CITATION: DALI Local 675 Pension Fund (Trustees) v. Barrick Gold Corporation, 2026 ONSC 991
COURT FILE NO.: CV-14-502316-00CP
DATE: 20260304

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND AND ROYCE LEE Plaintiffs	*Joel Rochon, Peter Jervis, Golnaz Nayerahmadi, Pritpal Mann and Sophie Chase*, for the Plaintiffs
– and –	
BARRICK GOLD CORPORATION, AARON W. REGENT AND JAMIE SOKALSKY, AMMAR AL-JOUNDI AND PETER KINVER Defendants	*Kent E. Thomson, Luis Sarabia, Steven G. Frankel, Kristine Spence, Jakob Kelly*, for the Defendants
	Jody Brown, Tina Yang and *Melanie Anderson* for the Law Foundation of Ontario, Intervenor on the issue of costs of the leave motions
	HEARD: January 14, 15 and 16, 2026

LEIPER, J.

REASONS FOR DECISION: CERTIFICATION AND LEAVE TO AMEND (PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*)

PART I. INTRODUCTION

[1] These are reasons for decision in the plaintiffs' certification motion under s. 5(1) of the *Class Proceedings Act, 1992* ("*CPA*")[1] and the plaintiffs' motion for leave to amend the statement of claim pursuant to Rule 26.01 of the *Rules of Civil Procedure* (the "Rules")[2].

[2] The plaintiffs bring this action in damages based on the defendants ("Barrick" and certain officers and directors) alleged material misrepresentations, relative to a gold mining project in the high Andes in Chile and Argentina.

[3] The plaintiffs assert causes of action under Part XXIII.1 of the *Securities Act* ("*OSA*")[3] and at common law for negligent misrepresentation. The amounts at stake are significant.

[4] The defendants do not challenge certification of the secondary market causes of action, because this court has granted leave under the *OSA* in two separate leave motions. The defendants raise issues with the proposed class definition and common issues.

[5] The defendants also challenge certification of the primary market claims. They oppose certification of this claim based on limitation periods, abuse of process and preferability.

[6] The defendants do not challenge certification of the common law claim in negligent misrepresentation. They take issue with certifying a common issue on reliance.

[7] The defendants submit there is no basis on which to approve any of the proposed common issues for aggregate damages in law based on the absence of expert evidence as to an appropriate trial methodology for calculating aggregate damages.

[8] Finally, the parties and the Law Foundation of Ontario made submissions on the costs of the leave motions. Both the plaintiffs and the defendants seek costs of the leave motions.

PART II. SUMMARY OF FINDINGS

[9] By way of summary, I make the following orders:

i. I certify the secondary market causes of action for which leave has been granted by the decisions of Akbarali, J. and Belobaba, J. and pursuant to s. 5(1) of the *CPA* with the amendments to the proposed class definition and proposed common issues as set out in these reasons;

ii. I decline to certify a common issue of aggregate damages relative to the secondary market claim;

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[1] S.O. 1992, c. 6. S. 5.
[2] R.R.O. 1990, Reg. 194.
[3] R.S.O. 1990, c. S.5.

iii. I decline to certify the primary market cause of action pursuant to s. 130.1 of the *OSA*;

iv. I certify the common law claim in negligent misrepresentation, with amendments to the proposed common issues as set out in these reasons;

v. I grant leave to the plaintiffs to amend the proposed fresh as amended statement of claim in accordance with these reasons;

vi. I order costs of the leave motions in favour of the plaintiffs in the amount of $2.75 million all-inclusive of fees, disbursements and taxes.

[10] Pursuant to sections 24 and 25 of the *CPA*, I reserve to the common issues judge, the method of determining individual claims and the amounts payable by the defendants, if any.

PART III. BACKGROUND

[11] In her reasons for decision on the second of two leave motions, Akbarali, J. set out the context for this litigation as follows:[4]

> [2] In May 2009, Barrick announced that it had green-lit a mega-project, known as Pascua-Lama, to develop a gold and silver mine in the High Andes. The Pascua side of the project was in Chile. It was where the open pit mine and crushing facility were intended to be located. The Lama side of the project, across the border in Argentina, was where the processing facility was intended to be located. The greatest share of the expense related to the Lama side of the project. The project was 45,000 hectares in size, or roughly two-thirds the size of the city of Toronto.
>
> [3] The project presented significant engineering, environmental, and regulatory challenges. George Potter, who held the position of Barrick's Senior Vice President, Capital Projects during the early stages of the project, described some of the complexities in his evidence. For example, being located in the high Andes, the terrain was rugged, the climate was arid, the winter was cold, and strong winds blew during all seasons. Due to its remote location, workers, construction materials, and equipment all had to be transported to the project by road in both Chile and Argentina. The project was not connected to power grids in either country, so electrical substations and transmission lines had to be constructed. Camps had to be built to house the workers.
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> [4] The bi-national nature of the project gave rise to complications, requiring Barrick to deal with different governments and governmental agencies at multiple levels in both Chile and Argentina. The project had to contend with tax regimes, legal and regulatory systems, and economic conditions in both countries.

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[4] *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold Corporation*, 2022 ONSC 1767, aff'd, 2024 ONCA 105. ("*2022 Leave"*)

> [5] The challenges inherent in the project became further complicated by events that occurred while the project was ongoing, including rampant inflationary pressures, a serious earthquake in Chile, and a superboom in construction projects worldwide, across industries, which resulted in an increase in cost and decrease in supply of commodities and labour. In addition, the project was eventually placed on hold after an injunction issued by a Chilean court due to environmental concerns. Ultimately, the project was placed on care and maintenance before completion, the company having concluded that it was no longer financially viable.

PART IV. THE PRIOR LEAVE DECISIONS AND APPEALS

[12] For the better part of a decade, the parties prepared and litigated the *OSA* leave motions and two appeals from those motions. The outcomes of those decisions are important because they establish the parameters for this certification motion. As a result, I discuss those findings in some detail before analyzing the issues on certification.

[13] As a result of the motions for leave and appellate findings, the plaintiffs succeeded in obtaining leave to pursue secondary market claims in two areas of representation with corresponding public corrections. These can be summarized within two categories:

i. Barrick's environmental compliance arising from a representation made on July 26, 2012.

ii. Barrick's capital expenditure ("capex") and schedule for gold productions to environmental compliance, arising from representations made in February and March of 2012.

[14] At the first leave motion in 2019, Belobaba, J. granted leave on the environmental representation cause of action. Belobaba, J. found there was more than a reasonable possibility that the plaintiffs would be able to establish that on July 26, 2012, the defendants misrepresented in Barrick's 2012 Q2 Report that the gold mine project had achieved critical milestones with completion of the first phase of the pioneering road and the water management system (the "WMS"), allowing "pre-stripping"[5] to commence.[6]

[15] Justice Belobaba did not make a definitive finding as to when this statement was publicly corrected. Although he was satisfied that a press release issued by the defendants on June 28, 2013, was capable of being a public correction, he noted the defendants' position that their press release of November 1, 2012, was also capable of being a full public correction of the July 26, 2012,

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[5] "Pre-stripping" is the process of excavating and removing surface rock at the mine site to obtain access to the ore in the ground below the surface rock.

