

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*

CONSOLIDATED FACTUM OF THE RESPONDENT
TERRY LONGAIR PROFESSIONAL CORPORATION

Date: May 1, 2025

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PART I - OVERVIEW

1. The Divisional Court granted the Appellant, Akumin Inc.,¹ leave to appeal from the motion judge's order granting the Respondent, Mr. Longair,² leave to proceed with his statutory claim for secondary market misrepresentation brought under Part XXIII.1 of the Ontario *Securities Act* ("**OSA**"). The outcome of that appeal will effectively dictate the result in Akumin's second appeal, which is taken as of right from the motion judge's certification order.
2. The appeal of the leave motion is dispositive because the Part XXIII.1 leave test requires a higher standard of proof than the test for class certification. Put simply, if the claim satisfies the stricter standard under Part XXIII.1, then it will also satisfy the certification criteria.
3. The Divisional Court order granting Akumin leave to appeal significantly restricts the scope of Akumin's leave appeal. There is an initial threshold issue, namely: Did the motion judge err in her comment that this Court had erred in *Cronos*? If this Court finds that the motion judge made no such error, that's effectively the end of both appeals.
4. There are two ways to approach this threshold issue, and the appeals in general.
5. The first approach, which Mr. Longair urges this Court to adopt, is to view them as simple error correction appeals, focused on the narrow gating issue of whether the motion judge erred in her comment. Mr. Longair says that the motion judge made no such error, that this can be demonstrated quite easily, and essentially that's the beginning and the end of the appeals.

¹ "Akumin" is used in this factum to refer collectively to all of the Appellants.

² The Respondent is Terry Longair Professional Corporation, which as the name suggests, is a professional corporation owned and controlled by Terry Longair. Mr. Longair is used in this factum to refer to both collectively.

6. The second approach, which is the one Akumin urges this Court to adopt, is to view the appeals as jurisprudential ones requiring the Court to wrestle with a sprawling array of issues that engage all aspects of the statutory scheme created by Part XXIII.1 of the *OSA*.

7. On the one hand, Mr. Longair disputes Akumin's attempt to turn the appeals into something that is so much more expansive and complicated than they really are or need to be. But on the other hand, Mr. Longair must join issue with Akumin and provide the Court with a response to the host of jurisprudential issues Akumin attempts to put on the Court's plate.

8. Any analysis must start with what the motion judge said in relation to this Court's decision in *Cronos*. And her comment must be understood for what it was: an observation by the motion judge, who has significant experience in this area of the law, that this Court mistakenly *transposed one word in one line of obiter* when it was summarizing the lower court decision in *Cronos*, referencing language first used by Perell J. in 2016 in *SNC-Lavalin*. The same language has been cited and referenced accurately in many other cases (including by this Court in *Barrick #1*), each instance of which illustrates this Court's inadvertent one-word transposition error in *Cronos*.

9. Contrary to the impression created by Akumin's factums, the motion judge's comment was not a finding that this Court erred *in law* in *Cronos*, nor did she rely on that comment as justification to depart from law as set out and applied by this Court in *Cronos*.

10. The motion judge made her impugned comment during her analysis of the public correction element of the statutory cause of action within the test for leave under Part XXIII.1. In that portion of her reasons, she sets out the proper law articulated by this Court in a series of recent decisions—one of which (*Barrick #2*) upheld the same motion judge in relation to her public correction analysis in that case.

11. The motion judge then properly applied that law to the evidence before her. The key aspects of that evidence are not in dispute. Akumin restated 2.25 years of its financial reporting because it identified two accounting errors: one related to credit losses and accounts receivable; the other related to the improper capitalization of repair and maintenance expenses. Akumin revealed these problems through a series of four partial public corrections—each one revealing incrementally more, culminating in its restated financial statements for nine fiscal quarters.

12. These problems resulted in Akumin restating key financial statement line items having a significant impact on the overall financial picture that Akumin had presented to the market. For example, Akumin falsely reported net income of \$7.7 million for Q1-Q3 2019 when it should have been a *net loss* of \$9.4 million. This required a -222% downward adjustment in the restatement, flipping Akumin's earnings from positive to negative.

13. There were massive declines in Akumin's share price following the 1st and 2nd Public Corrections—both of which were company-issued news releases, the first accompanied by a Material Change Report filed with the OSC—which collectively erased about 1/3rd of the company's market capitalization. These facts are not disputed.

14. Mr. Longair and Akumin each retained economic experts to conduct econometric analyses of Akumin's share price movement during the class period using an event study methodology that is widely accepted and used in securities class actions. The motion judge admitted both experts' evidence.

15. The experts essentially agreed on the event study results: (1) there was a large (20 percent) statistically significant decline in Akumin's share price after the 1st Public Correction; (2) there was another one (this time 12 percent) after the 2nd Public Correction if a two-day "event window"

is used (the duration of time used to measure the market reaction); and (3) there were no statistically significant share price declines after the 3rd and 4th Public Corrections.

16. While the economic experts agreed on the raw event study results, they had conflicting opinions as to how to properly interpret those results, most importantly in relation to: (1) the nature of the new information the market was reacting to in relation to the 1st Public Correction; (2) the proper event window to use in relation to the 2nd Public Correction; and (3) whether the lack of a statistically significant share price decline following the 3rd and 4th Public Corrections was explained by “truth-on-the-market” (*i.e.*, a situation where the market has already priced the value of the new information into the share price based on information previously disclosed).

17. In granting leave to proceed, the motion judge held that it was not her role on a leave motion to resolve these disputes between the experts. In so doing, she adopted the same reasoning used by this Court in *Cronos*, where it said: “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 [*i.e.*, the test for leave under Part XXIII.1] and the issue should be left for trial.”³

18. In other words, while the motion judge remarked in her reasons that this Court had erred in *Cronos*, it was a comment about an inadvertent transposition error, and in substance the motion judge’s analysis and the result in the court below are entirely consistent with this Court’s decision in *Cronos*. This should be the end of the analysis.

³ *Badesha v. Cronos Group Inc.*, [2022 ONCA 663](#), para. 78, *Responding Book of Authorities* (“**RBOA**”), Tab 3.

19. Further, the result below is consistent with *every* reported Part XXIII.1 case involving a financial restatement. In every case, except for one, the court has granted leave to proceed, concluding that the plaintiff has a reasonable possibility of success at trial. The only restatement case for which leave was denied was *Nobilis*, but in that case there was a fatal problem with the pleading (the alleged misrepresentations were unrelated to the alleged public corrections) and the company's share price significantly *increased* following the alleged public corrections.

20. Yet, remarkably, Akumin takes all of this—the restricted nature of its leave appeal under the Divisional Court order; the undisputed evidence and factual findings; the motion judge's application of the proper law for public correction; and an outcome consistent with not only this Court's decision in *Cronos*, but every Part XXIII.1 leave motion—and attempts to spin it into a wide-ranging jurisprudential appeal requiring this Court to grapple with every major aspect of the Part XXIII.1 statutory regime, including: (1) *OSA* materiality; (2) public correction; (3) damages; (4) the relevance of statistically significant share price decline to each of the three preceding elements; (5) deemed loss causation; and (6) the role (if any) of market efficiency.

21. Akumin never comes out and says it this bluntly, but distilled to its essence, its appeal argument is that the motion judge erred in law by failing to apply a purported rule that collapses the tests for both *OSA* materiality and public correction into a *brightline requirement that there must be a statistically significant share price decline on the first day after each alleged public correction*. This purported legal rule lies at the core of the Gordian knot of concepts and issues raised by Akumin on both appeals.

22. The problem for Akumin is two-fold. First, its arguments violate decades of established law. Second, and in any event, a narrowly defined appeal to this Court from an order granting

leave to proceed under Part XXIII.1 is undoubtedly not the appropriate forum for Akumin's various jurisprudential arguments to be aired and adjudicated. If years of case law is to be overturned, and the interpretation of the statutory regime adopted by courts to date completely upended, that result can only be reached at trial.

23. Akumin's appeals should be dismissed.

PART II - FACTS

24. Mr. Longair disputes the characterization of many of the facts as presented by Akumin in its factums. For example, Akumin downplays the errors in its financial reporting, describing them as merely "technical accounting issues"⁴ and then says that when "the Company announced that it would be restating its financial statements and [then filed] the eventual restatement itself" that the market didn't consider the errors to be important because those public corrections "were not followed by statistically significant declines in Akumin's share price."⁵

25. This misrepresents core facts in the case, as found by the motion judge in findings that are not subject to challenge on this appeal given its narrow scope as set out by the Divisional Court order granting Akumin leave to appeal.

26. Given this limited scope, and the jurisprudential nature of Akumin's appeal argument, Mr. Longair does not spend valuable space here setting out a complete factual picture. He relies on the facts as set out and found by the motion judge in her reasons. The basic facts are as follows.

⁴ Akumin Factum (Certification), at para 22.

⁵ Akumin Factum (Certification), at para 4.

27. Between August and November 2021, Akumin disclosed to the market that it had overstated its revenue, accounts receivable and property plant and equipment for nine quarters.

28. Akumin corrected the misrepresentations through four disclosures, each incrementally revealing additional information correcting Akumin's prior untrue statements:

1st Public Correction (August 15, 2021):	Press release disclosing a delay of financials due to additional information and analysis related to potential additional credit losses for prior years.
2nd Public Correction (October 12, 2021):	Press release announcing the estimated impact of the credit losses on accounts receivable and disclosing an additional property plant and equipment error which had not yet been quantified.
3rd Public Correction (November 8, 2021):	Press release estimating the downwards adjustment to property plant and equipment as a result of improperly capitalized expenses.
4th Public Correction (November 15, 2021):	Filing of Akumin's restated financial statements. ⁶

