

[52] The motion judge's second finding was that Strathcona's unsolicited and inexpert opinions were premature and unreliable. The opinions were unsolicited because, while Strathcona was retained to design and oversee the 10,000-tonne BSP that Snowden had recommended, it had always been Snowden's responsibility to interpret the BSP results once the entire bulk sample was milled and, if necessary, to adjust the Resource Estimate, and no one asked or needed Strathcona to opine on the validity of the Resource Estimate. The opinions were inexpert because Strathcona's linear measurement approach assumed subject-matter consistency or "stationarity", exactly the opposite of what was found in the uniquely variable Brucejack deposit. In this regard, the motion judge accepted Mr. Jones' evidence that Strathcona's experience preparing mineral resource estimates appeared to be limited to techniques that had been shown to understate the high-grade mineralization and underestimated the Brucejack Resource, and that Pretium and Snowden agreed that Strathcona did not have the ability and

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knowledge to appropriately assess the Resource Estimate. Strathcona's inexperience in this regard was acknowledged by Mr. Srivastava under cross-examination. Strathcona's opinions were premature because Pretium had repeatedly advised it to wait for the results from the bulk sample before making conclusions. Finally, Strathcona's opinions were also unreliable. Based on the evidence, the motion judge agreed with Pretium that Strathcona made two overarching errors in concluding that there were "no valid gold mineral resources" at Brucejack: Strathcona's sample tower data were inherently unreliable because the sample tower results were not necessarily representative; and, as Mr. Jones explained, the simple linear measurement resource estimation technique that Strathcona was using was inappropriate for a variable deposit like Brucejack, where most of the gold is highly concentrated (the motion judge noted that Mr. Srivastava had also agreed with this observation): at paras. 34-52.

[53] The motion judge's third finding was that Pretium "acted properly throughout in its handling of Strathcona's so-called concerns". Pretium was clear in all public disclosures that the results of the BSP would not be disclosed until the bulk sample had been milled and the final report submitted. Additionally, every time Strathcona expressed a concern, Pretium discussed the matter internally and referred it to Snowden. The Pretium executives also vetted Strathcona's concerns with the company's disclosure committee and discussed them fully at two Board meetings.

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The Board concluded on both occasions that Strathcona's opinions were incorrect, and that it would be misleading to disclose erroneous opinions: at paras. 53-58.

**(3) The Motion Judge's Conclusion**

[54] In light of his findings, the motion judge's conclusion was unequivocal: "the Pretium defendants were under no obligation to disclose bad and misleading information. As such, there was no omission of any material fact": at para. 59.

[55] After setting out the definition of "material fact" from the OSA, the motion judge observed that "unreliable information is not a material fact": at para. 61. He referred to a passage from *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 38 B.L.R. (3d) 248, at para. 105, where the B.C. Court of Appeal concluded that, in order to determine the materiality of certain information that was not disclosed to the prospective purchaser of a gold mine, it was necessary to assess its objective reliability. He also referred to the Nova Scotia Supreme Court decision *Amirault v. Westminer Canada Ltd.* (1993), 120 N.S.R. (2d) 91, at para. 581, where preliminary mining results were not required to be disclosed where "within a day or week the sample grade may change upward dramatically".

[56] The motion judge also referred to para. 65 of *Sharbern Holding*, where the Supreme Court observed that the statutory requirement of disclosing material information does not impose an obligation on issuers to "disclose all facts" as this

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would “overwhelm investors with information and impair, rather than enhance, their ability to make decisions”.

[57] The motion judge concluded by stating that “[b]y any objective measure, Pretium was not obliged to publicly disclose information that was premature, unreliable and ‘dead wrong’ – these were not material *facts* that would assist a reasonable investor in making an informed investment decision”: at para. 67 (emphasis in the original).

**(4) The Reasonable Investigation Defence**

[58] The motion judge concluded that, if he was wrong in the analysis he had just completed, he would find in the alternative, on the evidence before him, that the defendants had satisfied both prongs of the “reasonable investigation” defence. He noted that the additional evidence adduced on the summary judgment motions, in particular the evidence of Mr. Jones and the other independent experts, added an important objective dimension to the defendants’ subjective perspective of why the Strathcona data were “inherently unreliable”, such that the second branch of the reasonable investigation defence had been satisfied. The motion judge agreed with, and quoted from, a decision dismissing the claim in parallel U.S. proceedings, where, among other things, the court upheld a reasonable investigation defence, concluding that Pretium was entitled to take a reasonable period of time – that is,

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until October 22, 2013, when the first mill results were delivered and Pretium "disclosed the disagreement", to investigate Strathcona's concerns.