[6] *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, 148 O.R. (3d) 755, rev'd in part, 2021 ONCA 104, leave to appeal refused, [2021] S.C.C.A. No. 202 ("*2019 Leave*").

statement. On that date, November 1, 2012, Barrick publicly disclosed that there was constitutional litigation being brought against it involving the project.

[16] Justice Belobaba postponed making any findings of corrective disclosures of the environmental representations until the certification motion.[7] He also declined to grant leave to proceed on accounting and on capex/scheduling representations.[8] In *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, ("*Drywall #1*") the Court of Appeal allowed the plaintiffs' appeal in part. The Court of Appeal sent the leave motion back for further consideration in respect of the capex scheduling misrepresentations, and the accounting and financial reporting misrepresentations.[9]

[17] In 2022, Akbarali, J. heard the second leave motion. Justice Akbarali concluded that in addition to the environmental representation, there was a reasonable possibility the plaintiffs could prove Barrick misrepresented its capex budget and schedule for the completion of the project, in its 2011 Q4 and Year-end Report released on February 16, 2012, and in its 2011 Annual Information Form of March 28, 2012. [10]

[18] Justice Akbarali granted the plaintiffs leave to proceed with:

> …a claim that Barrick made [alleged] misrepresentations in its February and March 2012 disclosures by:
>
> > a. affirming, as a statement of current fact, that its forecasts were based on assumptions that it considered reasonable; and
> >
> > b. disclosing an inaccurate capex budget and schedule by omitting to disclose that:
> >
> > > i. the estimates prepared by Barrick's sub-contractors, and particularly Fluor-Techint, were unreliable, thus rendering Barrick's capex budget unreliable and inaccurate; and
> > >
> > > ii. Barrick's internal estimates by January 2012 indicated that the capex budget was then estimated at $6.4 billion, and at $7.5 billion by Q1 2012.[11]

[19] Justice Akbarali sought supplementary submissions from the parties on the question of the dates of public correction linked to these representations. Her supplementary reasons analyzed several proposed dates asserted to be possible public corrections of the capex budget and scheduling representations. Justice Akbarali found in the result that "there is a reasonable

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[7] *2019 Leave* at paras. 99-102.
[8] *2019 Leave.*
[9] *Drywall #1* at para. 113.
[10] 2022 ONSC 1767, aff'd 2024 ONCA 105, leave to appeal to S.C.C. refused, 41228 (September 26, 2024) ("*2022 Leave*").
[11] *2022 Leave,* at para. 32.

possibility the plaintiffs will prove the July 2012 disclosure is a public correction. On the release of this disclosure, Barrick's share price declined by $1.45. There is evidence that Barrick analysts and the market were shocked by the magnitude of the budget increase and the delay. One analyst report referred to the "Pascua-Lama capital blow-out". [12]

[20] Justice Akbarali rejected the plaintiffs' submissions that there were public corrections after July 26, 2012, for the purposes of the leave motion, finding that "Barrick had accurately corrected any pre-existing misrepresentation about the schedule and capex budget by July 2012." [13]

[21] Justice Akbarali found that the relevant possible public corrections of these alleged misrepresentations are in Barrick's disclosures of May 2, 2012, and July 26, 2012.[14] Justice Akbarali found that although the plaintiffs did not seek a finding that the May 2, 2012 disclosure was a public correction, the defendants could argue that the May 2, 2012 disclosure was a complete public correction and deny liability for damages after that date. As Akbarali, J. observed, "[w]hether they succeed will be a question for the trial judge."[15]

[22] Justice Akbarali rejected the plaintiffs' submission that subsequent disclosure concerning the WMS environmental issues could constitute public corrections of the capex and scheduling representations, because such a decision would risk "opening up production and discoveries in a manner destined to make this litigation unwieldy and unduly costly, and therefore inconsistent with the goals of access to justice and judicial economy, and also the intent of the screening mechanism as described in *Theratechnologies*."[16]

[23] The Court of Appeal upheld Akbarali, J.'s leave decision, and declined to find any error in her findings relative to the date of public correction.[17] This portion of the claim is thus limited to claims "on behalf of persons who traded in Barrick securities between February 16, 2012, and July 26, 2012" in respect of the capex and scheduling representations first made on February 16, 2012.[18]

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[12] *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold Corporation*, 2022 ONSC 4216 ("*2022 Leave Supplementary"*), at para. 21, aff'd 2024 ONCA 105, leave to appeal to S.C.C. refused, 41228 (September 26, 2024).

[13] *2022 Leave Supplementary,* at para. 27-28.

[14] *2022 Leave*, at para. 33.

[15] *2022 Leave,* at para. 18.

[16] *2022 Leave,* at para. 31.

[17] *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, 2024 ONCA 105, leave to appeal to S.C.C. refused, 41228 (September 26, 2024) ("*Drywall #2").*

[18] *Drywall #2*, at paras. 5, 72-80; 83-85. See also: *Terry Longair Professional Corporation v. Akumin Inc*., 2025 ONCA 606, at para. 83, leave to appeal to S.C.C. requested 42077: "this is not a case such as *Barrick #2*, where the issuer had fully corrected the impugned misrepresentations as of a certain date and subsequent disclosures were not "public corrections" because there was nothing left to correct: *Barrick #2*, at paras. 81- 86.

[24] The plaintiffs did not appeal Akbarali, J.'s finding that May 2, 2012, could represent the date of a public correction, and the Court of Appeal did not analyze that aspect of Akbarali, J.'s leave decision in detail.[19]

[25] The Court of Appeal outlined the policy underpinnings for having the leave judge take on the task of identifying possible public corrections:

> Ultimately, s. 138.3(1) of the *OSA* is meant to provide generous access to justice to those whose trading decisions may have been tainted by misrepresentations. It would not be in keeping with this objective or with judicial economy to permit misrepresentation actions to be pursued on behalf of those who trade in securities after alleged misrepresentations have been completely publicly corrected, since a complete public correction will have removed any realistic prospect that those trading decisions may have been tainted.[20]

[26] The Court of Appeal also elaborated on the task of the leave judge relative to public corrections in secondary market claims:

> [71] A "public correction" of an alleged misrepresentation will serve as a "necessary time-post for the proposed [s. 138.3(1) action] and any eventual damages calculation": *Drywall #1*, at para. 66; *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838, 159 O.R. (3d) 241, at para. 46. A motion judge considering whether leave should be granted pursuant to s. 138.8 must therefore determine "whether [an] alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Drywall #1*, at para. 76.[21] [Emphasis added.]

PART V. THE ISSUES ON THE MOTIONS

[27] The issues to be determined on the motion for certification are:

i. Should the secondary market claims under s. 138.8 of the *OSA* be certified and if so, in what form? Should the issue of aggregate damages be certified?

ii. Should the primary market claims be certified? Should the issue of aggregate damages be certified?

iii. Should the common law cause of action in negligent misrepresentation be certified?

iv. Should the plaintiffs receive leave to amend the statement of claim as filed?

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[19] *Drywall #2* at para. 14.
[20] *Drywall #2* at para. 86.
[21] *Drywall #2* at para. 71.

v. Should the plaintiffs or the defendants receive their costs of the leave motions and if so, should costs be payable in the cause?