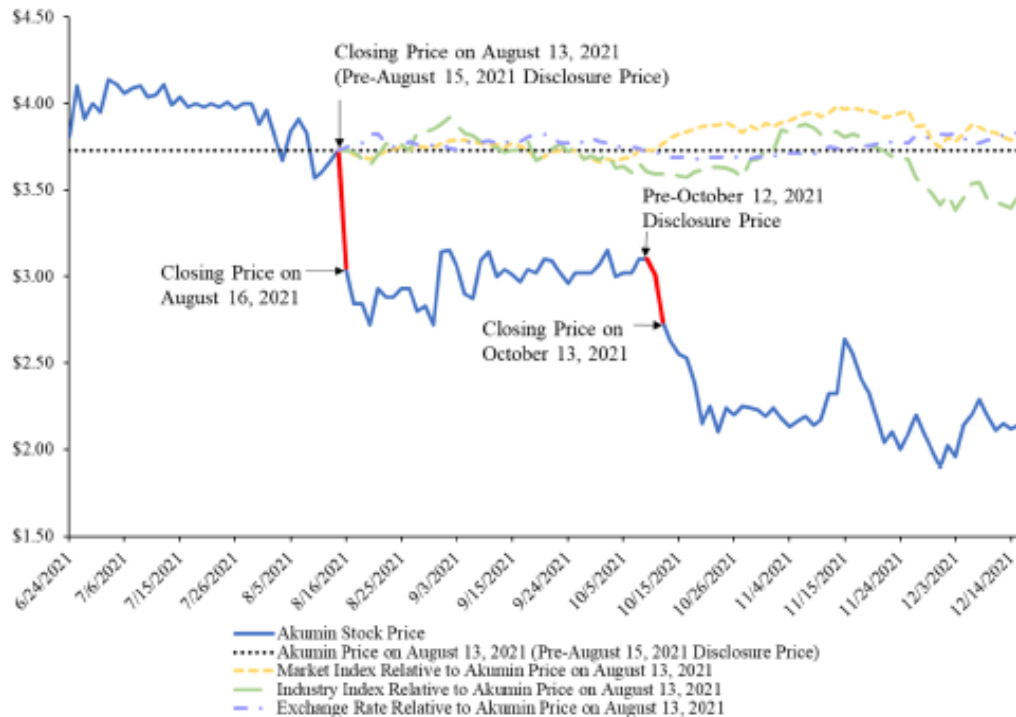
29. Both Mr. Longair's and Akumin's expert economists found large statistically significant excess share price declines after the 1st and 2nd Public Corrections, agreeing that Akumin's share price cumulatively lost about one-third of its value.⁷ These large declines are shown in red in the chart below:⁸

⁶ [Reasons](#), at para. 21, [Responding Compendium](#), Tab 4, pp. 34-35. August 15, 2021 Press Release, October 12, 2021 Press Release, November 8, 2021 Press Release, and November 15, 2021 Press Release and Restated YE 2021 Financial Statements, [Responding Compendium](#), Tabs 7, 8, 9 and 10, pp. 126-145.

⁷ [Reasons](#), paras. 97, 107-108, [Responding Compendium](#), Tab 4, pp. 49, 50. Expert Report of Dr. Sunita Surana, at paras. 91, 119, [Responding Compendium](#), Tab 17, pp. 236, 247. Expert Report of Robert Patton, paras. 117, 135 & Table 6, [Responding Compendium](#), Tab 18, pp. 378, 386-387.

⁸ Reply Expert Report of Dr. Sunita Surana, at para. 27, Figure 1, [Responding Compendium](#), Tab 19, p. 545.

FIGURE 1
AKUMIN STOCK PRICE (JUNE 24, 2021 TO DECEMBER 15, 2021)



30. Both experts also agreed there was no statistically significant excess share price decline after the 3rd or 4th Public Corrections. The opinion of Mr. Longair’s expert was that this lack of share price movement is attributable to “truth-on-the-market”, meaning “the share price did not move because the market had already incorporated the impact of the information [in the 3rd and 4th Public Corrections] from the earlier disclosures.”⁹

31. As for Akumin’s notes, like its shares, “the note prices dropped following the August 15 disclosure [the 1st Public Correction], and did not return to pre-disclosure levels.”¹⁰

⁹ [Reasons](#), at para. 112, [Responding Compendium](#), Tab 4, p. 51. Expert Report of Dr. Sunita Surana, at paras. 142, 157-159, [Responding Compendium](#), Tab 17, pp. 259-260, 268-269.

¹⁰ [Reasons](#), at para. 134, [Responding Compendium](#), Tab 4, p. 54. Akumin 7.00% and 7.50% Notes Price Chart, [Responding Compendium](#), Tab 20, pp. 537-539.

32. Mr. Longair tendered expert evidence that the alleged misrepresentations were critical accounting measures affecting Akumin's future earnings, a key measure impacting share price, since the market valued Akumin, like any public company, based largely on its future earnings.¹¹

33. Mr. Longair also tendered numerous reports from analysts that covered Akumin showing the negative effect of Akumin's misrepresentations on analysts' valuations and share price targets for Akumin and the credit-negative impact of the impugned information on Akumin's notes.¹²

34. Finally, it's important to note one critical fact that Akumin never mentions over the course of its 50 pages of written argument—namely, that it filed a Material Change Report with the Ontario Securities Commission in relation to the information disclosed in the 1st Public Correction.¹³ In other words, Akumin itself formally declared that the information it disclosed to the market in the 1st Public Correction was material (as defined in the *OSA*), and did so contemporaneously with the events at issue.

PART III - ARGUMENT IN RESPONSE TO THE ISSUES RAISED BY AKUMIN

35. As set out below, the combined appeals raise seven issues—three from the Divisional Court order granting leave to appeal from the motion judge's decision on the Part XXIII.1 leave motion, and four issues Akumin raises in relation to the certification order.

¹¹ Expert Report of Dr. Sunita Surana, at paras. 31, 33, 36, 38, Responding Compendium, Tab 17, pp. 201-205. See also Reply Expert Report of Dr. Sunita Surana, at paras. 139-153, Responding Compendium, Tab 9, pp. 499-506.

¹² Reasons, at paras. 110, 113, 119, 135, Responding Compendium, Tab 4, pp. 51, 52, 54. National Bank of Canada, August 16, 2021 "Akumin Delays Filing of Q2/2021 Financial Statements"; Cormark Securities Inc., October 12, 2021, "High Torque Equity Requires Execution"; National Bank of Canada, November 8, 2021 "Q3/21 Filings Delayed to Dec. 15, 2021; PPE Writedown on Excess Capitalization"; National Bank of Canada, November 15, 2021, "Filing of Delayed Q2/2021 Financials Provides Some Clarity"; Canaccord Genuity Capital Markets, November 18, 2021, "Q2/21: Restatements impact pricing and margin"; Moody's Akumin Reports, Responding Compendium, Tabs 12-16, pp. 154-183.

¹³ Reasons, at para. 7, 94, Responding Compendium, Tab 4, pp. 31 & 48. Material Change Report dated August 24, 2021, Responding Compendium, Tab 11, p. 151.

Appeal from the leave motion

- (1) Did the motion judge err in holding that this Court erred in its decision in *Badesha v. Cronos*?
- (2) If yes, does the error render the leave order unsafe?
- (3) If yes, what is the appropriate remedy?

Appeal from the certification motion

- (4) **Negligent misrepresentation claim:** Is a class proceeding the preferable procedure for the negligent misrepresentation claim?
- (5) **Class period:** Should the class period be shortened to end on October 12th, (the 2nd Public Correction) because there was no statistically significant share price decline after the 3rd and 4th Public Correction?
- (6) **Primary market noteholder claim:** Should the primary market noteholder claim be dismissed because the plaintiff has not identified a specific class member that has such a claim?
- (7) **Secondary market noteholder claim:** Should the secondary market noteholder claim be dismissed because the notes didn't trade in an efficient market?

Appeal from the Leave Motion

Issue 1: Did the motion judge err in holding that this Court erred in its decision in *Badesha v. Cronos*?

- (1) **The motion judge correctly noted that this Court erred in *Cronos*—not as a matter of law, but by inadvertently transposing one word when referencing prior case law**

36. The impression created by Akumin's factum is that the motion judge found that this Court erred in law in *Cronos*, and that she applied a different legal test for public correction than the one articulated in *Cronos*.

37. Contrary to Akumin’s submissions, the motion judge didn’t conclude that this Court had erred *in law* in *Cronos*. She also didn’t conclude that she needed to apply a test for public correction that differed from the one previously endorsed by this Court.

38. The motion judge applied the proper test and law for public correction arising out of a series of decisions from this Court that squarely addressed public correction: *Barrick #1*,¹⁴ *Imperial Metals*¹⁵ and *Barrick #2*¹⁶ (collectively referred to below as “the public correction trilogy”), the last of which saw this Court uphold the same motion judge in relation to her public correction analysis in that case.

39. As explained below, the motion judge’s comment that this Court erred in *Cronos* was merely a recognition by her that in one sentence of *obiter* from its *Cronos* decision, this Court mistakenly transposed one word (“corrective” with “material”) when summarizing the lower court decision in that case and referencing earlier case law.

40. Further, and again as explained below, the motion judge’s public correction analysis in the court below tracks the law on public correction as set out by this Court in the public correction trilogy.

41. The best starting place to illustrate the transposition error is the relevant excerpt from this Court’s decision in *Cronos*. It’s reproduced in full below—with emphasis and highlighting that

¹⁴ *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, [2021 ONCA 104](#), see e.g., para. [76](#), *Respondent’s Book of Authorities* (“**RBOA**”), Tab 12.

¹⁵ *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#), see e.g., para. [71](#), **RBOA**, Tab 10.

¹⁶ *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), see e.g., para. [47](#), **RBOA**, Tab 4.

is explained in the following paragraphs. The excerpt comes from a portion of the *Cronos* decision in which this Court is summarizing the motion judge's analysis on the leave motion in that case:

[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 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.¹⁷

42. Turning to the case at bar, under the section of her reasons entitled "Public Correction", when the motion judge is setting out the law on public correction, this is what she writes in relation to the excerpt from *Cronos* set out above:

[64] I acknowledge that the Court of Appeal, in para. 66 of its reasons in *Cronos*, referred to the materiality of the correction. With the greatest of respect to the

¹⁷ *Badesha v. Cronos Group Inc.*, [2022 ONCA 663](#), at para. 66, [RBOA](#), Tab 3.

Court of Appeal, it appears that in characterizing the motion judge's reasons, *it erred in referring to the materiality of the public correction*.¹⁸ [emphasis added]

43. That the motion judge was correct in this observation is evident from a review of the case law cited by this Court in the relevant extract from *Cronos*.

44. The original language comes from the 2016 *SNC-Lavalin* decision in which Perell J. adjudicated competing summary judgment motions engaging the public correction element of the Part XXIII.1 statutory cause of action. The defendant SNC-Lavalin argued that a semantic comparison of the alleged public corrections with the alleged misrepresentations demonstrated a fatal flaw in the plaintiff's case, namely, that the purported public corrections didn't semantically correct the alleged misrepresentations.

45. Justice Perell dismissed this argument and denied both summary judgment motions. In so doing, he rejected a purely semantic approach to public correction, instead affirming a contextual approach, in a passage that has been affirmed and quoted, in whole or part, many times since:

[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

¹⁸ [Reasons](#), at para. 64, [Responding Compendium](#), Tab 4, p. 43.

again is not a mechanical exercise, but rather one that involves evidence.¹⁹
[emphasis added]

46. The first 10 words of this passage—“the determination of whether a corrective disclosure is *corrective* depends...”—make clear that any consideration of share price movement in relation to the public correction element is done relative to the question (quoting Perell J., emphasis added) of “whether a corrective disclosure is *corrective*” and not (as Akumin’s appeal argument advocates) whether a corrective disclosure is *material*.