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## V. DISCUSSION

[59] The appellant submits that the motion judge erred in concluding that Pretium's failure to disclose Strathcona's concerns was not a misrepresentation by the omission of a material fact. In particular, the appellant contends that the motion judge applied the correct test for a material fact at the leave stage, but a different, and incorrect, test when, on the summary judgment motion, he injected the irrelevant consideration of "reliability", and relied on *post hoc* evidence of Pretium's subjective views and its business judgment.[4]

[60] After identifying the appropriate standard of review in this appeal, I will address the appellant's arguments.

### (1) Standard of Review

[61] The appellant contends that the standard of review is correctness. Essentially, the appellant advances what he says are legal errors. The

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[4] In his factum the appellant also made a procedural argument, that the motion judge should not have resolved "complex mining issues substantively disputed" between parties on a summary judgment motion. This argument was understandably not pressed in oral argument. Both sides brought mirror motions, seeking to have the certified common issues resolved by summary judgment. This court has consistently held that a party who has participated in a process below without complaint cannot object to this process on appeal: *Maurice v. Alles*, 2016 ONCA 287, 130 O.R. (3d) 452, at para. 25; *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150, 394 D.L.R. (4th) 601, at para. 17, leave to appeal refused, [2016] S.C.C.A. No. 173; *Harris v. Leikin Group Inc.*, 2014 ONCA 479, 120 O.R. (3d) 508, at para. 53. Here, the appellant not only acquiesced to the summary judgment process – he brought his own cross-motion.

respondents disagree, asserting that the standard of review is palpable and overriding error because what the motion judge had to decide involved questions of fact alone or of mixed law and fact.

[62] Typically, whether a defendant made a misrepresentation by the omission of a material fact is a question of mixed fact and law, and subject to a palpable and overriding error standard of review: *Sharbern Holding*, at para. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36. To the extent that an extricable legal issue is identified, the standard of review is correctness: *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161, at paras. 37-38, leave to appeal application discontinued, [2016] S.C.C.A. No. 454. The legal test for what constitutes a "material fact" under the OSA may constitute a question of law, subject to review on a correctness standard. However, absent an error in the legal standard, the motion judge's determination that there was no omission of a material fact is subject to deference, and to review on a palpable and overriding error standard: *A.M. Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 21, at para. 60, leave to appeal requested, [2022] S.C.C.A. No. 89.

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### (2) Whether Strathcona's Concerns Were a Material Fact Whose Omission Constituted a Misrepresentation

#### (i) The Alleged Misrepresentations

[63] The point of departure is Part XXIII.1 of the OSA, which provides for civil liability for secondary market misrepresentation. Section 138.3 sets out the statutory cause of action as follows:

> 138.3 (1) Where a responsible issuer…releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages…

[64] "Misrepresentation" as defined in s. 1(1) includes "(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made". A "material fact", in turn, is defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

[65] In the present case it is not alleged that Strathcona's concerns were a material fact that was "required to be stated" (such as a "material change" as defined elsewhere in s. 1(1)). Rather, the allegation is that Pretium made a misrepresentation by omission of a "material fact that [was]… necessary to make a statement not misleading in the light of the circumstances in which it was made".

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[66] Certified issue (a) that was before the motion judge was whether Pretium released documents on July 23, August 1, August 15, September 9, September 23, October 3 or October 9, 2013 that contained misrepresentations as pleaded in the Claim. The Claim asserted that the impugned documents contained material misrepresentations "as they omitted to state an adverse material fact that Strathcona, the Qualified Person responsible for the [BSP], had formed and communicated to Pretium its belief that the [BSP] was failing to confirm the validity of the [Resource Estimate], including the grade distribution and classification of Mineral Resources contained in the [Resource Estimate], and by necessary extension the validity of the Feasibility Study". While this is how the misrepresentations are specifically referred to in the Claim, in the proceedings the motion judge and the parties (including on appeal) referred to the omitted information as "Strathcona's concerns".