[28] The issue to be determined on the motion for leave to amend the plaintiffs' statement of claim is simply whether the court should grant or refuse leave in accordance with the *Rules*?

PART VI. THE STATUTORY FRAMEWORKS

Certification

[29] There are several sets of statutory provisions and Rules which apply to the issues. I include those, but for brevity, I have omitted the detailed provisions of the *OSA*. I discuss the relevant legislative framework for costs in a later section of these reasons.

[30] The remaining statutory provisions which guide this analysis begin with the starting point on a certification motion: the test for certification found in s. 5(1) of the *CPA*:

> **5** (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
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> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
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> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
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> (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
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> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Aggregate Damages as a Common Issue

[31] The defendants challenge whether questions on aggregate damages are properly certifiable in this case. Section 24 of the *CPA* sets out the circumstances in which a court may determine aggregate or part of a defendant's liability to class members in these terms:

> **Aggregate assessment of monetary relief**
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> **24** (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

The Relevant Limitation Periods under the *OSA*

[32] The defendants submit that the plaintiffs' primary market claims are statute-barred. The relevant provisions in the *OSA* which apply are:

> **Limitation periods**
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> **138** Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,
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> (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
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> (b) in the case of any action, other than an action for rescission, the earlier of,
>
> (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
>
> (ii) three years after the date of the transaction that gave rise to the cause of action.

Leave to Amend a Pleading

[33] Rule 26.01 of the *Rules* grants the court the ability to give leave to a party to "amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

[34] Rule 25.11 permits the court to strike out all or part of a pleading, with or without leave to amend, on the ground that the pleading,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

[35] Further, any party may seek to have a question of law raised by a pleading determined pursuant to Rule 21.01:

> **21.01** (1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

[36] I analyze the issues on the motions next.

PART VII. ANALYSIS OF THE ISSUES ON CERTIFICATION

A. THE SECONDARY MARKET CLAIMS PURSUANT TO s. 138.8 OF THE *OSA*

Section 5(1)(a): The pleadings disclose a cause of action

[37] The plaintiffs obtained leave to proceed on the secondary market claims relative to the representations described above. Once leave has been obtained, this puts the plaintiffs' case on a strong footing at the certification stage.[22]

[38] The defendants accept that this aspect of the claim may be certified. They have conceded that the test under s. 5(1)(a) of the *CPA* has been met.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff

The Issue: Should there be a single class definition or sub-classes?

[39] The defendants submit that the plaintiffs' proposed class definition is overbroad, and improperly blends the two claims of misrepresentation together, contrary to the judicial findings on the *OSA* leave motions.

[40] The plaintiffs' proposed class definition blends the dates of the environmental and capex/scheduling claims into one paragraph, and includes the primary and secondary claims in one omnibus class definition as follows:

> All individuals and entities, wherever they may reside or are domiciled, other than those resident in Quebec during the Class Period and the Excluded Persons, who acquired securities of Barrick either by primary distribution in Canada or a purchase on the TSX or other secondary market in Canada (other than secondary market

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[22] *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, 327 O.A.C. 156, at para. 48, leave to appeal requested but application for leave discontinued, [2015] S.C.C.A. No. 59.

> purchasers who were residents of Quebec) from and including February 16, 2012 to and including June 28, 2013 and held some or all of those securities through one or more of the following public correction dates: July 26, 2012, November 1, 2012, April 10, 2013 and June 28, 2013 ("Class Period").

[41] The plaintiffs submit that this class definition meets the three objectives for class definitions because it identifies those with a potential claim for relief, it defines the parameters of the lawsuit and describes those who will be bound by its result, and who are entitled to notice of the action.[23]

[42] The plaintiffs' proposed class definition uses the first date of the alleged capex/scheduling misrepresentation to start the analysis. They propose four correction dates as the "time posts for damages". The plaintiffs submit that these dates flow from the findings made by Belobaba, J. and Akbarali, J. and are supported by expert evidence from Professor Gregg Jarrell and Cynthia Jones. The proposed corrective disclosure dates are July 26, 2012, November 1, 2012, April 10, 2013, and June 28, 2013. Taken together, the plaintiffs submit there is "some basis in fact" to find that each of these dates are dates of corrective disclosures, with the final determination of that issue to be left to the trial judge.

[43] The plaintiffs submit that their class definition properly leaves to the trial judge the question of the correction or partial corrections and ultimately the damages issues. The plaintiffs submit that the appropriate class definition is to set the "time posts" at the date of the earliest alleged misrepresentation, through to the end of the last possible correction of the alleged misrepresentations.

[44] The plaintiffs rely on similarly formulated class definitions certified in *Longair v. Akumin Inc. et al.,* 2024 ONSC 3675, aff'd, 2025 ONCA 606, leave to appeal to S.C.C. requested 42077, and in *Badesha v. Cronos Inc*., 2022 ONCA 663, 163 O.R. (3d) 481.

[45] The representations and potential public corrections at issue in *Akumin* involved financial disclosures and restatements, and commonality in the representations. The motion judge reviewed and certified a class definition based on the secondary market claims, reasoning:

> [204] Whether the claim for damages beginning prior to the FY 2019 financial reports is ultimately successful, in these circumstances, I am not inclined to pre-judge it. Were I to shorten the class period, I would, in effect, be reaching conclusions on the merits of the materiality assessment of the Q1-Q3 statements which, in my view, ought to be made at trial on a full record.
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> [205] Akumin further argues that the class period ought to end after the August 15, 2021 disclosure which, in its submission, is the only disclosure that resulted in a statistically significant share price decline.

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[23] *Sun Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 57.

> [206] I have already expressed some reservations about the potential role of the November 8 and 15, 2021 disclosures as public corrections in the statutory scheme given the lack of statistically significant share price decline associated with those dates. However, there is some basis in the evidence for the truth-on-the-market theory, and a plausible legal theory put forward by the plaintiff as to why all of the identified statements are public corrections. I am not inclined to pre-determine that question under the guise of shortening the class period, especially when, as the law currently stands, there is uncertainty with respect to the role of public correction in the statute.

[46] The Court of Appeal upheld the motion judge's decision to leave the factual question of the available corrections to the trial judge. The motion judge approved a single class definition with one broad class period, which encompassed several potential public correction dates within the time posts. That class definition reads, "All persons and entities, other than the Excluded Persons, that acquired Akumin Inc. ("Akumin")'s securities during the period from May 15, 2019, at 7:46 a.m. ET to November 15, 2021, at 7:04 a.m. ET."[24]

[47] In *Badesha v. Cronos Group, Inc.,* 2023 ONSC 5678, the parties proposed class definitions with two time-posts as between the first representation and the last available date of public correction. The Court of Appeal sent the decision denying leave back to the Superior Court, noting a "core commonality" among the alleged misrepresentations. This commonality meant that the trial judge could treat the claim as being about a single misrepresentation, pursuant to section 138.3(6) of the *OSA*.[25]

[48] The plaintiffs submit that the environmental representation and capex/scheduling representation are fundamentally interrelated, because Barrick's environmental violations led to the project being suspended, which in turn caused the delay and increases to the capex budget. For those reasons, the plaintiffs argue that their proposed class definition is like those which were uncontroversially available in *Akumin* and *Cronos*. However, this submission does not acknowledge that the circumstances, and treatment of the representations in the case at bar are different from those in *Akumin* and *Cronos*. Here, I must grapple with the unique procedural background of the leave motions, and the grouping of the representations into two categories.