47. In 2021, this Court in *Barrick #1* approved and reproduced in full Perell J.’s language from *SNC-Lavalin* excerpted above and held that “Perell J. correctly rejected a purely semantic and mechanical approach to the determination of a public correction.”²⁰

48. With this case law as a reference point, now turn back to the relevant excerpt from this Court’s decision in *Cronos* set out above at paragraph 41. The Court cites its decision in *Barrick #1* and again cites with approval and reproduces a portion of Perell J.’s language from *SNC-Lavalin*. See the second highlighted portion in the excerpt at paragraph 41.

49. But what is also evident from this excerpt, by looking at the first highlighted portion and comparing it with the second highlighted portion, is that the language used by this Court in *Cronos* introducing the oft-cited Perell J. language from *SNC-Lavalin* mistakenly uses the word “material” rather than “corrective”. The Court uses the phrase “whether a correction is *material*”

¹⁹ *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*, 2016 ONSC 5784, at para. 45, RBOA, Tab 11.

²⁰ *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, [2021 ONCA 104](#), at para. 50, RBOA, Tab 12.

when the original language from *SNC Lavalin* is explicitly directed at the question of “whether a correction is *corrective*.”

50. In other words, a comparison of the original language used by Perell J. in *SNC-Lavalin* with the language used by this Court in *Cronos* reveals that the Court mistakenly transposed the word “material” with “corrective” in one line of its *Cronos* decision. That’s all the motion judge was getting at in saying this Court erred in *Cronos*.

51. Her conclusion is also supported by a review of the entire lower court decision in *Cronos*. Recall that the context of the language from *Cronos* is that this Court is summarizing what the motion judge had done in that case. Such a review demonstrates—as the motion judge here says in her reasons—that the motion judge’s overall analysis focused on the materiality of the misrepresentations, not the materiality of the public corrections.²¹

(2) The motion judge properly set out and applied the law dealing with public correction

52. Mr. Longair’s defence of the motion judge’s analysis is not limited to identifying the one-word transposition error from this Court’s decision in *Cronos*. A substantive review of the motion judge’s public correction analysis shows that she canvassed and then applied the proper law as set out by this Court in the public correction trilogy. That law is briefly summarized below.

53. Part XXIII.1 of the *OSA* creates a civil cause of action for investors who acquire or dispose of an issuer’s securities between the time the issuer releases a document that contains a misrepresentation (T_1) and the time that misrepresentation is publicly corrected (T_2).²²

²¹ At para. 65 of her reasons, the motion judge writes: “The motion judge’s reasons make clear that he was considering the materiality of the misrepresentation....” [Reasons](#), at para. [65](#), [Responding Compendium](#), Tab 4, p. 43.

²² *Securities Act*, [R.S.O. 1990, c. S.5](#), s. 138.3(1), [Respondents’ Factum](#), Schedule “B”.

54. The “public correction” element plays a minor role in the statutory scheme relative to the “misrepresentation” element. Quoting Strathy C.J.O. (as he then was) in *Imperial Metals*, “misrepresentation does the heavy lifting in the statutory cause of action. It is the wrong at issue....”²³

55. The role of the public correction, or more accurately the date of the public correction, is two-fold.

56. First, it acts as “a necessary time-post for the cause of action” because it determines the end of the class period (T_2). The beginning of the class period (T_1) is the date that the impugned misrepresentation was first made.²⁴

57. Second, the public correction date factors into “any eventual damages calculation” because the prescribed formulas for calculating damages under Part XXIII.1 use the public correction date as one of the inputs.²⁵

58. The test to determine whether something constitutes a public correction 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.”²⁶

59. There need not be “facial symmetry between the public correction and the alleged misrepresentation.” Rather, there only needs to be some linkage or connection between the two,

²³ *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), at para. 50, [RBOA](#), Tab 4. See also: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, [2021 ONCA 104](#), at paras. 63-72, [RBOA](#), Tab 12.

²⁴ *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#), at para. 71, [RBOA](#), Tab 10.

²⁵ *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#), at para. 71, [RBOA](#), Tab 10.

²⁶ *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#), at para. 71, [RBOA](#), Tab 10.

such that “the alleged public correction can reasonably be taken as correcting the alleged misrepresentation.”²⁷

60. All this law is properly set out by the motion judge at paragraphs 52 to 58 of her reasons. She then applies that law in making her dispositive finding of mixed fact and law in relation to public correction, namely, that Mr. Longair had “established a reasonable possibility that all four alleged public corrections were partial corrections.”²⁸ Leave to appeal was not granted in relation to this finding.

Issue 2: If the motion judge did err, does that error render the leave order unsafe?

(1) Even if the motion judge did err in her remark about this Court’s decision in *Cronos*, that error doesn’t render the leave order unsafe

61. Akumin’s argument relies on the phrase from *Cronos* that says, in assessing the “materiality of a public correction” the court must consider “a statistical analysis of the effect of the correction.”

62. In most Part XXIII.1 cases, including this one, such a statistical analysis is conducted by econometric experts using an event study. An event study uses a well-established methodology and econometric analysis to isolate and calculate the effect of new information on a company’s share price, after controlling for general market or industry forces. The effect of new information on share price after controlling for market or industry forces is called an “excess return”. If the stock’s excess return falls outside its normal volatility range, the excess return is “statistically

²⁷ *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), at para. [48](#), [RBOA](#), Tab 4. *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#), at para. [79](#), [RBOA](#), Tab 10.

²⁸ [Reasons](#), at para. [123](#), [Responding Compendium](#), Tab 4, p. 52.

significant”, demonstrating the price movement is due to the new information rather than chance.²⁹

63. For the sake of argument, assuming that there was no transposition error and the Court meant what it wrote in this one line of *obiter* in *Cronos*—*i.e.*, that assessing the materiality of public correction must include consideration of “a statistical analysis of the effect of the correction”—the motion judge still met that test in the course of her analysis.

64. In paragraphs 97, 107-108, 115-116 and 120 of her reasons, the motion judge references the event study evidence tendered by both sides analyzing Akumin’s share price movement after each alleged public correction, and she considered that evidence in reaching her overall finding that Mr. Longair had met the requirements to obtain leave to proceed.

65. Put simply, there is nothing unsafe about the leave order, even if the motion judge was wrong in saying that this Court erred in *Cronos*.

(2) What’s “unsafe” is Akumin urging this Court to interpret one word of *obiter* in *Cronos* as creating new tests for *OSA* materiality and public correction

66. The analysis to this point demonstrates a few things. First, the motion judge was merely commenting on an inadvertent one-word transposition error when she said this Court erred in *Cronos*. Second, that comment (even if wrong) doesn’t render the leave order unsafe, because the motion judge still did what the language from *Cronos* requires, assuming it applies as written.

67. It also reveals something else: the true nature of Akumin’s argument. Initially, Akumin’s argument presents as an appeal directed at a single comment made by the motion judge in her

²⁹ Expert Report of Dr. Sunita Surana, at paras. 54-55, 69-70, and 77. Responding Compendium, Tab 17, pp. 217, 223-224, 229.

public correction analysis. This is the proper scope of the appeal as limited by the Divisional Court order granting Akumin leave to appeal.

68. But Akumin's argument goes much further. It does so by trying to engage this Court in a review of all aspects of the decision below, including the motion judge's analysis of the materiality of the alleged misrepresentations. That this is true is evident from the fact that for Akumin to succeed on the appeal, this Court must do more than just affirm the language it used in *Cronos* about the need to consider "a statistical analysis of the effect of the correction" when assessing a public correction.

69. Instead, Akumin needs this Court to endorse an interpretation of its *Cronos* decision that accepts a principle that Akumin never comes out and explicitly states: that the test for *OSA materiality* of a misrepresentation requires that each alleged public correction be followed by daily statistically significant share price decline. This is what Akumin really means when it says, for instance, that the motion judge failed to apply the proper market impact test.

70. Mr. Longair responds to this argument below, even though it goes beyond the proper scope of the appeal from the leave order.

(i) Akumin's purported rule conflicts with the established test for *OSA materiality*

71. The first problem is that the purported test for *OSA materiality* that Akumin says this Court endorsed in *Cronos* is in direct conflict with the established test for *OSA materiality*, and more generally materiality in the overall securities law context.

72. “Material” is not defined in isolation in the *OSA*. Rather, it’s defined in reference to a “material fact”, which is a fact “that would reasonably be expected to have a significant effect on the market price or value of the securities.”³⁰ Using this language and applying it to the context of a Part XXIII.1 claim, a misrepresentation by a company is material if the misrepresentation would reasonably be expected to have a significant effect on the company’s share price.

73. There is a developed body of case law interpreting and applying materiality in the securities law context. There are two defining features of the test for *OSA* materiality.³¹

74. First, the materiality assessment must be contextual: there is no single factor or brightline rule that is determinative. Instead, all the surrounding circumstances must be considered. The motion judge underscores this aspect of the *OSA* materiality test in her reasons in the following passage:

Determining materiality is an objective, contextual, and fact-specific inquiry, considered from the perspective of a what a reasonable investor would consider important in deciding to invest, and at what price. ... Determining materiality requires applying a legal standard to specific facts in light of all of the relevant circumstances and the total mix of information.³²

75. Second, assessing *OSA* materiality is a forward-looking inquiry asking whether the misrepresentation *would reasonably be expected to have* a significant effect on the market price of the issuer’s securities.³³ Applied in relation to a claim brought under Part XXIII.1, the *OSA*

³⁰ *Securities Act*, [R.S.O. 1990, c. S.5](#), s. 1(1), *Respondents’ Factum*, Schedule “B”.

³¹ See e.g., *Cornish v. Ontario Securities Commission*, [2013 ONSC 1310](#), paras. [47](#), [50-51](#), [53](#), [RBOA](#), Tab 9.

³² [Reasons](#), at para. [47](#), [Responding Compendium](#), Tab 4, p. 40. *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011 SCC 23](#), at para. [59](#), [RBOA](#), Tab 17. *Cappelli v. Nobilis Health Corp.*, [2019 ONSC 2266](#), at para. [147](#), [RBOA](#), Tab 7. *Cornish v. Ontario Securities Commission*, [2013 ONSC 1310](#), at para. [51](#), [RBOA](#), Tab 9. *Wong v. Pretium Resources Inc.*, [2022 ONCA 549](#), at paras. [82](#), [85](#), [RBOA](#), Tab 23. *Dyck v. Tahoe Resources Inc.*, [2021 ONSC 5712](#), at paras. [241-242](#), [RBOA](#), Tab 13. [National Policy 51-201 Disclosure Standards](#), s. 4.2, [Responding Factum](#), Schedule “B”.

³³ *Securities Act*, [R.S.O. 1990, c. S.5](#), s. 1(1), *Respondents’ Factum*, Schedule “B”. *Cornish v. Ontario Securities Commission*, [2013 ONSC 1310](#), at para. [47](#), [RBOA](#), Tab 9.

materiality test asks: assessed as at the time the misrepresentation was made, would the information that was misrepresented be reasonably expected to have a significant effect on the company's share price in the future?