[67] There was no question that Strathcona had communicated concerns to Pretium in the course of its work on the BSP; the issue before the motion judge was whether Strathcona's concerns were a material fact, where the omission to state that fact in Pretium's public disclosures during the Class Period rendered any statement contained therein misleading and, thereby, constituted a "misrepresentation" as defined by the OSA.

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[68] In oral argument, the appellant relied almost exclusively on the Supreme Court's decision in *Sharbern Holding* as authority for what constitutes a material fact in the context of a misrepresentation by omission.

[69] Because *Sharbern Holding* occupied a central role in the appellant's submissions, I will begin my analysis by setting out what that case says about the legal test for a material fact in the context of securities disclosure, and how materiality is to be determined in a particular case. I will then address the appellant's arguments and explain why I have concluded that the motion judge applied the correct test and made no palpable and overriding error in his conclusion that Strathcona's concerns were not a material fact that Pretium was required to disclose, and for that reason, in his dismissal of the misrepresentation claim.

**(ii) *Sharbern Holding***

[70] *Sharbern Holding* is a decision of the Supreme Court that addresses the materiality of omitted information in the context of an alleged misrepresentation. At issue was information that was not disclosed by Vancouver Airport Centre Ltd. (VAC), in its marketing of strata lots in two hotels (a Hilton and a Marriott) it was developing on the same property. At trial, VAC was found liable at common law and under s. 75 of the *Real Estate Act*, R.S.B.C. 1996, c. 397, for having made material false statements in its disclosure documents when it failed to disclose to

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prospective purchasers of the Hilton units the more favourable financial arrangements it had offered to purchasers of the Marriott units. It was alleged that the Disclosure Statement (a document required under the *Real Estate Act*) for the Hilton units made actionable misrepresentations when it stated that VAC had entered into agreements with the Marriott that were "similar in form and substance" to those governing the Hilton, and that VAC was not aware of any existing or potential conflicts of interest that could reasonably be expected to materially affect the purchaser's investment decision.

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[71] The B.C. Court of Appeal allowed VAC's appeal, concluding that, based on VAC's extensive factual and expert evidence concerning actual and industry practice in the management of multiple hotels by a single entity, and the absence of evidence to objectively support that a reasonable investor would have been concerned about the details of the financial arrangements, the omitted information was not material.

[72] On further appeal, the Supreme Court concluded that the trial judge erred in finding that the omitted facts were "inherently" material and in not considering their materiality in light of the evidence. In his reasons for a unanimous court, Rothstein J. addressed in detail the meaning of "materiality" in the context of the requirement to disclose material facts, including the standard of proof that is required and the type of evidence that is relevant.

[73] At para. 45, Rothstein J. formulated the test for the materiality of an omitted fact as follows:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote…Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available" [citing *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (1976), a leading U.S. case dealing with proxy solicitations, at p. 449].

[74] He observed that: "materiality" involves the application of a legal standard to particular facts; it is a question of mixed law and fact, determined objectively from the perspective of a reasonable investor; and, it is a fact-specific inquiry to be determined on a case-by-case basis in light of all relevant considerations and "from the surrounding circumstances forming the total mix of information made available to investors": at para. 61.

[75] Rothstein J. explained that the requirement that the material fact "would", rather than "might", have been considered important by a reasonable investor creates a "standard tending toward probability rather than toward mere possibility": at para. 49. He held that issuers are not under an obligation to "disclose all facts that would permit an investor to sort out what was material and what was not", and that doing so would "overwhelm investors with information and impair, rather than enhance, their ability to make decisions": at para. 65.

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[76] He explained that the materiality of a fact, statement or omission is something that must be proven by the party alleging materiality, except in those cases where common sense inferences are sufficient. He described the required analysis for materiality in the case of an omission as follows, at para. 61:

> A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer. [Emphasis added.]

**(iii) The Alleged Errors**

[77] The appellant contends that, in deciding the summary judgment motion, the motion judge departed from the teachings of *Sharbern Holding* by injecting a new and irrelevant factor of "reliability". The appellant says that, not only is reliability entirely absent from Rothstein J.'s discussion, but that by considering the reliability of the information or fact that was withheld, the motion judge ignored the court's exhortation, at para. 51, that, "[g]iven that materiality is determined objectively, from the perspective of a reasonable investor…the subjective views of the issuer do not come into play when assessing materiality". The appellant contends that

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the motion judge improperly relied on Pretium's subjective views and business judgment, in finding Strathcona's concerns to be unreliable and, therefore, not material information that had to be disclosed. The appellant says that the reliability of the information should play no role at all: whether or not Pretium agreed with Strathcona's concerns, they needed to be disclosed, so that the market could make up its own mind.