[49] I discuss that history next, including why I conclude that the representations here do not have the same homogeneity that were involved in *Akumin* or *Cronos.* While the delays and environmental issues may be factually interrelated, broadly speaking, the question for certifying the class definition is the legal relationship between the representations and the potential corrections of those representations.

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[24] *Longair v. Akumin Inc. et al.,* 2024 ONSC 3675, at paras. 16, 207.
[25] *Badesha v. Cronos Group Inc.*, 2022 ONCA 663, at para. 57.

[50] It is important to define the class with precision.[26] In this case, specificity will guide discovery, aid the fact-finding process at trial, and ensure that the certification order respects and applies the leave motions' decisions, as undisturbed on appeal.

[51] In the case at bar, two judges gave leave on two separate sets of representations. They took different approaches to the issue of the dates of public correction. If the outcomes are blended into a single class definition, this will not respect the findings made by the leave judges. For example, the plaintiffs' proposed class definition identifies July 26, 2012, as a possible date of correction without differentiating this as between the capex/scheduling representation and the environmental representation. This is a problem because July 26, 2012, is the date of the environmental representation, thus it is not an available public correction date of that representation. The plaintiffs' proposed class definition is thus confusing.

[52] The plaintiffs' proposed class definition raises a second issue, because it implies that there are several potential public correction dates for the capex/scheduling representations, including July 26, 2012, but also November 1, 2012, April 10, 2013, and June 28, 2013. Class counsel submitted that like the motion judge in *Akumin,* I should leave the determination of the exact public correction date for the trial judge. The plaintiffs submit that although Akbarali, J. found two possible corrections on a plain reading of the representations, of May 2, 2012, and July 26, 2012, that a damages analysis could reveal other corrections made after July 26, 2012.

[53] I disagree. The plaintiffs' submission ignores Akbarali, J.'s findings, upheld by the Court of Appeal, that the capex/scheduling representation was fully corrected by no later than July 26, 2012. Justice Akbarali specifically rejected any possibility that June 28, 2013 or April 10, 2013 could be available public correction dates relative to that representation.[27] The Court of Appeal upheld both Akbarali J.'s approach and her conclusions on public correction.[28] As the plaintiffs have worded it, the class definition re-inserts the June and April 2013 correction dates into the mix for the capex/scheduling representation cause of action. The leave stage requires a merits-based analysis, and in this case, the Leave 2022 decision has set the time post for the capex/scheduling correction.

[54] Notably, in *Akumin*, at para. 83, the Court of Appeal affirmed its finding in *Barrick #2,* that the final public correction of the capex/scheduling representation happened on July 26, 2012. Monahan, J.A. wrote that: "I would add that this is not a case such as *Barrick #2,* where the issuer had fully corrected the impugned misrepresentations as of a certain date and subsequent disclosures were not "public corrections" because there was nothing left to correct".[29]

[55] As Akbarali, J. explained at para. 17 of her reasons in *Leave 2022 Supplementary*:

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[26] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 21.

[27] *2022 Leave Supplementary,* at para. 27-28.
[28] *Drywall #2,* at para. 84.
[29] *Barrick #2*, at paras. 81- 86.

> Considering each alleged public correction in this manner allows the court to adjudicate the leave motion in a manner that achieves the legislative intent of the screening mechanism. In other words, failing to consider the individual alleged corrections at all could lead to the possibility that, through the alleged public corrections (if unscrutinized), plaintiffs could unjustifiably expand the scope of discovery and the complexity of the proceeding, all of which is inconsistent with both the legislative goal of the screening mechanism. Such an expansion of the proceedings would also be inconsistent with at least two of the goals of the Class Proceedings Act, 1992: access to justice and judicial economy.

Finding on Class Definition: There should be sub-classes which respect the two leave decisions

[56] I am persuaded that there should be sub-classes given the unique procedural history of this case the two distinct judicial approaches to the question of leave, and to best serve the trial process. This will not pre-determine damages nor fetter the discretion of the trial judge. It respects the outcomes of the leave motions, and the appeal decisions.

[57] I begin with the appropriate class definition arising from the leave decision of Akbarali, J. and the order concerning public corrections. The order reads:

> THIS COURT ORDERS that the relevant possible public correction(s) of these alleged misrepresentations are Barrick's disclosures on May 2, 2012, and July 26, 2012.

[58] Had this been the only claim for which leave was granted, the class definition could uncontroversially, and consistent with similar claims based on secondary market claims, have been:

> All individuals and entities, wherever they may reside or are domiciled, other than residents of Quebec and the Excluded Persons, who acquired common shares of Barrick on the TSX or other secondary markets in Canada from and including February 16, 2012 to and including May 2, 2012 or July 26, 2012, and held some or all of those shares through May 2, 2012 or July 26, 2012.

[59] I note that this version responds to two of the defendants' other concerns with the plaintiffs' proposed version, by specifying "shares" for "securities" and using wording which excludes early sellers who do not have a claim in damages.

[60] I turn next to the class definition for the cause of action flowing from the environmental representation approved by Belobaba, J. The defendants initially proposed wording that set the date of public correction as November 1, 2012, based on Barrick's disclosure about constitutional litigation on that date. During oral argument, the defendants modified this submission given that Belobaba, J. discussed the fact that June 28, 2013, was a viable date of public correction, although he deferred deciding as between November 1, 2012, and June 28, 2013, until certification. I agree that there is some basis in fact to include these dates in the class definition based on their content, Belobaba J.'s comments, and the evidence of statistically significant share declines on those dates.

[61] The defendants propose a modified class definition for the subclass related to the environmental representation claim, which includes both potential dates of public correction:

> All individuals and entities, wherever they may reside or are domiciled, other than residents of Quebec and the Excluded Persons, who acquired common shares of Barrick on the TSX or other secondary market in Canada from and including July 26, 2012 to and including November 1, 2012, or June 28, 2013 and held some or all of those shares through November 1, 2012 or June 28, 2013.

[62] That leaves one outstanding issue arising from the plaintiffs' submission that April 10, 2013, may also be a potential correction. The plaintiffs rely on the wording of press releases issued on that date and evidence from their experts that there was a statistically significant drop in share price on that date. The defendants resist including April 10, 2013, as a possible correction of the environmental representation. They submit that Belobaba, J. rejected this date as a possible correction and rely on para. 87 of his reasons:

> There is nothing in the two Barrick press releases of April 10, 2013, the Dow Jones Newswire of the same date, or the press release of October 31, 2013 that can fairly be said to reveal the existence of any of the 11 alleged omissions. That is, there is nothing in these four alleged "partial corrections" that even suggest that Barrick may have commenced pre-stripping before the WMS was completed in violation of the RCA.

[63] However, due to the finding of the Court of Appeal in *Drywall #1*, which found that this approach to the question of what constitutes a public correction was unduly narrow, I will not treat this as is a binding statement at the certification stage. Could the press releases of April 10, 2013, be found at trial to be public corrections? I have analyzed those representations to fairly frame the class definition as required for trial.