76. Akumin's argument takes aim at both defining features of the *OSA* materiality test (it's contextual, and it's forward-looking, assessed from the date of the misrepresentation) and flips them on their head: *OSA* materiality now purportedly requires the application of brightline rule turning on statistically significant share price decline, looking backwards from the date of the public correction.

77. Perversely, at paragraph 30 of its leave factum, Akumin relies on the following passage from *MM Fund v. Americas Gold and Silver Corp.* to support its argument that *OSA* materiality turns on historical share price decline looking backwards from the public correction—when in fact the passage says the exact opposite:

[T]he 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 decline in share price to the misrepresentation or omission in question...³⁴

(ii) Akumin's siloed approach to *OSA* materiality and public correction would give issuers an easy way to undermine the remedial objectives of Part XXIII.1

78. The motion judge also rejected Akumin's position that each correction must be material based on a purposive analysis of Part XXIII.1. The statutory right of action's purpose—detering

³⁴ *MM Fund v. Americas Gold and Silver Corp.*, [2022 ONSC 6515](#), at para. [22](#), [RBOA](#), Tab 15.

corporate non-disclosure, protecting investors and incentivizing accurate and timely disclosure—has figured prominently in this Court’s interpretation of Part XXIII.1.³⁵

79. Here, the motion judge held that “[i]f the public correction has to be material ... then the court is encouraged to parse each partial correction in a way that disconnects the circumstances around each public correction from the others.”³⁶

80. She then found that “this siloed approach does not support the legislative goal of incentivizing fair and accurate disclosure by issuers” and instead, “it incentivizes issuers to do exactly what Strathy C.J.O. rejected in *Baldwin*: disclose that “something has happened and we are looking into it” in the hopes of provoking the expected share price decline, and leaving the clear public correction until later, hoping to minimize or avoid a share price decline following the corrective disclosure.”³⁷

81. The motion judge correctly concluded:

An approach that involves parsing each alleged partial correction to determine whether it provoked a statistically significant share price decline, and parsing each statistically significant share price decline to determine if it was provoked by a (partial) correction, would encourage the court to limit the contextual analysis it undertakes, when the jurisprudence to date clearly favours a contextual approach to the questions of materiality and public correction.³⁸

³⁵ See, e.g., *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), at para. 16, *RBOA*, Tab 4.

³⁶ *Reasons*, at para. 66, *Responding Compendium*, Tab 4, p. 43.

³⁷ *Reasons*, at para. 66, *Responding Compendium*, Tab 4, p. 43. See, e.g., *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), at para. 57, *RBOA*, Tab 4.

³⁸ *Reasons*, at para. 67, *Responding Compendium*, Tab 4, p. 44.

(iii) Akumin’s purported new rule is an absurd interpretation of *Cronos*

82. The established tests for public correction and *OSA* materiality do not require daily share price decline on each public correction date. This Court has never said that. You can re-read this Court’s decision in *Cronos* or any other case in this area as many times as you want, but you won’t find it. No Canadian court or tribunal or securities regulator has ever adopted this principle.

83. That’s why the best Akumin can do is to zero in on one word (“material”) from one phrase (“whether a correction is material”) of *obiter* from this Court’s *Cronos* decision, which Akumin then tries to leverage into a new legal test upending decades of case law.

84. An obvious problem for Akumin’s argument is that if this Court had any intention in *Cronos* of articulating a new legal test for *OSA* materiality or public correction, that intention would be clearly expressed. This Court doesn’t exercise its appellate review function covertly through the unexplained use of one word in *obiter*, expecting that this one word, without any accompanying explanation, will be read as denoting a fundamental change in the law.

(iv) Even if *OSA* materiality does require statistically significant share price decline—we have that here

85. For the sake of argument, let’s take it one step further. Assume this Court intended that its use of one word in a single line of *obiter* was meant to articulate a new test for *OSA* materiality. Even under that scenario, Akumin’s appeal must still be dismissed in relation to the claim brought on behalf of Akumin shareholders because the new brightline rule for *OSA* materiality—statistically significant share price decline accompanying a public correction—is satisfied here.

86. The motion judge made findings of fact that there were statistically significant share price declines following the 1st and 2nd Public Corrections. She didn’t make any palpable and overriding

errors in doing so because the evidence tendered *by both sides* fully supported them, nor in any event was leave to appeal granted on those aspects of her reasons.

87. This is how the motion judge summarized the evidence in relation to the 1st Public Correction:

Following the August 15, 2021 disclosure, Akumin's share price fell. Both Dr. Surana and Mr. Patton produced event studies that demonstrate a statistically significant share price decline. Dr. Patton found a one-day excess return of -20.36%, and a two-day cumulative excess return of -27.16%, both statistically significant at the 5% level. Dr. Surana's event study showed a one-day excess return of -18.5%, and a two-day cumulative excess return of -23.9%, both of which were statistically significant at the 1% level.³⁹

88. It's similar with the 2nd Public Correction. The experts agreed that Akumin's share price dropped significantly over the next two days. What they disagreed about was the length of the appropriate event window to analyze that decline. Longair's expert (Dr. Surana) says that a two-day window should be used. Doing so results in a -24.5% share price decline. Akumin's expert (Mr. Patton) agreed that a two-day event window gives this result, but in his view a one-day event window is more appropriate, which negates any excess decline.⁴⁰

89. The motion judge references this evidence and the competing approaches and finds that both were "supported by credible and reliable expert evidence" and that "[i]t is not the role of a judge on a leave motion to resolve the questions on which those experts disagree" and that "I decline to stray into a mini-trial."⁴¹

³⁹ [Reasons](#), at para. 97, [Responding Compendium](#), Tab 4, p. 49.

⁴⁰ [Reasons](#), at paras. 107-108, [Responding Compendium](#), Tab 4, p. 50.

⁴¹ [Reasons](#), at para. 120, [Responding Compendium](#), Tab 4, p. 52.

90. In so doing, the motion judge properly applied the law addressing the limited scope of a leave motion and the prohibition on mini-trials articulated by this Court in *Barrick #2*.⁴² Her analysis was correct and it accords with a similar analysis used by this Court in *Cronos* where the Court said: “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.”⁴³

91. Thus, even if Akumin is right that leave to proceed may not be granted absent statistically significant share price decline accompanying a public correction, that test is satisfied here.

(v) Akumin’s approach muddles the concepts of: (a) public correction; (b) OSA materiality; (c) damages; and (d) statistically significant share price decline

92. Akumin’s approach is wrong because it improperly muddles these four concepts. This is a foundational error in Akumin’s argument and thus it will be addressed in some detail below.

93. At the outset, it’s important to recognize the key role that “share price decline” plays in cases brought under Part XXIII.1. Any valid claim brought under Part XXIII.1 seeks damages (investor losses) correlated to changes in the value of an issuer’s securities caused by a misrepresentation.⁴⁴ The most common situation, as illustrated by the case at bar, is a claim for damages tied to a decline in the market price of an issuer’s shares.

⁴² *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#), at paras. 34-39, RBOA, Tab 10.

⁴³ *Badesha v. Cronos Group Inc.*, [2022 ONCA 663](#), at para. 78, RBOA, Tab 3.

⁴⁴ In relation to the phrase (emphasis added) “*changes in the value of an issuer’s securities*” — it’s “changes” (and not decline) because a case can be also be brought on behalf of investors that sold securities prior to a public correction that cause an increase in the value of securities; it’s “value” because the statutory cause of action does not require a market “price” for the security; and it’s “securities” because a claim can be brought in respect of any OSA regulated security, *e.g.*, shares, notes, etc.

94. But there's an important distinction between "share price decline" and "*statistically significant* share price decline." The latter is a term of art used in securities litigation originating in the event study methodology used by econometric experts. Put simply, a statistically significant share price decline is one from which a valid inference can be drawn, based on a regression analysis using historical data, about the relationship between an alleged public correction and observed share price movement.⁴⁵

95. Statistically significant share price decline is frequently used in Part XXIII.1 cases as evidence to establish either, or both, of two key elements of the statutory cause of action: public correction and *OSA* materiality. But, critically, statistically significant share price decline is *a type of evidence*. It's not *a required element* under the statutory scheme or a prerequisite to establish a public correction or *OSA* materiality or damages under Part XXIII.1.

96. Akumin's argument urges this Court to essentially collapse the tests for public correction and *OSA* materiality into one brightline rule requiring statistically significant share price decline as a prerequisite for both. Further, it argues that damages under Part XXIII.1 are tied to statistically significant share price decline—without which there are no damages.

97. These are fundamental errors that distort the statutory scheme. The proper relationship between *evidence* of statistically significant share price decline and the *statutory elements* of public correction; *OSA* materiality; and damages is set out below.

⁴⁵ Expert Report of Dr. Sunita Surana, at paras. 69-70 and 77, Responding Compendium, Tab 17, p. 223-224, 229.

(a) ***Public correction vs statistically significant share price decline***

98. This Court has acknowledged that while some alleged public corrections are corrective of misrepresentations on their face, others require deeper analysis to determine whether they meet the legal test for public correction.⁴⁶

99. A financial restatement is an example of a public correction that corrects a misrepresentation on its face. A reader doesn't need to infer anything because it's clear on the face of the document that the restated results correct the figures as initially reported.

100. Here, the motion judge found that the 1st Public Correction fell into this category (emphasis added): "the August 15, 2021 disclosure *on its face* called into question prior financial reporting as it related to credit losses."⁴⁷ Then, later in her reasons, she found the same thing regarding all four public corrections: "I am also satisfied that the plaintiffs have established a reasonable possibility that all four alleged public corrections were partial corrections. *A plain reading of the disclosure reveals that they each correct or clarify information about the impugned statements* and would have been understood to do so by the market."⁴⁸

101. The second category of public corrections are those where the corrective nature of the information is not clear on their face. In these circumstances, whether a disclosure is a public correction requires more, including consideration of the wider context in which it was made and how that information was understood by the market. This is how evidence of statistically significant share price movement is relevant to the public correction analysis.

⁴⁶ See e.g., *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, [2021 ONCA 104](#), at paras. [48](#), [51](#), [76](#), *RBOA*, Tab 12. *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), at paras. [39](#), [50](#), *RBOA*, Tab 4.

⁴⁷ *Reasons*, at para. [95](#), emphasis added, *Responding Compendium*, Tab 4, p. 48.

⁴⁸ *Reasons*, at para. [123](#), emphasis added, *Responding Compendium*, Tab 4, p. 52.

102. Consider the following illustration. Suppose a company announces that it was granted a license effective January 1st of next year, and that this information does not explicitly correct anything the company said previously. In other words, it's not evident on the face of the announcement that it's a public correction of a prior misrepresentation.

103. But suppose that over the next two days the share price falls by 30 percent. This is contextual evidence beyond the words of the announcement itself which can be used to assess how the market interpreted the new information—was the market reacting because it interpreted the information as corrective of something the company had said earlier? If so, this supports a finding that the announcement was a public correction.