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[78] I would not give effect to the appellant's arguments, which I will address in turn.

**(iv) The Motion Judge Applied the Correct Test**

[79] I am not persuaded that the motion judge applied a test that was wrong at law when he determined that the Strathcona concerns were not material information, in part because they were unreliable. As I will explain, although the motion judge did not repeat the principles from *Sharbern Holding* that he previously set out in his leave decision, he undertook an analysis that was consistent with, and did not depart from, the framework articulated in that case. Moreover, the motion judge properly focused on the relevant factors, including reliability, in concluding that Strathcona's concerns, which were the expression of an opinion, did not constitute a material fact that ought to have been disclosed.

[80] The motion judge was right to begin his analysis by identifying the alleged misrepresentations. At para. 21 he set out what the appellant himself had pleaded:

that the respondents made misrepresentations in each of the impugned documents by omitting Strathcona's concerns that "the Bulk Sample Program was failing to confirm the validity of the [Resource Estimate], including the grade distribution and classification of Mineral Resources contained in the [Resource Estimate], and by necessary extension the validity of the [Feasibility Study]".

[81] The motion judge identified as the central issue the materiality of the information that was not disclosed. He noted that the case was in essence about the opinions expressed by Strathcona about the validity of Snowden's Resource Estimate and the related Feasibility Study – that the Resource Estimate was "unreliable", "invalid", "materially inaccurate" and "incorrect", that immediate public disclosure to this effect was required, and ultimately (in its resignation letter) that "there [were] no valid gold mineral resources for the VOK zone", and that all of Pretium's disclosures suggesting the opposite were "erroneous and misleading": at paras. 34 and 35. These were strongly stated opinions, with which Pretium disagreed. As I explain below, it was relevant for the motion judge to assess the objective reliability of Strathcona's concerns, for the purpose of determining whether they were material facts that would assist a reasonable investor to make an informed investment decision.

[82] The motion judge, as *Sharbern Holding* instructs, undertook a "fact-specific inquiry" in light of all relevant considerations. He assessed the "contextual evidence", examining both the disclosed information and the omitted information.

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He considered Strathcona's role, the record of communications and the evidence of Snowden (which had not been presented at the leave stage) to conclude that Strathcona was expressing opinions prematurely, outside the scope of its retainer and based on faulty assumptions. His characterization of Strathcona's opinions as inexpert, unsolicited, premature and unreliable was firmly anchored in the evidence. He explained why he accepted the respondents' evidence respecting Strathcona's concerns, and why he was unpersuaded by the appellant's evidence. (I note that the appellant does not contest the motion judge's findings of fact, or point to any palpable and overriding error, except, as discussed below, to suggest that the finding that Strathcona's concerns were unreliable relied on *post hoc* evidence and Pretium's subjective views).

[83] The motion judge considered the omitted information in the context of Pretium's public disclosures – see, for example, paras. 30 and 53. He considered the public communications about the BSP, noting that the market expected the reporting on the BSP and its effect on the Resource Estimate to occur at the completion of the program, after the bulk sample had been milled and the final report submitted: at para. 53.

[84] Referring to the definition of misrepresentation in the OSA, the motion judge concluded that there was no omission of any material fact because the respondents were not obliged to disclose "bad and misleading information": at para. 59.

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[85] In my view, the motion judge adopted a contextual and fact-specific approach to the materiality of Strathcona's concerns and, in particular, whether they were material facts that were required to be disclosed. He conducted a detailed review of the evidence on the summary judgment motion, and explained, by reference to such evidence, why he concluded that Strathcona's concerns were premature, inexpert and unreliable, and in turn, by reference to the disclosure already made, "were not material facts that would assist a reasonable investor in making an informed investment decision". I will now address the appellant's discrete concerns with the motion judge's analysis.

**a. The reliability of Strathcona's concerns was a relevant consideration in the context of this case**

[86] The motion judge concluded that Strathcona's concerns were not reliable because Strathcona made two overarching errors: its sample tower data were inherently unreliable because they were based on samples that were not necessarily representative; and, the resource estimation technique that Strathcona was using (based on the assumption of "stationarity" of the resource) was inappropriate for a variable deposit like Brucejack, where most of the gold is highly concentrated in narrow veins.