[64] In doing so, I apply the "some basis in fact" test to determine whether the trial judge could find that April 13, 2013, constitutes a "public correction", that is, was there a disclosure on that date which was "reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement"[30]

[65] As the Court of Appeal discussed in *Akumin*, there are two types of corrections in public market cases. The first is an express correction, where the subsequent disclosure states that the previous assertion was untrue at the time it was made: In that circumstance, there is no need for statistical or other analysis. The correction will be obvious. The court can then move to the main issue at trial, that is whether the impugned statement was a "misrepresentation." [31]

[66] The second type of correction is where the alleged public correction does not reveal that the prior statement was untrue. As the Court of Appeal recognized in its reasons in *Akumin*: "This

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[30] *Akumin* 2025 ONCA 606, at para. 50.
[31] *Akumin* at para. 50.

was the circumstance presented in *Barrick* #1, where the defendant made a number of announcements which, although resulting in significant declines in its share price, did not expressly state that prior statements it had made could no longer be relied upon."[32]

[67] In the case of the second kind of correction, at trial, the court must consider "in context and in light of all surrounding circumstances, [whether] the public correction was reasonably capable of being understood as revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact."[33]

[68] I begin with the environmental representation of July 26, 2012, from the MD&A portion of Barrick's Q2 2012 Report:

> During the second quarter, the project achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities.

The nature of the misrepresentation arises from the plaintiffs' allegation that the water management system had not been completed as required by the environmental permit.

[69] The November 1, 2012 proposed public correction accepted which the parties accept, was identified as possible by Belobaba, J. That statement reads:

> November 1, 2012 (Q3 2012) -- "In September and October 2012, two constitutional rights protection actions were filed in Chile by representatives of an indigenous community and certain other individuals, seeking the suspension of construction of the Chilean portion of the Pascua-Lama project due to alleged non-compliance with the requirements of the Project's Chilean environmental approval. The Court declined to issue an immediate injunction suspending pre-stripping activities, but both cases have been admitted for review by the Court. We intend to vigorously defend these actions."

[70] According to the plaintiffs' experts, Professor Gregg Jarell, former Chief Economist at the U.S. Securities and Exchange Commission (SEC) and Cynthia L. Jones, CFA, the November 1, 2012 correction was accompanied by a corresponding share price drop of $2.06/share (approximately $2.1 billion drop in market cap).

[71] The defendants submit that this information was capable of being understood as a correction of "anything that might possibly be misleading" in the July 26, 2012 representation.

[72] The words of the November 1, 2012 release do not specifically correct the July 26, 2012 representation, particularly given Barrick's stated intention to "vigorously defend" the actions linked to litigation over the ability to conduct pre-stripping. However, I would leave this issue to

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[32] *Akumin* (ONCA), at para. 52

[33] *Akumin* (ONCA), at para. 52, citing *Drywall #1* at para. 76.

the trial judge, as there is some basis in fact that this information advised the market that litigation could give rise to a finding that Barrick had not met the conditions for pre-stripping.

[73] Moving to April 10, 2013, as a potential public correction, on that date Barrick issued two press releases which read:

> *April 10, 2013 Barrick First Press Release* -- "Pascua-Lama preliminary injunction in Chile; major construction of works in Argentina unaffected . . . Barrick Gold Corporation (NYSE:ABX) (TSX:ABX) (Barrick or the "company") is aware of media reports indicating that a Chilean court has issued a preliminary injunction pending a full hearing halting construction activities on the Chilean side of the Pascua-Lama project. The company has not yet been formally notified of the court order and will assess the potential implications once it has received official notification. Construction activities in Argentina, where the majority of Pascua-Lama's critical infrastructure is located, including the process plant and tailings storage facility, are not affected."
>
> April 10, 2013 Barrick Second Press Release -- "Barrick to suspend construction on Chilean side of Pascua-Lama . . . Barrick Gold Corporation (NYSE:ABX) (TSX:ABX) (Barrick or the "company") today announced that the company is suspending construction work on the Chilean side of the Pascua-Lama project while working to address environmental and other regulatory requirements to the satisfaction of Chilean authorities. In the interim, activities deemed necessary for environmental protection will continue as authorized.
>
> Construction activities in Argentina, where the majority of Pascua-Lama's critical infrastructure is located, including the process plant and tailings storage facility, are not affected. It is too early to assess the impact, if any, on the overall capital budget and schedule of the project."

[74] This disclosure confirms the outcome of the litigation risk that Barrick flagged in the November 1, 2012, disclosure. It relates to the question of the completion of the requirements to enable pre-stripping to begin or to be continued. I find that there is some basis in fact that the trial judge might find this to be a correction of the alleged misrepresentation of July 26, 2012. The expert evidence from Professor Jarell and Ms. Jones, who conducted detailed event studies relating to Barrick's public disclosures, found that the April 10, 2013, disclosure led to a share price drop of $ 1.65/share (an approximate $1.7 billion drop in market cap).

[75] The defendants tendered a report from Professor Allen Ferrell which critiques the findings of Professor Jarrell and Ms. Jones. However, the defendants do not challenge the admissibility of those reports on certification. This is not the stage at which to resolve credible competing expert opinions, unless they are not reasonably capable of being accepted as evidence at trial.[34]

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[34] *Kamrani-Ghadjar v. Anaergia Inc.*, 2025 ONSC 2167, at para. 70.

[76] The defendants submit that the April 10, 2013 disclosures are not capable of being understood as a correction. They submit that these are nothing more than the timely disclosure of the materialization of the previously disclosed risk on November 1, 2012, which can be analogized to the "legally benign" disclosure discussed in *Poirier v. Silver Wheaton Corp. et al*.[35]

[77] In *Poirier*, the corporate defendant had disclosed a potential tax liability and later announced that the liability had materialized. The motion judge found these were two legally benign events because there was no actionable representation followed by a correction. This is a different scenario than in the case at bar.

[78] The defendants seek to apply the reasoning in *Poirier* with reference to the November 1, 2012 disclosure (advising of litigation and a risk) and the April 10, 2013 disclosure (advising that the risk had materialized). This is not an apt comparison. The logic in *Poirier* would require that there are two "legally benign" disclosures that provided updated information about a risk that has materialized. The first such disclosure is the environmental representation of July 26, 2012, which has been found not to be "legally benign" followed by the April 10, 2013, correction which as discussed above is capable of being found to be a correction of the content in the July 26, 2012, disclosure.

[79] The relationship between the April 10, 2013, disclosures and the July 26, 2012, environmental representation, and the expert evidence satisfy me that there is some basis in fact on which the trial judge could find that April 10, 2013, communication was a correction and should form part of the class definition.

[80] Finally, the disclosure of June 28, 2013, reads:

> June 28, 2013 Barrick Press Release -- "Schedule Re-sequencing and Reduction of 2013-2014 Capital Spending . . . The company has submitted a plan, subject to review by Chilean regulatory authorities, to construct the project's water management system in compliance with permit conditions for completion by the end of 2014, after which Barrick expects to complete remaining construction works in Chile, including pre-stripping. Under this scenario, ore from Chile is expected to be available for processing by mid-2016.