104. But that might not be the entire story. The analysis needs to be contextual and consider all the surrounding circumstances. For instance, maybe the share price dropped because the company's main competitor disclosed the same day that it had been granted a similar license, but its license was effective immediately. In that case, the share price movement may be the market's reassessment of each company's competitive position relative to the other, and not an indication that the new information was corrective of anything said previously.

105. The key point is that a statistically significant share price decline is not a prerequisite to establishing a public correction. The corrective nature of a disclosure can be apparent on its face, as the motion judge found here in relation to all four alleged public corrections.

(b) *OSA materiality* vs statistically significant share price decline

106. Event studies are frequently used as evidence that an alleged misrepresentation is material as defined in the *OSA* because an inference can be drawn from a statistically significant share

price decline after a public correction that the market would have reacted the same way at the time the misrepresentation was made (which is the relevant point in time for assessing *OSA* materiality).

107. Critically, however, while a statistically significant share price decline after a public correction can be probative evidence supporting a finding of *OSA* materiality in relation to the initial misrepresentation, *the converse isn't always true*. In other words, the lack of statistically significant share price decline following a corrective disclosure doesn't mean that the information that was initially misrepresented, and subsequently corrected in the public correction, wasn't material information as of the date the misrepresentation was made.

108. The case law underscores this point, including the following except from *Cornish*:

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 *OSA* 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...⁴⁹

109. The facts here are illustrative. The experts on both sides agree there was no statistically significant share price decline following the 3rd and 4th Public Corrections.

110. But as the motion judge describes in her reasons, Dr. Surana's opinion is that the lack of excess decline is explained by the concept of "truth on the market", where the market has already priced in (often described as "impounded") the value of the new information into the share price based on information previously disclosed. In Dr. Surana's opinion, the market already

⁴⁹ Quoted in *Cornish v Ontario Securities Commission*, [2013 ONSC 1310](#), para. 69, *RBOA*, Tab 9.

impounded the value-relevance of the information in the 3rd and 4th Public Corrections into Akumin's share price through its reaction to the 1st and 2nd Public Corrections.⁵⁰

111. In other words, the market didn't wait to react until it had the corrected numbers contained in the formal restatements (the 4th Public Correction). Instead, it reacted as soon as Akumin disclosed a problem with its prior financial reporting (the 1st Public Correction). And it reacted again when Akumin subsequently disclosed that it would be restating 2.25 years of financial reporting, which was still a work in progress at that time (the 2nd Public Correction).⁵¹

112. While the 3rd and 4th Public Corrections provided incrementally more information, that information did not result in further excess decline because the value-relevance of the new information had already been impounded into Akumin's share price.

113. The key point is that statistically significant share price decline is not a statutory prerequisite. As with public correction, establishing *OSA* materiality does not require statistically significant share price decline. It's an error of law to conflate the two as Akumin's argument does. This is what the motion judge was referring to when she held: "In my view, Akumin's approach muddles the materiality of the representation [*i.e.*, *OSA* materiality] with the materiality of the correction [*i.e.*, a statistically significant price decline following the public correction]."⁵²

⁵⁰ [Reasons](#), at paras. 112 and 116, [Responding Compendium](#), Tab 4, p. 51. Expert Report of Dr. Sunita Surana, at paras. 31, 33, 36, 38, [Responding Compendium](#), Tab 17, pp. 201-205. See also Reply Expert Report of Dr. Sunita Surana, at paras. 139-153, [Responding Compendium](#), Tab 19, pp. 499-506.

⁵¹ Another explanation as to why information that is *OSA* material, and corrects a prior misrepresentation, may not result in an economically material reaction from the market is confounding news—*i.e.*, new positive information that is released concurrently with other new information in the public correction.

⁵² [Reasons](#), at para. 63, [Responding Compendium](#), Tab 4, p. 43.

(c) Damages vs statistically significant share price decline

114. Part XXIII.1 has prescribed formulas for calculating damages. The formulas are not relevant on the leave motion, however, unless a defendant established that there was no share price movement at all that could result in any damages under the formulas and thus the plaintiff would have no reasonable possibility of success at trial. This is essentially what happened in *Nobilis*, the lone outlier among the restatement cases in that leave to proceed was denied.⁵³

115. But this is clearly not the situation here given the massive share price decline and the loss of one-third of Akumin's market capitalization. Still, Akumin's argument invokes the concept of damages and (again) conflates this statutory element with evidence of statistically significant share price decline. Akumin says that without a statistically significant share price decline after a public correction, any damages would lack the necessary connection to any loss caused by the alleged misrepresentations.

116. This argument runs contrary to the Part XXIII.1 statutory scheme. It does so because it inverts onto the plaintiff an evidentiary burden to prove causation, *i.e.*, that any share price movement after a public correction was caused by the alleged misrepresentation. As this Court described in *Imperial Metals*, under Part XIII.1, a causal link between the misrepresentation and the plaintiff's damages is presumed, and the defendant bears the onus of disproving causation:

[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 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

⁵³ *Cappelli v. Nobilis Health Corp.*, [2019 ONSC 2266](#), [RBOA](#), Tab 7.

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).⁵⁴

117. Once a misrepresentation and public correction are proven, the plaintiff is presumptively entitled to damages calculated pursuant to the formulas set out in section 138.5(1). These formulas are arithmetic in nature, generally calculated as: (the price paid for the securities) – (the price at which the securities were sold or a deemed holding price). They do not require or rely on in any way statistically significant share price decline. Section 138.5(3) then shifts the onus to the defendant to prove that some or all the presumptive damages were not related to the misrepresentation.

118. Akumin’s argument violates this scheme by placing the onus on the plaintiff to prove causation under the guise of the tests for public correction and materiality.

(vi) Market efficiency is not required under Part XXIII.1

119. Akumin relies on the concept of market efficiency, repeatedly referencing the same language of Perell J. from *SNC-Lavalin* discussed above, focusing specifically on the excerpt saying that the analysis of a public correction requires (emphasis added): “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.”

⁵⁴ Deemed reliance in relation to causation and damages is established by s 138.5(3) of the *OSA*, which provides (emphasis added): “... 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...” *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#), at para. 17, [RBOA](#), Tab 4.

120. Akumin's market efficiency argument is wrong and is just a more complicated way to push the same erroneous principle that statistically significant share price movement is a required element under Part XXIII.1.

121. A market for a security is said to be "efficient" when it rapidly impounds the value relevance of any new public information into the price of the security, such that the price reflects all public information.⁵⁵ That a security trades on a public stock exchange doesn't necessarily mean that the market for that particular security is efficient. But the market for a particular security will not be efficient if that security does not trade on some type of public market.

122. Market efficiency is a prerequisite to conducting an event study of a security's price movement. Therefore, it follows that without market efficiency there can't be any evidence about statistically significant share price movement. Critically, however, and as discussed above, statistically significant share price movement is not required to establish a public correction, *OSA* materiality or damages under Part XXIII.1.

123. That market efficiency is not required for claims under Part XXIII.1 is reinforced by the language used by the legislature in the *OSA*. For example:

- A "material fact" is defined as "a fact that would reasonably be expected to have a significant effect on the market price *or value* of the securities". This shows that materiality may be established even when there is no impact on the price of a security.⁵⁶
- Part XXIII.1 defines an "issuer's security" and does not, by its text, exclude securities that do not trade in an efficient market, but it does include securities whose market price *or value* is derived from or based on a security of a

⁵⁵ Expert Report of Dr. Sunita Surana, at Appendix A, para. 1, Responding Compendium, Tab 17, p. 278.

⁵⁶ *Securities Act*, R.S.O. 1990, c. S.5, s. 1(1), Responding Factum, Schedule "B".

responsible issuer. It also, by its text, excludes several classes of securities, but not those that do not trade in an efficient market.⁵⁷

- The Part XIII.1 issuer liability limit is calculated with reference to the issuer's market capitalization (share price x shares outstanding), but the Regulations provide a method for calculating market capitalization for securities that do not even trade on a "published market".⁵⁸
- The damage formulas apply to securities that do not trade on a "published market",⁵⁹ and "if there is no published market" damages are calculated based on "the amount that the court considers just."⁶⁰
- The OSA Regulations prescribe the method of calculating the "trading price" of a security that trades infrequently ("if there was trading ... in the published market on *fewer than half of the trading days* during the period...") or that does not trade at all ("If there were *no trades of securities* of that class in the published market during the period for which the trading price is to be determined...").⁶¹

124. Finally, it's important to underscore the stage of this proceeding. This is a limited appeal arising from a leave motion under Part XXIII.1. The Supreme Court of Canada considered the test for leave in *Theratechnologies*, which was a case brought under the Quebec securities legislation that parallels the OSA. The Court held that the leave standard only required the plaintiff to put forward "a plausible analysis of the applicable legislative provisions."⁶²

125. Here, the applicable legislative provisions support Mr. Longair's interpretation that market efficiency is not required. At minimum, this interpretation is a "plausible" one, especially given that Akumin's competing interpretation is grounded in only a few words from Perell J.'s decision in *SNC-Lavalin*, as opposed to any of the legislative provisions, and the decision in *SNC-Lavalin* wasn't about whether market efficiency is a statutory prerequisite.

⁵⁷ *Securities Act*, [R.S.O. 1990, c. S.5](#), s. 138.1, 138.2, *Responding Factum*, Schedule "B".

⁵⁸ *Securities Act*, [R.R.O. 1990, Reg. 1015: GENERAL](#), s. 249, *Responding Factum*, Schedule "B".

⁵⁹ *Securities Act*, [R.S.O. 1990, c. S.5](#), s. 138.5(1), (2) and (3), *Responding Factum*, Schedule "B".

⁶⁰ *Securities Act*, [R.S.O. 1990, c. S.5](#), s. 138.5(1), (2) and (3), *Responding Factum*, Schedule "B".

⁶¹ *Securities Act*, [R.R.O. 1990, Reg. 1015: GENERAL](#), s. 251, *Responding Factum*, Schedule "B".

⁶² *Theratechnologies Inc. v. 121851 Canada Inc.*, [2015 SCC 18](#), at para. 39, *RBOA*, Tab 19.

126. The motion judge also referenced the early stage of the proceeding in considering Akumin's market efficiency argument: "Requiring an event study when one cannot be completed, and thus denying investors who hold securities that do not trade in an efficient market access to the statutory regime is, at this stage of the proceeding, inconsistent with the goals of the *OSA*."⁶³ And she noted "to the extent Akumin wishes to advance a different theory of the statute, it is free to do so at trial where the issue can be determined on a full record."⁶⁴

Issue 3: If the motion judge did err, and the error renders the leave order unsafe, what is the appropriate remedy?

127. As discussed above, the motion judge did not err. And even if she did, any error doesn't render the leave order unsafe. As such, there is no need to consider an appropriate remedy.