[87] I do not agree with the appellant's submission that the motion judge erred in considering the reliability of Strathcona's concerns as part of his materiality

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analysis. While the reliability of omitted information is not necessarily relevant to the question of materiality in all cases, it was relevant here, together with the observations that Strathcona's concerns were premature and expressed outside "its own lane".

[88] The appellant is correct that reliability was not identified as a component of a "material fact" in *Sharbern Holding*. In that case, however, the quality or reliability of the omitted information was not at issue: there were in fact more favourable financial arrangements offered to the Marriott unit purchasers and there was in fact a potential or actual conflict of interest. The only question was whether the trial judge erred in concluding that these facts were material and that their omission from VAC's Disclosure Statement was, accordingly, a misrepresentation.

[89] In the present case, by contrast, what was omitted was not (as in *Sharbern Holding*, and many other material fact cases), an undisputed fact. The omitted information was the expression of an opinion by Strathcona that the BSP was failing to confirm the validity of the Resource Estimate, and by necessary extension the validity of the Feasibility Study. While the appellant argues that it was the fact of Strathcona having expressed an adverse opinion that was material, it is the substance of the opinion that Strathcona was urging Pretium to disclose, and indeed that the appellant asserts was a "material adverse fact". The appellant, at para. 35 of his factum, asserts that "the Claim alleges that Strathcona's concerns were material facts that Pretium was required, but omitted to disclose in its public

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statements at the time". The opinion was offered in the course of, and before completion of, the BSP. It was based on sample tower results and Strathcona's field observations. It was an opinion that was not shared by Pretium or Snowden. In determining the materiality of such an opinion to a reasonable investor it was relevant to consider, among other things, its objective reliability.[5]

[90] The motion judge, in considering the reliability of Strathcona's concerns, referred to *Inmet*, a decision of the B.C. Court of Appeal that also dealt with the materiality of an opinion in the context of disclosure. The action involved an alleged breach of contract for the sale of a gold mine. The purchaser asserted that it was relieved of liability for its refusal to complete the purchase because of the vendor's breach of a disclosure clause in the contract. Among other things, the court considered whether certain information expressing concerns about ore reserves and expressions of doubt, speculations and recommendations for further investigation of Inmet employees and consultants following a blasthole study was individually or cumulatively "material fact information". The court observed that the

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[5] There is case law in Ontario in the secondary market misrepresentation context (see for example *Miller v. FSD Pharma*, *Inc*., 2020 ONSC 4054) that adopts a "market impact" test for materiality, rather than the "reasonable investor" approach in *Sharbern Holding* and other cases. While the appellant points this out in his factum, at para. 49 he states, "[w]hile the subtleties of the two definitions of materiality may be important in some situations, that is not the case here", reiterating his position that "[u]nder either approach, Strathcona's Concerns were material for Pretium's investors and the market for its securities". I agree that nothing turns in this case on whether one or the other approach is appropriate in all or particular cases, and I express no view in that regard. The parties agreed that whether an omission is a material fact is governed by the principles in *Sharbern Holding* and joined issue on whether the motion judge adopted an approach on summary judgment that was consistent with the principles outlined in that case.

question was not, as the trial judge had opined, whether the information was subsequently proven to be true or accurate, but that "the analysis of whether any of the undisclosed information was material fact information…has to include an assessment of its objective reliability": at paras. 104-5.

[91] Similarly, in the present case, in assessing whether Strathcona's concerns – which were also the expression of an opinion – constituted a material fact, their objective reliability was a relevant consideration. Reliability does not mean that the information was proven to be true. Nor does it depend on an issuer's subjective views. *Sharbern Holding* instructs that materiality is determined objectively, from the perspective of a reasonable investor – whether there is a substantial likelihood that the disclosure of the information would have been viewed by the reasonable investor as having significantly altered the total mix of information made available: at para. 61. Whether omitted information constitutes a material fact depends in part on the nature of the information, and how it would be considered by a reasonable investor – not in a vacuum, but in the context of the disclosure already made. The motion judge was required to consider the omitted information in context.