[81] Justice Belobaba found that this disclosure was capable of being a correction of the representation of July 26, 2012, because it acknowledged that the WMS had not been constructed in compliance with the permit conditions. The expert evidence from the plaintiffs is that this disclosure caused a share price drop of $0.97/share (approximately $1.0 billion drop in market cap).

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[35] *Poirier v. Silver Wheaton Corp*., 2022 ONSC 80, 2 C.T.C. 179, at para. 131.

Finding: s. 5(1)(b) Certified Class Definition for the Secondary Market Claims

[82] Based on the discussion above, I certify the following class definitions in the secondary market claims:

i. All individuals and entities, wherever they may reside or are domiciled, other than residents of Quebec and the Excluded Persons, who acquired common shares of Barrick on the TSX or other secondary market in Canada from and including February 16, 2012 to and including May 2, 2012 or July 26, 2012, and held some or all of those shares through May 2, 2012 or July 26, 2012;

ii. All individuals and entities, wherever they may reside or are domiciled, other than residents of Quebec and the Excluded Persons, who acquired common shares of Barrick on the TSX or other secondary market in Canada from and including July 26, 2012 to and including November 1, 2012, April 10, 2013 or June 28, 2013 and held some or all of those shares through November 1, 2012, April 10, 2013 or June 28, 2013.

Section 5(1)(c): The Proposed Common Issues in the Secondary Market claims

[83] I turn to the next issue. The parties agree that there are common issues that meet the test under s. 5(1)(c). The defendants object to the plaintiffs' framing of some of these issues, which I discuss next.

Is PCI 1 imprecise?

[84] The defendants submit that PCI 1 is imprecise and problematic because it could improperly expand the secondary market claims beyond the parameters established by Belobaba, J. and Akbarali, J. The plaintiffs' PCI 1 reads:

> Did the Impugned Documents contain a misrepresentation within the meaning of ss. 1(1) and 138.3 of Part XXIII.1 of the *OSA* and Other Canadian Securities Legislation? If so, what specific misrepresentations were made and in which documents?[36]

[85] The defendants submit that PCI 1 invites the trial judge to look beyond the representations for which leave was granted, referring only to the lengthy documents containing the representations. The defendants propose that PCI 1 track the language in the orders issued by the leave judges to define the secondary market claims precisely.

[86] The plaintiffs submit that the issues will be sufficiently bounded by their proposed amended statement of claim, which includes the precise representations. They submit that the

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[36] The plaintiffs would add this footnoted description to PCI 1: "Being the Fourth-Quarter and Year End 2011 Report (released February 16, 2012), the Annual Information Form for the Year-Ended December 31, 2011 (released March 28, 2012), and/or the Second-Quarter Management's Discussion & Analysis (released July 26, 2012)."

parties will have guidance from the leave orders. Finally, the plaintiffs submit that PCI 1 creates no prejudice to the defendants' trial rights.

[87] I agree that the orders made by Akbarali, J. and Belobaba, J. as well as the proposed amended pleading are precise as to the representations at issue. Given those boundaries, the plaintiff's proposed version would not necessarily lead to them expanding the issues beyond those for which leave has been granted. I find that either version meets the "some basis in fact test" that there are common issues as to whether the statements constituted misrepresentations under the *OSA*.

[88] However, I find that a detailed version of PCI 1 has practical value. This version will provide the trial judge with a level of detail about the statements in issue, and the question of misrepresentation, which are at the core of the secondary market action. The parties filed leave materials which created an unwieldy, voluminous record for each judge to navigate. This case has involved a history of imprecision in the pleadings which has increased the number of issues to be determined at every procedural step to date. The trial judge will benefit from a precise statement of the common issues.

Finding: s. 5(1)(c) PCI 1 should specify the representations

[89] I find that PCI 1 should be replaced with 3 sub-questions. Question 1 relates to the environmental representation. Questions 2 and 3 relate to the capex and scheduling representations:

1. Did the following statement contained in Barrick's Quarterly Report for the Second Quarter of 2012 dated July 26, 2012, constitute a misrepresentation within the meaning of ss. 1(1) and 138.3 of Part XXIII.1 of the *OSA* and Other Canadian Securities Legislation?

   > During the second quarter, the project achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities.

2. Did any of the following statements contained in Barrick's Fourth Quarter and Year-End Report 2011 dated February 16, 2012, constitute a misrepresentation within the meaning of ss. 1(1) and 138.3 of Part XXIII.1 of the *OSA* and Other Canadian Securities Legislation?

   (a) Forward-looking statements are necessarily based upon a number of estimates and assumptions that, while considered reasonable by the Company, are inherently subject to significant business, economic and competitive uncertainties and contingencies.

   (b) At the Pascua-Lama project, approximately 55% of the previously announced preproduction capital of $4.7- $5.0 billion has been committed and first production is expected in mid-2013.

(c) Forward-looking statements are necessarily based upon a number of estimates and assumptions that, while considered reasonable by management, are inherently subject to significant business, economic and competitive uncertainties and contingencies.

3. Did either of the following statements contained in Barrick's Annual Information Form for the year ended December 31, 2011, dated as of March 28, 2012, constitute a misrepresentation within the meaning of ss. 1(1) and 138.3 of Part XXIII.1 of the *OSA* and Other Canadian Securities Legislation?

(a) Forward-looking statements are necessarily based upon a number of estimates and assumptions that, while considered reasonable by us, are inherently subject to significant business, economic and competitive uncertainties and contingencies.

(b) Approximately 55% of the previously announced preproduction capital of $4.7-$5.0 billion has been committed and first production is expected in mid-2013.

PCI 3: How should the common issue on damages be framed?

[90] The defendants submit that the damages issue proposed in PCI 3 cannot be certified.

[91] Proposed PCI 3 must be read alongside PCI 2 to which no objection is taken. Those questions read:

> PCI 2: Are the Defendants, or any of them, liable to the Class Members for the misrepresentation(s) under s. 138.3 of the *OSA* and Other Canadian Securities Legislation?
>
> PCI 3: If the answer to (2) is "yes", did the Class Members suffer damages caused by the misrepresentations? If so, what were the damages suffered by class members?

[92] The defendants submit that this question cannot be certified because as drafted, PCI 3 asks the common issues judge to determine each individual class members' damages. That cannot be done in common, because once a methodology is accepted for determining the per share damage, then any individual claims remain to be assessed using variables for each class member that include: (i) the price paid for the shares; (ii) whether and when the shares were sold; (iii) the price at which they were sold; and (iv) whether the individual entered into any hedging or other risk limitation transactions.

[93] The plaintiffs submit that PCI 3 is a straightforward damages question, like those certified in *Akumin* and in *Cronos*. In those decisions, the common issue on damages was phrased: "What

is the method of calculating the damages payable to the Class Members in respect of Part XXIII.1 of the *OSA* and the Securities Legislation?"[37]

[94] The plaintiffs clarified in oral argument that their formulation of PCI 3 does not refer to the calculation of individual damages. The plaintiffs submit that PCI 3 simply describes with greater precision the process for determining damages in common issues trials in secondary market claims: the formula for damages calculation in s. 138.5(2) of the *OSA* is applied, and expert evidence as to methodology is tendered to yield trial findings as to the damage per share that will guide the individual issues' claims.