Appeal from the Certification Motion

Issue 4: Is a class proceeding the preferable procedure for the negligent misrepresentation claim?

(1) What the motion judge decided

128. Mr. Longair advances three claims:

- (1) **primary market claim:** brought under Part XXIII of the *OSA* on behalf of investors that purchased notes that Akumin issued under a series of primary market offerings during the class period—the class here is restricted to investors who acquired their notes in a distribution in Canada;⁶⁵

⁶³ [Reasons](#), at para. 133, [Responding Compendium](#), Tab 4, p. 53.

⁶⁴ [Reasons](#), at para. 133, [Responding Compendium](#), Tab 4, p. 53.

⁶⁵ The primary market class excludes investors who acquired their notes in a distribution outside of Canada. This exclusion exists because of case law holding that a primary market claim under Part XXIII of the *OSA* is only available to investors who acquired securities in a primary market distribution conducted inside Canada. This "inside Canada" restriction does not exist in relation to secondary market claims brought under Part XXIII.1 of the *OSA*. Therefore, the class in relation to the secondary market claim in the within proceeding is a global class of investors.

- (2) **secondary market claim:** brought under Part XXIII.1 of the *OSA* on behalf of investors that purchased Akumin securities (shares or notes) in the secondary market during the class period—the class here is a global class;⁶⁶ and
- (3) **common law misrepresentation claim:** brought on behalf of the same primary market and secondary class members set out above, in relation to the same primary and secondary market transactions.

129. The factual basis for all three claims is the same. They each allege the same misrepresentations in the same impugned financial reporting. The motion judge certified all three.

130. The preferable procedure criterion set out in section 5(1)(d) of the *CPA* requires that a class proceeding “be the preferable procedure for the resolution of the common issues.”⁶⁷

131. The motion judge made the following findings in concluding that this criterion was satisfied for all three claims:

The cost for any individual investor to advance their claim against the defendants would be out of proportion to their losses, making it inefficient from an economic perspective to advance an individual action. By aggregating the claims of the class members into one proceeding, the three goals of class proceedings are met.

The common issues predominate in this litigation, and there is no superior procedure that has been identified which could address the class members’ claims.

I thus find that a class proceeding is the preferable proceeding in this case.⁶⁸

132. These findings are subject to deference, especially given the low “some basis in fact” standard applicable to the preferability analysis.⁶⁹ This Court has repeatedly held that “[t]he

⁶⁶ The class for the secondary market claim is “global” in the sense that it is not geographically limited. So, for example, Akumin’s shares, which traded on the TSX and later also on the Nasdaq, could have been purchased by investors residing anywhere in the world. All those investors are included in the secondary market class, no matter where they reside or on which exchange they purchased their shares.

⁶⁷ *Class Proceedings Act, 1992*, [S.O. 1992, c. 6](#), s. 5(1)(d), *Responding Factum*, Schedule “B”.

⁶⁸ [Reasons](#), at paras. 219-220, *Responding Compendium*, Tab 4, p. 67

⁶⁹ *AIC Limited v. Fischer*, [2013 SCC 69](#), paras. 1 and 39, *RBOA*, Tab 2.

decision as to preferable procedure is ... entitled to special deference because it involves weighing and balancing a number of factors.”⁷⁰

(2) Akumin’s appeal argument

133. Akumin’s argument only relates to the common law negligent misrepresentation claim. It goes as follows: If leave is granted for the secondary market claim and a class proceeding moves forward advancing that claim (along with the primary market claim that doesn’t need leave under the *OSA*), then that proceeding is the preferable procedure rather than the common law claim. Akumin relies on Perell J.’s 2014 decision in *Celestica*.⁷¹

134. In making this argument, Akumin criticizes the motion judge for her failure to “treat the certification motion as a meaningful screening device” and writes: “In the Reasons, the Motions Judge does not address the negligent misrepresentation claim at all [emphasis in the original] under the preferability analysis.”

(3) Mr. Longair’s response

135. Mr. Longair makes three points in response.

136. First is a response to Akumin’s cheap shot against the motion judge. What Akumin doesn’t disclose in its factum is that it didn’t advance this argument in the court below. In other words, Akumin castigates the motion judge for failing to address an argument that she never heard.

⁷⁰ *Pearson v. Inco Ltd.*, [2005 CanLII 42474](#) (ON CA), at para. 43, *RBOA*, Tab 16.

⁷¹ *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, [2014 ONSC 1057](#), at paras. 181-189, *RBOA*, Tab 21.

137. The only preferable procedure argument Akumin made below for the common law claim was that if leave was not granted for the secondary market claim, then a class action wasn't the preferable procedure for the common law claim.⁷² Mr. Longair never disputed this.

138. The argument Akumin now makes is designed to address the scenario under which leave *is granted* for the secondary market claim. It's hardly surprising that the motion judge's reasons don't address this argument when she never heard it.

139. Second, Akumin's new argument is based on a fundamental error of law for the test to be applied in the preferability analysis. The preferable procedure criterion requires that a class proceeding be *the preferable procedure* to resolve the common issues raised by a specific claim (e.g., the common law negligent misrepresentation claim)—as opposed to other procedural alternatives (e.g., multiple individual proceedings).

140. It's not, as Akumin's argument suggests, *the preferable cause of action* criterion, under which the court assesses which of multiple causes of action (e.g., Part XXIII.1 statutory claim vs common law claim) brought within a single proceeding is the preferable cause of action to advance as a class proceeding.

141. Third, Akumin's reliance on *Celestica* is misplaced and invites this Court into legal error. It's true that in *Celestica* Perell J. accepted the argument Akumin now makes and denied certification of a common law misrepresentation claim because a parallel statutory claim under Part XXIII.1 (for which he granted leave) was the preferable procedure.

⁷² Akumin Responding Factum (Motions for Leave to Proceed and Certification), paras. 111-116 ("If the leave motion is dismissed, the plaintiff's common law and primary market claims – even though they do not require leave – should also not be certified. It is not "preferable" to certify an action that is likely bound to fail."), Responding Compendium, Tab 22, pp. 571-572.

142. But what’s important—yet again—is what Akumin doesn’t disclose in its factum. Akumin fails to mention that *Celestica* (which wasn’t appealed) is the lone outlier in more than a decade of jurisprudence on this issue. As far as Mr. Longair’s counsel is aware, every other time this argument has been adjudicated, it’s been rejected.

143. This includes decisions by the Supreme Court of Canada (*Green*⁷³), this Court (*Fantl*⁷⁴ and *Carom*⁷⁵) and lower courts in Ontario and British Columbia (*Canadian Solar*⁷⁶ and *Tietz*⁷⁷).

144. These cases are cited and they won’t all be reviewed here. The Supreme Court’s decision in *Green* is sufficient—a case that Akumin’s counsel is familiar with given that they acted as counsel to an intervenor on the Supreme Court appeal.

145. In *Green*, as here, the plaintiff sought certification of a negligent misrepresentation claim (other than reliance and damages) alongside a claim brought under Part XXIII.1. And there, as here, “[t]he defendants ... 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*.”⁷⁸ The Supreme Court rejected this argument for two reasons.

⁷³ *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#), at paras. [126-128](#), [RBOA](#), Tab 6.

⁷⁴ *Fantl v. Transamerica Life Canada*, [2016 ONCA 633](#), at para. [39](#), [RBOA](#), Tab 14.

⁷⁵ *Carom v. Bre-X Minerals Ltd.*, [2000 CanLII 16886](#) (ON CA), at para. [45](#), [RBOA](#), Tab 8.

⁷⁶ *Abdula v. Canadian Solar*, [2015 ONSC 53](#), [RBOA](#), Tab 1. This decision, released a year after *Celestica*, squarely considers and rejects Akumin’s argument. Justice Taylor certified a claim for negligent misrepresentation alongside a secondary market claim under Part XXIII.1, writing (at paras. [41](#) and [44](#)): “[t]he 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. ... 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.*”

⁷⁷ *Tietz v Bridgemark Financial Corp.*, [2024 BCSC 1166](#), at para. [187](#), [RBOA](#), Tab 20. All these cases acknowledge, as does Mr. Longair, that the individual issues arising from a claim for negligent misrepresentation standing alone, and not in tandem with other claims based on the same factual footprint, may render the negligent misrepresentation claim unsuitable for certification. But where it is brought in tandem with another certified claim, these concerns are minimized and the negligent misrepresentation claim should be certified.

⁷⁸ *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#), at para. [126](#), [RBOA](#), Tab 6.

146. First, the Court found the argument ran “counter to the language of s. 138.13 *OSA* stating the statutory right of action under s. 138.3 *OSA* is meant to be “in addition to, and without derogation from, any other rights”.⁷⁹ Thus, the statutory claim is available on top of any other claim, such as a common law negligent misrepresentation claim.

147. Second, the Court noted that (emphasis added) “the defendants’ argument *confuses procedure with substantive causes of action*.”⁸⁰ The preferable procedure inquiry does not mean 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.” Instead, “[i]t 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.”⁸¹

Issue 5: Should the class period be shortened to end on October 12th, (the 2nd Public Correction) because there was no statistically significant share price decline after the 3rd and 4th Public Corrections?

(1) What the motion judge decided

148. The motion judge certified the claim using a class definition with a November 15, 2021 class period end date, just before the release of the 4th Public Correction.

149. This class period end date follows as a matter of law from the motion judge’s prior finding on the leave motion that Mr. Longair had “established a reasonable possibility that all four alleged public corrections were partial corrections.”⁸²

⁷⁹ *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#), at para. [128](#), [RBOA](#), Tab 6.

⁸⁰ *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#), at para. [128](#), [RBOA](#), Tab 6.

⁸¹ *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#), at para. [128](#), [RBOA](#), Tab 6.

⁸² [Reasons](#), at para. [123](#), [Responding Compendium](#), Tab 4, p. 52.

150. This is because the class period end date for any Part XXIII.1 claim is defined in section 138.3(1) of the *OSA* as 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*” (emphasis added).

(2) Akumin’s appeal argument

151. Akumin argues that the motion judge erred in extending the class period past the 2nd Public Correction “where the plaintiff has acknowledged that there was no decline in Akumin’s share price following [the 3rd and 4th Public Corrections].”

152. Akumin says the class period should end on October 12, 2021, just before the 2nd Public Correction. It frames the argument in relation to the cause of action criterion under section 5(1)(a) of the *CPA*.