[92] This ties into a related argument made by the appellant, that Strathcona's concerns were material because a reasonable investor would have considered this information to be important in light of the information that was already public. The appellant contends that, as soon as Pretium chose to talk about Strathcona and the BSP in its news releases and other disclosure, it was required to disclose

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Strathcona's concerns based on its visual observations, the underground drilling and the sample tower, so long as the concerns were not retracted. The appellant relies on the fact that the BSP was highlighted in the disclosure and that Strathcona was a recognized mining expert that was responsible for the program. Even if Strathcona's concerns were not true or accurate, they were from a source that was already within the total mix of information. By remaining silent, Pretium misrepresented that the BSP was proceeding "business as usual". In providing updates on the BSP without disclosing adverse facts, Pretium's disclosures were misleading.

[93] I disagree. The problem with this argument is that it takes an unwarranted "broad brush" approach to the question of disclosure and material facts, that is inconsistent with the fact-specific inquiry mandated by *Sharbern Holding*. What is required is an objective determination – considering what was occurring and known by the issuer within the context of the total mix of information – of what would have been important to a reasonable investor, and whether the failure to disclose the information would render misleading something already stated in the issuer's disclosure.

[94] In this case, the disclosure that had already been made – about the BSP and Strathcona's role, and their relationship with the Resource Estimate and the Feasibility Study – is an essential part of the context. While Strathcona's responsibility for the BSP was addressed in Pretium's disclosures, none of the

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disclosures suggested that Strathcona was to analyze and report on testing of the bulk sample through the sample tower, that the Resource Estimate would be assessed before the milling of the entire bulk sample was completed and Strathcona had provided its report, or that Strathcona was expected to opine on the Resource Estimate or the Feasibility Study, based on the sample tower results, or at all. The motion judge concluded, at para. 53, that "[f]rom the outset, Pretium made clear in its public disclosures that the results of the Bulk Sample Program would not be disclosed until the bulk sample had been milled and the final report submitted".

[95] There was also nothing in the information that had been publicly disclosed to suggest that the tower sample results were already confirming the Resource Estimate or that Strathcona's work was endorsing it. Indeed, the evidence was that the market had adopted a "wait and see" approach. A secondary market misrepresentation by omission requires evidence that disclosure already made is misleading because of the omission. The appellant was unable to point to anything specific in the impugned documents that was misleading as a result of the failure to communicate Strathcona's concerns.[6]

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[6] In his factum the appellant suggests that the impugned disclosures "portrayed that the BSP's results were continuing to affirm the accuracy of the Resource Estimate and Feasibility Study", however there is nothing in the public disclosures to support this statement. The further suggestion that the August 1, 2013 MD&A

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[96] If the information available to the market suggested otherwise – that, for example, Strathcona was expected to express its views on the Resource Estimate as its work on the BSP progressed – then, presumably Strathcona's concerns would have had to have been disclosed. In such circumstances, the failure to disclose Strathcona's concerns would have constituted the omission of material information, irrespective of their reliability. However, a negative opinion expressed prematurely by a QP who had not yet completed its work, that was based on incomplete information outside what it was required to do (and what had been represented that it would do), would not have been material to a reasonable investor. In fact, it would have been misleading to have disclosed such information. The approach suggested by the appellant, that such disclosure should have been made so that investors could have decided what to do with the information, was squarely rejected by Rothstein J. at para. 65 of *Sharbern Holding*:

> … [The trial judge] said that the conflict of interest must be disclosed so that investors can weigh its costs and benefits against those of other factors. However, the statutory requirement does not impose on issuers an obligation to disclose all facts that would permit an investor to sort out what was material and what was not. This approach would not only result in excessive disclosure, regardless of materiality, it would overwhelm

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informed the market that the "BSP will confirm that the resource model is accurately projecting the Mineral Resource estimate within the bulk sample area", takes the statement out of its context, which, together with earlier statements, makes it clear that the BSP work that was designed to test two domains of mineralization used in the Resource Estimate was for the purpose of confirming the Resource Model projections. Similar statements were made before the Class Period, in describing the BSP. None of this was pressed in oral argument, where the essence of the alleged misrepresentation was that it was "business as usual".

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> investors with information and impair, rather than enhance, their ability to make decisions.

[97] Accordingly, in this particular case, the reliability of the information provided by Strathcona was relevant in assessing whether Pretium omitted material facts from its disclosure that ought to have been disclosed for the benefit of "the reasonable investor". The motion judge made findings of fact that Strathcona's concerns, which were opinions, were based on objectively unreliable information, that they were premature, and that they were expressed outside the scope of the work Strathcona had been engaged to perform. Disclosure of facts that the motion judge found to be objectively unreliable would not have benefitted the "reasonable investor" but would have led to the kind of mischief in the market that the disclosure obligations under the OSA seek to obviate.