Finding: s. 5(1)(c) PCI 3 may be certified

[95] I conclude that a more precise formulation of PCI 3 which resolves any ambiguity from the plaintiffs' proposed question may be certified as follows: What is the method of calculating the damages payable to the Class Members in respect of Part XXIII.1 of the *OSA* and the Securities Legislation? What are the per share damages?

PCI 12: Should PCI 12, the aggregate damages question be certified?

[96] The plaintiffs have proposed as PCI 12, a common issue on aggregate damages (including for the claims under the secondary market claims) as follows:

> 12. Can some or all of the damages of the Class be calculated in the aggregate pursuant to s. 24 of the CPA?

[97] The plaintiffs submit that the logic of s. 24(1) *CPA*, the structure of the *OSA* which sets a cap on aggregate damages payable, and precedents from certification decisions in other secondary market claim cases meet the "some basis in fact" requirement for a question on aggregate damages.[38] The plaintiffs state in their factum that they intend to call economist Professor Frank Torchio to opine on aggregate damages at trial. The plaintiffs have not tendered a report from Professor Torchio, nor has he been cross-examined for this motion.[39]

[98] The plaintiffs' litigation plan sets out a list of experts retained, and the areas on which each of their expert witnesses is proposed to opine. The expert list does not include Professor Torchio, nor does it describe the methodology or model he would use at trial.

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[37] *Longair* at para. 212; *Badesah v. Cronos Group* at para. 20.

[38] *Silver v. Imax Corporation*, 2009 CanLII 72334 at para. 195; *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2017 ONSC 5026

[39] Instead, the plaintiffs have provided a report from their expert, Cynthia Jones describing the multi-trader model. They do not intend to rely on the Jones report at trial. The defendants point out that Ms. Jones acknowledged in her cross-examination that the multi-trader model she employed for the purposes of her report has been used to support settlements but has not been empirically tested and she would not testify at trial based on her multi trader model methodology. In these circumstances, I would not rely on that opinion as a foundation for aggregate damages.

[99] I am guided by the following principles articulated by van Rensburg J. in *Silver* at para. 195:

i. The assessment of aggregate damages is a typical common issue in class proceedings;

ii. A question on aggregate damages should be certified "in the absence of compelling evidence that aggregate damages should not be available in a given case"'

iii. The court must only be satisfied that there is a "reasonable likelihood" that the conditions in s. 24(1) of the *CPA* will be satisfied:

iv. Provided that there is evidence that an aggregate assessment would be warranted, the determination of whether this should occur is for the trial judge.

v. It is not for the judge hearing the certification motion to weigh conflicting expert evidence on the issue.

[100] The plaintiffs submit that questions of aggregate damages are routinely certified in secondary market claims. The defendants have provided several cases from certification motions in other contexts, where judges have declined to approve an aggregate damages question, although none of these are in the context of secondary market claims under the *OSA*:

i. *Head v. 859530 Ont. Inc.*, 2025 ONSC 4817, at paras. 156-157: Healey, J. declined to certify a common issue in aggregate damages where the plaintiffs had not tendered evidence of a methodology for determining aggregate damages in an action involving residents of a Barrie long term care home who contracted Covid, many of whom died. The plaintiffs decided not to rely on their expert and presented no alternative procedure in evidence or in their litigation plan. Healey, J. declined to certify the proposed common issue on aggregate damages, applying the comments of Perell, J. in *Lilleyman v. Bumblebee Foods LLC,* 2023 ONSC 4408, aff'd 2024 ONCA 606, 173 O.R. (3d) 682, leave to appeal refused, [2024] S.C.C.A. No. 406, at para. 362

ii. *Canada v. Greenwood*, 2021 FCA 186, at paras. 188-189, leave to appeal refused, [2021] S.C.C.A. No. 377: This class proceeding involved causes of action in negligence for bullying, intimidation, reprisal and harassment, in RCMP workplaces, and for related reprisals suffered by those who have raised complaints. The Federal Court of Appeal found that the motion judge erred in certifying a question on aggregate damages because the representative plaintiffs tendered no evidence to suggest a method for the conduct of an aggregate assessment of damages and their litigation plan was similarly silent on the point (at para. 19).

iii. *Sandhu v. HSBC Finance Mortgages Inc*., 2017 BCSC 874, at paras. 76-77, 95-98: This case involved a claim on behalf of mortgagors who alleged the defendant had not disclosed the cost of borrowing to borrowers contrary to the statute. The plaintiffs did not tender any expert evidence to propose a methodology for aggregate damages. The Court relied on *Pro-Sys Consultants Ltd. v. Microsoft Corp.,* 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 118 which reads:

> … the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied. [Emphasis added.]

iv. *Sparkes v. Imperial Tobacco Canada Ltd*., 2008 NLTD 207, 282 Nfld, & P.E.I.R. 176, at para. 106, 120, aff'd 2010 NLCA 21, 295 Nfld. & P.E.I.R. 267: In this tobacco litigation case for deceptive trade practices, the application judge denied certification. On the question of aggregate damages, Adams, J. wrote that "The burden of putting forward an adequate evidentiary record falls squarely with the Plaintiff, even though the threshold may be low. As I have already indicated, the Plaintiff has not put forth any evidence in this regard."

[101] In the case at bar, the plaintiffs have provided an expert report which opines, among other things, a methodology for calculating aggregate damages. Experienced economist, Cynthia L. Jones, provided an opinion on several questions related to this litigation, including

i. the efficiency of the market during the class period;

ii. whether certain information released by Barrick was material information;

iii. the outcome of event studies considering whether stockholders suffered damages incurred upon several corrective disclosures of allegedly false or misleading information; and

iv. whether class-wide damages can be calculated using a multi-trader model.

[102] In her affidavit prepared for certification, Ms. Jones fairly identified the limitations on her method of estimating aggregate damages. She wrote, the "estimate of the aggregate damages has been facilitated with a trading model that may or may not ultimately mimic the actual trading in Barrick's stock by potential class members. For these reasons, my analysis is preliminary and subject to modification based on facts and circumstances that will be established at a later point in time."

[103] Ms. Jones explained in her expert report that the "multi-trader model" for estimating aggregate damages uses certain assumptions in place of individual trader data. Ms. Jones stated that "experts for both plaintiffs and defendants frequently employ trading models, such as the one I have used here, to estimate aggregate damages in the course of mediation and for case assessment purposes, in the absence of actual investor transaction data."

[104] During cross-examination, Ms. Jones confirmed that without the trading data from the harmed investors, the multi-trader model is not capable of being empirically reviewed, and that she would not testify on that basis at trial, given the U.S. *Daubert* principles.[40]

Finding: s. 5(1)(c) PCI 12 may not be certified

[105] I conclude that the plaintiffs have not met the modest hurdle for certification for a question in aggregate damages. They have tendered no evidence of their proposed trial methodology. Their proposed trial expert is not listed in the amended litigation plan. There is no description of the proposed methodology. The plaintiffs' economics expert, Ms. Jones, conceded the potential limitations of the multi-trader model which she uses. The plaintiffs have not explained their decision not to call Ms. Jones as their expert for the purposes of establishing aggregate damages, nor have they explained whether their trial expert will be putting forward the same model. There is an absence of evidence on which to find there is some basis in fact that there is a plausible methodology for calculating aggregate damages at trial.