(3) Mr. Longair’s response

153. Mr. Longair makes three points in response.

154. First, this argument cannot succeed if Akumin’s appeal from the leave order is dismissed. That’s because the standard of proof on a Part XXIII.1 leave motion (*i.e.*, is there a reasonable possibility of success at trial?) is higher than the standard of proof required for the cause of action criterion under section 5(1)(a) of the *CPA* (*i.e.*, the Rule 21 standard: is it plain and obvious, assuming the facts as pleaded are true, that the claim cannot succeed?). As this Court held in

Kinross, because of the higher threshold applicable to the leave motion, where leave to proceed is granted, the claim “will inevitably meet the cause of action criterion for certification.”⁸³

155. Second, even if assessed independently under s. 5(1)(a), far from being plain and obvious that a class period end date corresponding with the 4th Public Correction has no chance of success, that’s the end date prescribed by section 138.3(1) of the *OSA*, which says the claim runs until “the time when the misrepresentation contained in the document was publicly corrected.”

156. In this case, because (as found by the motion judge) there were four partial corrections, and the misrepresentations were not fully corrected until Akumin filed its restatements as part of the 4th Public Correction, the statute requires a class period that runs until the 4th Public Correction.

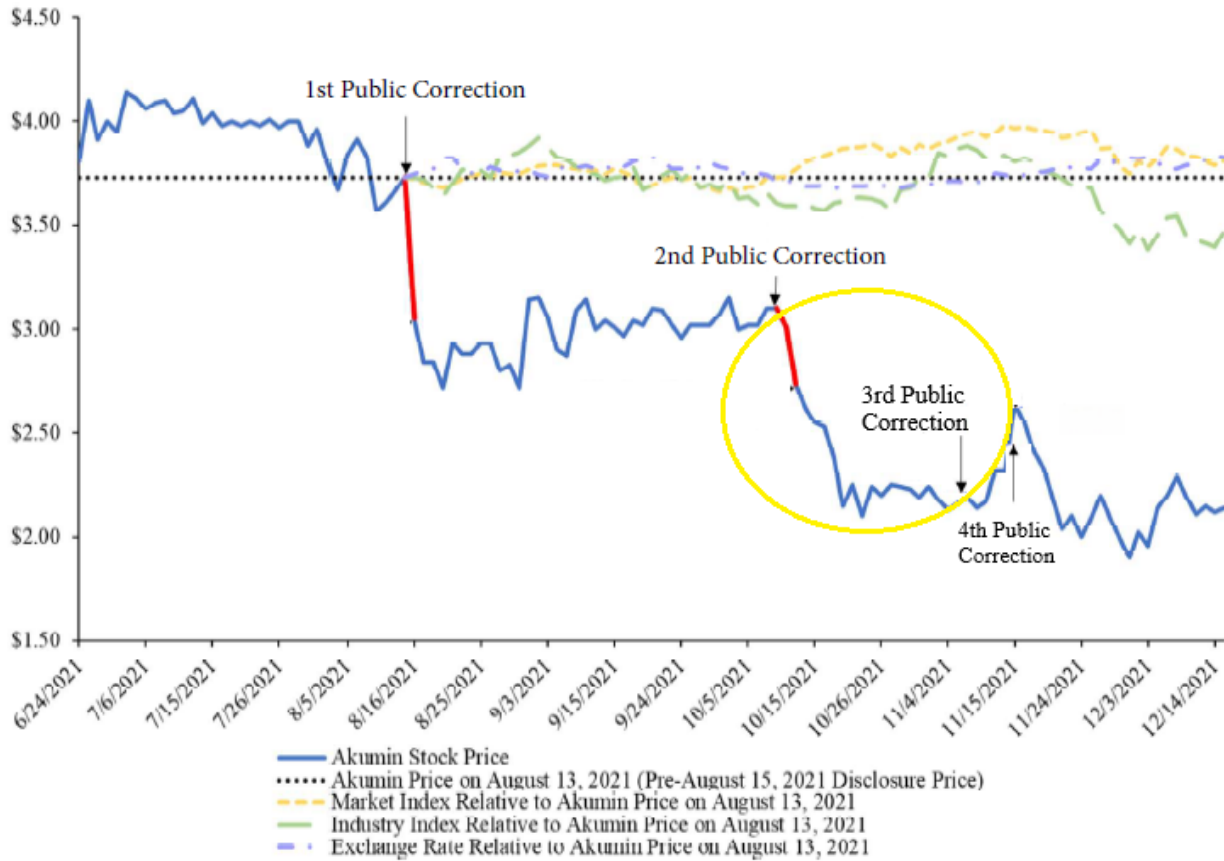
157. Third, Akumin misstates both the evidence and Mr. Longair’s position when it says that “the plaintiff has acknowledged that there was no decline in Akumin’s share price following [the 3rd and 4th Public Corrections].”

158. It’s true that there was no *statistically significant* share price decline following the 3rd and 4th Public Corrections. But that’s far different from asserting, as Akumin does, that there was “*no decline in Akumin’s share price.*”

159. The evidence here is not in dispute and demonstrates the opposite: there was substantial share price decline during the timeframe Akumin is trying to exclude from the class period, which

⁸³ *Bayens v. Kinross Gold Corporation*, [2014 ONCA 901](#), at para. 48, *RBOA*, Tab 5.

is everything after the 2nd Public Correction on August 15, 2021. This decline is identified in the yellow circle below:⁸⁴



Issue 6: **Should the primary market noteholder claim be dismissed because the plaintiff has not identified a specific class member that has such a claim?**

(1) What the motion judge decided

160. The motion judge certified a class that included investors who purchased notes issued by Akumin under several primary market offerings it completed during the class period. In so doing, the motion judge applied the correct test for the identifiable class criterion under section 5(1)(b)

⁸⁴ Modified from Figure 1, Surana Reply Report, p. 21, Responding Compendium, Tab 19, p. 454.

of the *CPA*, which requires the court to assess using the “some basis in fact” standard, “whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action.”⁸⁵

161. In her reasons, the motion judge notes: “Akumin argues, without authority, that by failing to identify any noteholder that purchased notes on the primary market from a Canadian underwriter, the plaintiff has failed to satisfy the s. 5(1)(b) criterion.” The motion judge rejects this argument, relying on the Divisional Court decision in *Keatley Surveying*. She writes:

There is no need for evidence from other class members where the existence of the class is not dependent on personal or subjective criteria, as is the case here. ... We do not need to know the names of the class members, or any of them; we need to be sure we can identify whether someone falls into the class or not such that they are bound by the result of the proceeding (subject to opt-out rights).⁸⁶

(2) Akumin’s appeal argument

162. Akumin repeats the same argument on the appeal, in reference to both the identifiable class and the preferable procedure certification criteria.

(3) Mr. Longair’s response

163. Mr. Longair makes four points in response.

164. First, Akumin doesn’t challenge that the class as certified by the motion judge is objectively defined, without reference to the merits of the action. Nor does Akumin contest that primary market noteholders can self-identify. These are the two hallmarks of a properly defined class under the established case law.

⁸⁵ [Reasons](#), at para. [194](#), [Responding Compendium](#), Tab 4, p. 64.

⁸⁶ [Reasons](#), at paras. [197-198](#), [Responding Compendium](#), Tab 4, p. 64.

165. Second, as the motion judge notes in her reasons, Akumin had no authority to support its argument in the court below. Akumin now relies on two cases—but neither support its argument.

166. The first is *Sun-Rype*, which was a class action about price-fixing of high-fructose corn syrup (HFCS). The identifiable class criterion was not met in that case. While the class was defined objectively, it was impossible for class members to self-identify because it wasn't possible to determine whether HFCS was in a particular product based on how the ingredients were disclosed.⁸⁷

167. *Sun-Rype* stands for the principle that class members must be able to self-identify. But this doesn't assist Akumin because investors with primary market note claims can self-identify—an investor will know if she purchased Akumin notes under a primary market offering—and Akumin doesn't contest the motion judge's finding in this regard.

168. The second case is *Aphria*. There, as here, the defendants objected to the inclusion of a primary market class because there was no direct evidence of the existence of any primary market investors. Perell J. rejected this argument, holding “there is no requirement at the certification stage of a proposed class action that the putative Class Members be identified.”⁸⁸

169. Justice Perell ultimately declined to certify one of the claims advanced, specifically a primary market claim against the underwriter defendants. But he did so because that claim offended a different rule, namely, that while a plaintiff may assert claims held by other class members that the plaintiff does not have, there must be a plaintiff with *a claim* against every defendant. Because the plaintiff in *Aphria* had no claim against the underwriter defendants, and

⁸⁷ *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013 SCC 58](#), at paras. [55](#), [61-63](#), [72](#), RBOA, Tab 18.

⁸⁸ *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, [2021 ONSC 5405](#), at para. [109](#), RBOA, Tab 22.

there was no other plaintiff who did, the primary market claim against the underwriters was struck.⁸⁹

170. Once again, this case doesn't assist Akumin. The primary market claim here is advanced against Akumin. While Mr. Longair doesn't have a primary market claim against Akumin, he does have a secondary market and common law claim against Akumin, which is all that's required.

171. Third, assuming for the sake of argument, contrary to all the case law, that the identifiable class criterion *does require* an evidentiary assessment in relation to the existence of a primary market noteholder class, such a requirement is met here when assessed using the "some basis in fact" standard and reviewing the offering memoranda in the record.

172. Those memoranda include, for example, the following language (emphasis added): (1) the offering "is being *made ... in Canada* pursuant to exemptions from the prospectus requirements of applicable Canadian securities laws"; (2) "[t]he notes are being *offered and sold ... to ... non-U.S. persons in transactions outside the United States*"; (3) they contain an entire section titled "*Residents of Canada*" describing the tax implications *for Canadian purchasers*; and (4) they contain a section on the circumstances under which the notes qualify for investment in Canadian registered accounts, and reference "the offering memorandum prepared *for Canadian investors*".⁹⁰

⁸⁹ *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, 2021 ONSC 5405, at paras. 128, 145, RBOA, Tab 22.

⁹⁰ Offering Memorandum for 7.000% Senior Notes due 2025, pp. cover, iii, iv, 158, 169, Responding Compendium, Tab 23, pp. 574-578 In its factum, Akumin misstates the class definition for primary market purchasers, saying its defined as primary market purchasers of notes from Canadian underwriters, Responding Factum (Certification), paras. 60, 65, pp. 25, 27. That's not right. The primary market class is defined as all purchasers of Akumin securities during the class period, *excluding* persons who acquired Akumin notes in the primary market in a distribution *outside* of Canada. In other words, the primary market class includes all investors that purchased Akumin notes under a primary market distribution in Canada.

173. Fourth, Akumin’s reliance on the preferable procedure criterion in relation to this ground of appeal is misplaced and just a re-packaging of the identifiable class argument. The preferable procedure criterion focuses only on the form of the action and is not engaged here.

Issue 7: Should the secondary market noteholder claim be dismissed because the notes didn’t trade in an efficient market?

(1) What the motion judge decided

174. The motion judge certified the claim with a class that included investors that purchased Akumin notes in the secondary market. In doing so, she relied upon her findings in relation to the secondary market claim involving Akumin’s shares (as opposed to notes) that “Akumin made untrue statements, and those statements were publicly corrected.”⁹¹

175. For *OSA* materiality vis-à-vis the notes, the motion judge referenced Akumin’s argument that *OSA* materiality required market efficiency, which Akumin argued could not be established given the agreed fact that Akumin’s notes didn’t trade in an efficient market.