[98] As such, I would not give effect to the appellant's submission that the motion judge erred in considering the reliability of Strathcona's concerns as part of his analysis.

**b. The motion judge did not rely on *post hoc* evidence or defer to Pretium's subjective views**

[99] The appellant submits that the motion judge's assessment of materiality relied on a *post hoc* evaluation that accepted Pretium's subjective opinions and business judgment. There is simply no basis for this contention.

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[100] First, the evidence adduced on the summary judgment motion was not *post hoc* evidence that was created with the benefit of hindsight. Although assembled years after the relevant events, the respondents' evidence included emails and letters that showed the discussions about Strathcona's concerns by the relevant actors at Pretium at the time and, importantly, included Snowden's contemporaneous views. The affidavits of Pretium and Snowden representatives spoke to the views they had expressed to Strathcona when the events were unfolding, which were consistent with what was contained in the contemporaneous communications. The evidentiary record showed that, during the Class Period, Pretium was actively engaging with Strathcona and raising exactly the same concerns as it did on the summary judgment motion, namely that Strathcona had always been skeptical of the modelling method used in the Feasibility Study, that it prematurely and outside "its own lane" expressed an opinion that the Resource Estimate over-estimated the gold grade, even with very little data, and that the sample tower method was not a representative sample.

[101] The motion judge's findings were based on evidence dating from the Class Period, and he did not adopt a hindsight assessment of whether Strathcona's concerns were justified or correct.

[102] Nor did the motion judge simply accept Pretium's subjective views or business judgment. While on the leave motion, the motion judge concluded that Pretium's subjective views were not sufficient to displace the "objective reality that

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Strathcona, an experienced mining consultant, was telling Pretium that its testing was showing almost no gold", he observed that the initial characterization of the two consultants as equally skilled resource estimate consultants "with equal expertise and qualifications offering equally valid opinions" had been dislodged by the evidence on the summary judgment motions: at paras. 12-14. He concluded that the additional evidence adduced on the summary judgment motions added "an important objective dimension" to Pretium's view that the Strathcona concerns were "inherently unreliable": at para. 74.

[103] Contrary to the appellant's submission, the motion judge did not allow Pretium's business judgment to qualify or undermine its duty of disclosure. In *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, the company, after making public a prospectus forecast, and between the release of the forecast and the offer closing, did not disclose that its fourth quarter numbers were lagging and did not match the forecast. Instead, management relied on its belief that by year-end the company would achieve or exceed the forecast. When numbers kept dropping, the information was disclosed, and stock prices dropped. Binnie J. held that "[t]he Business Judgment Rule is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure": at para. 54 (emphasis in original). In this case, Pretium did not base its disclosure decision on the belief that further work on the BSP would provide favourable results. Instead, its representatives were reasonably of the view –

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supported by the opinions of the consultant responsible for the Resource Estimate – that the results from the BSP could only be accurate upon completion of the project, which included milling the sample at the Montana mill. This was consistent with the contemporaneous evidence of the behaviour of institutional investors. The market was adopting a "wait and see" approach. It may have been a "business as usual" message, but the failure to disclose Strathcona's concerns did not render any prior statement by Pretium misleading.

[104] The motion judge considered the materiality of the information that was withheld in the circumstances that existed at the time, not with hindsight, and he did not defer to Pretium's business judgment. He considered the evidence of contemporaneous communications between Pretium and Snowden, internally at Pretium (including to its board of directors) and between Pretium and Strathcona, about Strathcona's concerns, including the substance of Strathcona's opinions and advice and the obligation to make disclosure.

**c. What is a material fact does not depend on "reasoning backwards" from the alleged public correction**

[105] In a similar argument, the appellant asserts that the fact that Pretium's share price dropped precipitously after the October 9 and 22, 2013 news releases (the latter of which he characterizes as a corrective disclosure, or, using the words of

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the OSA, a public correction), confirms that Strathcona's concerns must have been material.