176. The motion judge rejected this argument in her analysis of the leave motion. She held that Mr. Longair’s reading of the *OSA* (*i.e.*, market efficiency is not a prerequisite to relief under Part XXIII.1) was “plausible and sufficient to clear the leave bar.” In doing so, she found among other things, that “[r]equiring an event study when one cannot be completed, and thus denying investors who hold securities that do not trade in an efficient market access to the statutory regime is, at this stage of the proceeding, inconsistent with the goals of the *OSA*.”⁹²

⁹¹ [Reasons](#), at para. [127](#), [Responding Compendium](#), Tab 4, p. 53.

⁹² [Reasons](#), at para. [133](#), [Responding Compendium](#), Tab 4, p. 53.

(2) Akumin's appeal argument

177. On its appeal, Akumin repeats the same argument it made below and says the motion judge erred under section 5(1)(a) of the *CPA* (the cause of action criterion) by certifying the secondary market note claim given that the notes didn't trade in an efficient market.

(3) Mr. Longair's response

178. Mr. Longair makes three points in response.

179. First, if Akumin's leave appeal is dismissed, this ground of appeal must also be dismissed. Again, this relates to the higher standard of proof applicable on the leave motion. If Mr. Longair's claim on behalf of secondary market noteholders has a reasonable possibility of success (the leave standard), then it logically follows that it's not plain and obvious that the same claim cannot succeed (the cause of action criterion).

180. Second, as discussed above, the premise that market efficiency is required for any claim under Part XXIII.1 is incorrect. Among other things, the plain wording of the legislation and the overall legislative objective animating Part XXIII.1 undermine Akumin's argument.

181. Third, while there is no event study evidence supporting *OSA* materiality for the secondary market note claim, there is other probative evidence that the motion judge properly relied upon in her analysis, namely, the decline in the note prices and the Moody's reports.

182. In terms of the note price evidence, the motion judge references "the note price history in the record" that "indicates that the note prices dropped following the [1st Public Correction], and

did not return to pre-disclosure levels.”⁹³ This finding is not challenged by Akumin and the record plainly supports it: between August 13 (the day before the 1st Public Correction) and November 29 (ten trading days after the 4th Public Correction) Akumin’s 7.0% notes declined by \$5.36 (-5.4%), from \$99.48 to \$94.13; and its 7.5% notes by \$5.00 (-5.1%), from \$98.25 to \$93.25.⁹⁴

183. Turning to the Moody’s reports, the motion judge references these and finds that “they provide some context to the market reaction to Akumin’s disclosures.”⁹⁵ They do so because Moody’s is one of the world’s leading credit rating agencies specializing in analyzing credit risk (increases in credit risk put downward pressure on the market price of notes) including, in this context, the credit risk associated with the likelihood that Akumin would meet the payment obligations it owes to its noteholders.

184. In her reasons, the motion judge references and quotes from four different Moody’s reports issued during the class period, each of which commented on the credit negative implications to Akumin’s notes from the company’s accounting issues and restatement.⁹⁶

185. None of these findings or evidence is challenged by Akumin on this appeal.

PART IV - ADDITIONAL ISSUES

186. No additional issues are raised by Mr. Longair.

⁹³ [Reasons](#), at para. [134](#), [Responding Compendium](#), Tab 4, p. 54.

⁹⁴ Bloomberg 7.00% and 7.50% Note Price Chart, [Responding Compendium](#), Tab 20, pp. 537-539.

⁹⁵ [Reasons](#), at para. [135](#), [Responding Compendium](#), Tab 4, p. 54.

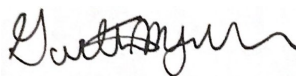
⁹⁶ [Reasons](#), at para. [135](#), [Responding Compendium](#), Tab 4, p. 54. Moody’s Akumin Reports, [Responding Compendium](#), Tab 21, pp. 541-566.

PART V - ORDER REQUESTED

187. Mr. Longair requests an order dismissing the appeals, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: May 1, 2025



Paul Guy / Garth Myers

**Lawyers for the Plaintiff (Respondent),
Terry Longair P.C.**

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)

CERTIFICATE

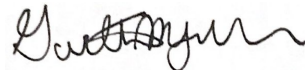
I estimate that 1.75 hours will be needed for my oral argument.

An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with subrule 3. There are 14,788 words in Parts I to V.

The Respondent's factum is 50 pages in length, in accordance with the Direction of Lauwers J.A. dated January 24, 2025.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 1st of May 2025



Paul Guy / Garth Myers

**Lawyers for the Plaintiff (Respondent),
Terry Longair P.C.**

SCHEDULE “A” - AUTHORITIES

1. *Abdula v. Canadian Solar*, [2015 ONSC 53](#)
2. *AIC Limited v. Fischer*, [2013 SCC 69](#)
3. *Badesha v. Cronos Group Inc.*, [2022 ONCA 663](#)
4. *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#)
5. *Bayens v. Kinross Gold Corporation*, [2014 ONCA 901](#)
6. *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#)
7. *Cappelli v. Nobilis Health Corp.*, [2019 ONSC 2266](#)
8. *Carom v. Bre-X Minerals Ltd.*, [2000 CanLII 16886](#) (ON CA)
9. *Cornish v. Ontario Securities Commission*, [2013 ONSC 1310](#)
10. *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, [2024 ONCA 105](#)
11. *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784
12. *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, [2021 ONCA 104](#)
13. *Dyck v. Tahoe Resources Inc.*, [2021 ONSC 5712](#)
14. *Fantl v. Transamerica Life Canada*, [2016 ONCA 633](#)
15. *MM Fund v. Americas Gold and Silver Corp.*, [2022 ONSC 6515](#)
16. *Pearson v. Inco Ltd.*, [2005 CanLII 42474](#) (ON CA)
17. *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011 SCC 23](#)
18. *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013 SCC 58](#)
19. *Theratechnologies Inc. v. 121851 Canada Inc.*, [2015 SCC 18](#)
20. *Tietz v Bridgemark Financial Corp.*, [2024 BCSC 1166](#)
21. *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, [2014 ONSC 1057](#)
22. *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, [2021 ONSC 5405](#)
23. *Wong v. Pretium Resources Inc.*, [2022 ONCA 549](#)

SCHEDULE “B” – STATUTES

1. *Securities Act*, [R.S.O. 1990, c. S.5](#)

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; (“présentation inexacte des faits”)

“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; (“fait important”)

Definitions

138.1 In this Part,

“issuer’s security” means a security of a responsible issuer and includes a security,

- (a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and
- (b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; (“valeur mobilière d’un émetteur”)

Application

138.2 This Part does not apply to,

- (a) the purchase of a security offered by a prospectus during the period of distribution;
- (b) the acquisition of an issuer’s security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;
- (c) the acquisition or disposition of an issuer’s security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or

- (d) such other transactions or class of transactions as may be prescribed by regulation.

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;
- (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.

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'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
- 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:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired 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 received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), 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 acquired 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 received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), 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 received upon the disposition of those securities (deducting any commissions paid in respect of the disposition 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 acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,
- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such 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, then the amount that the court considers just.

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.

2. ***Securities Act, R.R.O. 1990, Reg. 1015: GENERAL***

249. For the purposes of Part XXIII.1 of the Act, “market capitalization” means, in respect of an issuer, the amount determined as follows:

1. For each class of equity securities for which there is a published market, determine the sum of the number of outstanding securities of the class at the close of trading on each of the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred.
2. Divide the sum determined under paragraph 1 by 10.
3. Multiply the quotient determined under paragraph 2 for each class by the trading price of the securities of the class on the principal market for the securities for the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred.
4. Add the amounts determined under paragraph 3 for each class of equity securities for which there is a published market.
5. For each class of equity securities not traded on a published market, determine the fair market value of the outstanding securities of that class as of the day on which the misrepresentation was made or the failure to make timely disclosure first occurred.
6. Add the amounts determined under paragraph 5 for each class of equity securities not traded on a published market.
7. Add the amount determined under paragraph 4 to the amount determined under paragraph 6 to determine the market capitalization of the issuer.

251. For the purposes of Part XXIII.1 of the Act, “trading price” means, in respect of a security of a class of securities for which there is a published market, the amount determined under the following rules:

1. Subject to paragraphs 2 and 3, the trading price of the security is the volume weighted average price of securities of that class on the published market during the period for which the trading price is to be determined.
2. Subject to paragraph 3, if there was trading in the securities of that class in the published market on fewer than half of the trading days during the period for which the trading price of the securities is to be determined, the trading price of the security is determined as follows:

- i. Calculate the sum of the average of the highest bid and lowest ask prices for each trading day in the period on which there were no trades in securities of that class in the published market.
 - ii. Divide the amount determined under subparagraph i by the number of trading days on which there were no trades in securities of that class in the published market.
 - iii. Add to the amount determined under subparagraph ii the volume weighted average price of securities of that class on the published market for those trading days on which securities of that class were traded.
 - iv. Divide by two the amount determined under subparagraph iii.
3. If there were no trades of securities of that class in the published market during the period for which the trading price is to be determined, the trading price of the security is the fair market value of the security.

3. National Policy 51-201 [Disclosure Standards](#)

4.1 Materiality Standard

- (1) The definitions of “material fact” and “material change” under securities legislation are based on a market impact test. The definition of “privileged information” contained in the “tipping” provision of the securities legislation of Québec is based on a reasonable investor test. Despite these differences, the two materiality standards are likely to converge, for practical purposes, in most cases.
- (2) The definition of a “material fact” includes a two part materiality test. A fact is material when it (i) significantly affects the market price or value of a security; or (ii) would reasonably be expected to have a significant effect on the market price or value of a security.

4. **National Instrument 51-201 Continuous Disclosure Obligations**

1.1(1) In this Instrument:

"material change" means

- (a) a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer; or
- (b) a decision to implement a change referred to in paragraph (a) made by the board of directors or other persons acting in a similar capacity or by senior management of the reporting issuer who believe that confirmation of the decision by the board of directors or any other persons acting in a similar capacity is probable;

Material Change Reports

Publication of Material Change

- 7.1 (1) Subject to subsection (2), if a material change occurs in the affairs of a reporting issuer, the reporting issuer must
- (a) immediately issue and file a news release authorized by an executive officer disclosing the nature and substance of the change; and
 - (b) as soon as practicable, and in any event within 10 days of the date on which the change occurs, file a Form 51-102F3 Material Change Report with respect to the material change.

5. *Class Proceedings Act, 1992*, [S.O. 1992, c. 6](#)

Certification

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.

**TERRY LONGAIR PROFESSIONAL
CORPORATION**
Plaintiff (Respondent)

-and- **AKUMIN INC. et al.**
Defendants (Appellants)

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*

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