[106] In this case it is not admitted that the October 22, 2013 news release constituted a public correction – in the sense that it corrected information that was previously misstated. The respondents assert that what is alleged to have been a public correction in fact corrected nothing from the previous disclosures. The disclosure was made in order to inform the market that Pretium's expert responsible for the BSP was leaving the project unexpectedly, and it was in this context that Strathcona's concerns and Pretium's responses were communicated. There was no correction of previous information, since Strathcona had remained on the project during the Class Period, and had confirmed that it would complete the BSP, even after it began expressing concerns. Nor did the October news releases validate Strathcona's concerns.

[107] Even in cases where it is admitted or obvious that there was a public correction, the market response, while relevant to materiality, is not determinative: *Peters v. SNC-Lavalin Group Inc*., 2021 ONSC 5021, at paras. 195, 197. And, as Ducharme J. noted in *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107 (Div. Ct.), in connection with a material change, "if the material change is disclosed by the issuer along with other information, the market reaction to the combined disclosure may not be a reliable indicator of the market impact of the disclosure of one particular piece of information in isolation":

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at para. 59. In this case the appellant led no evidence to tie the decline in Pretium's share price to the disclosure of Strathcona's concerns.

[108] Here, as in *Peters*, it would be "reasoning backwards" from a "precipitous decline in the market value of the issuer's shares" to infer that the omitted information was material. As such, the decline in the market at the time of the October 2013 news releases says very little, if anything, about the materiality of Strathcona's concerns.

## VI. CONCLUSION

[109] The motion judge did not err in his analysis. He was correct to consider the omitted information's reliability, in the context of the public disclosures already made, when concluding that Pretium had not made misrepresentations by omission. The objective unreliability of Strathcona's concerns, as well as their prematurity and the fact that they were expressed by Strathcona outside "its own lane", was relevant to whether a reasonable investor would have viewed the information as having significantly altered the total mix of information. The motion judge did not rely on *post hoc* evidence or Pretium's subjective views in his analysis. The evidence he accepted consisted of the contemporaneous views of Pretium and Snowden, which provided an objective picture of the merits of Strathcona's concerns at the relevant time. And, the drop in share price in October 2013 after the public announcement of Strathcona's resignation and the reasons

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therefor, did not provide evidence of misrepresentations by omission in the earlier disclosures.

[110] Finally, I would observe that the motion judge's analysis does not run afoul of the well-canvassed policy objectives of securities regulation. It is trite that a core objective of the continuous disclosure regime is the protection of investors through the "full, true and plain disclosure of all material facts": *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112, at p. 126. Continuous disclosure creates "a 'level playing field' where all investors have access to the same information and all pricing and investment decisions are made from the same starting point": *Theratechnologies Inc. v. 121851 Canada Inc.,* 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 25. Continuous disclosure in the secondary market is "at the heart of securities regulation and must be scrupulously accurate and fair": *Rahimi v. SouthGobi Resources Ltd.,* 2017 ONCA 719, 137 O.R. (3d) 241, at para. 80, leave to appeal refused, [2017] S.C.C.A. No. 443. None of these policy objectives would have been served by the disclosure of Strathcona's concerns in the factual circumstances of this case.

[111] The motion judge reasonably concluded that the objectively unreliable and erroneous opinion of Strathcona, which was offered prematurely and outside "its own lane", was not a material fact that was required to be disclosed in the context of the disclosures already made. The motion judge did not reach his conclusion by changing the legal test from the leave stage to the summary judgment stage.

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Rather, the appellant's evidence, which was sufficient to make out a reasonable possibility of success at the leave stage, did not withstand the higher burden of proof on the summary judgment motion. The motion judge did not err in finding, on a preponderance of the evidence, that there were no omissions of material fact and thus no misrepresentations to ground a claim under s. 138.3.

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## VII. DISPOSITION

[112] For these reasons, I would dismiss the appeal and I would award the respondents their costs of the appeal in the agreed amount of $50,000, inclusive of HST and disbursements.

Released: July 22, 2022 "K.M.v.R."

"K. van Rensburg J.A."
"I agree. L.B. Roberts J.A."
"I agree. E. Ria Tzimas, J. (*AD HOC*)"

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|---|---|---|---|
| **TERRY LONGAIR PROFESSIONAL CORPORATION**<br>Plaintiff (Respondent) | and | **AKUMIN INC. et al.**<br>Defendants (Appellant) | Court of Appeal File No. COA-24-CV-0846 |

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

# RESPONDENT'S BOOK OF AUTHORITIES

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