[106] I decline to certify a question on aggregate damages relative to the secondary market claims.

Section 5(1)(d) and Section 5(1)(e): Preferability and Representative Plaintiff in the Secondary Market Claim

[107] The defendants have not challenged the suitability of a common issues trial as the preferable procedure. I am satisfied that the proposed secondary action claims meet the preferable procedure hurdle, because they serve judicial economy, aim to provide behaviour modification, and provide access to justice to the shareholders who meet the class definition.[41]

[108] On the question of the representative plaintiffs, there is evidence in the record that the Trustees and Mr. Lee acquired Barrick shares on the TSX, held some or all of those shares through one or more of the public correction dates and have claims in damages. Thus, they have a cause of action pursuant to *OSA* Part XXIII.1 against the defendants.

[109] As representative plaintiffs, Mr. Lee and the Trustees must also be able to "vigorously and capably prosecute the interests of the class".[42]

[110] There is a litigation plan which the representative plaintiffs have agreed to revise. The representative plaintiffs have met with counsel and received periodic progress reports on the action. Each is willing to take on the responsibility of representing the class members.

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[40] *Daubert v. Merrell Down Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).
[41] *Hollick,* at para. 27.
[42] *Sondhi v Deloitte*, 2017 ONSC 2122, 1 C.P.C. (8th) 49, at para. 39.

[111] I have reviewed the cross-examinations of the representative plaintiff Royce Lee and of Lisa Watt, Partner at Manion Wilkins & Associates Ltd., the third-party administrator of the Drywall Acoustic Lathing and Insulation Local 675 Pension Trust Fund (the "Fund").

[112] The defendants submit that there is reason to doubt the suitability of the proposed representative plaintiffs, because during cross-examination, the representatives did not appear to have sufficient familiarity with the fundamental aspects of these proceedings. Counsel for the defendants also submitted that I should reduce the weight given to the evidence of Mr. Lee and Ms. Watt due to interjections from plaintiff counsel during those examinations.

[113] Mr. Lee was cross-examined on November 21, 2025, based on his affidavit of March 13, 2025. He has a high-level understanding of the litigation and relies on counsel to brief and update him on the material. Prior to his cross-examination he reviewed the litigation plan. Most of the substantive questions posed to him by defendant counsel concerned his knowledge of facts relative to the primary market claim, including in Quebec. Some of the interjections from class counsel, particularly in the opening few minutes of that examination, were unnecessarily argumentative, however I do not find that those interjections went so far as to undermine Mr. Lee's ability to serve as a representative plaintiff.

[114] I find that Mr. Lee understands his role, does not have any conflicts with class members, and is able to take on the responsibilities of a representative plaintiff. While Mr. Lee may not have had up to date knowledge of some aspects of the claim, particularly those aspects which involved technical aspects of the debt instruments, I grant him some leeway on that aspect of the claim. Cross examinations of representative plaintiffs are not legal proficiency tests. The court must assess their interest, potential conflicts and willingness to serve in the role. They ought to have read and be familiar with the key documents and understand the nature of the claims.[43] I am satisfied that Mr. Lee meets these criteria.

[115] During her cross-examination, Ms. Watt confirmed her knowledge of the claim, her role in acting as the point of contact on behalf of the Trustees of the Pension Fund (the "Trustees"), her familiarity with the litigation plan, and her responsibility to meet with counsel to obtain regular updates on the proceedings. Ms. Watt is the chair of the board of trustees, and in that capacity, she confirmed the involvement of the Trustees in carrying out the responsibilities of a representative plaintiff. I conclude that the Trustees are a satisfactory representative plaintiff in this action.

Finding: The Plaintiffs have met the Preferable Procedure Requirement under Section 5(1)(d) and the Representative Plaintiff Requirement under Section 5(1)(e)

[116] For the reasons set out above, I find that a class proceeding is the preferable procedure for the secondary market claims, and that Mr. Lee and the Trustees are suitable representative plaintiffs. They are capable of assuming the duties and responsibilities as a representative plaintiff, would fairly and adequately represent the interests of the class, have produced a plan for the

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[43] *Martin v. AstraZeneca Pharmaceuticals Plc*, 2012 ONSC 2744, 27 C.P.C. (7th) 32, at paras. 362-368, aff'd 2013 ONSC 1169 (Div. Ct.).

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 do not have, on the common issues for the class, an interest in conflict with the interests of other class members.

B. CERTIFICATION OF THE PRIMARY MARKET CLAIMS

Section 5(1)(a) *CPA*: The Pleadings Disclose a Cause of Action

Issue: Are the primary market claims statute barred?

[117] The plaintiffs seek certification of their primary market claims under s. 130.1 of the *OSA*. Leave is not required for primary market claims.

[118] The basis for the primary market claims is that Barrick incorporated its capex and scheduling representations for which leave was granted in the secondary market claims, in a March 29, 2012, offering memorandum in Canada (the "OM"). Class members purchased 4.850% notes and 5.250% notes offered by the OM and exchanged certain of the previous notes for identical notes offered by a Prospectus issued in May of 2012. Purchasers of the Notes bought them during the period of distribution – April 3, 2012, under the OM and May 9, 2012, under the Prospectus. The plaintiffs plead that class members suffered damages in the form of declines in the value of the Notes when the capex/scheduling misrepresentations were revealed in subsequent corrective disclosures.

[119] The plaintiffs submit that the claim has been brought within the relevant limitation period in s. 138 of the *OSA*, which requires a primary market claim to be brought on "the earlier of, 180 days after the plaintiff had knowledge of the facts giving rise to the cause of action, or three years after the date of the transaction that gave rise to the cause of action."

[120] The defendants submit that the primary market claims cannot be certified because they are time-barred. I deal with that issue first.

[121] The relevant dates are as follows. The alleged capex and scheduling misrepresentations were made in the March 28, 2012 annual information form and in the February 16, 2012 fourth quarter and year-end report for 2011 which were incorporated by reference into the OM of March 29, 2012.

[122] As discussed above, in the leave decision on the secondary market claims, upheld by the Court of Appeal, Akbarali, J. concluded that the capex/scheduling representations were publicly corrected on July 26, 2012, in Barrick's second quarter report. The defendants submit that the Royce Lee claim, first brought in April of 2014 (later consolidated with the Trustees' claim dated September 5, 2014) is out of time. They submit that because the primary market members of the class are sophisticated institutional investors, they ought to have known of the facts giving rise to the claim as of the date of correction, that is, by July 26, 2012. Thus, the relevant limitation period under s. 138(b)(i) of the *OSA* is 180 days from July 26, 2012.

[123] I disagree. The question of the plaintiffs' knowledge of the facts underlying the primary market claims is a trial issue. It depends on findings of fact that cannot be resolved at the certification stage. I do not agree that I should decline to certify the primary market cause of action

by finding that the plaintiffs ought to have known the facts that gave rise to their cause of action, as of July 26, 2012. This interpretation is not supported by the language of the statute as recently interpreted in *Kamrani-Ghadjar*, at paras. 193-201 and 209. In *Kamrani-Ghadjar*, Agarwal, J. held that s. 138(b)(i) of the *OSA* contemplates "actual knowledge" on the part of the plaintiffs. This interpretation requires an inquiry into the state of mind of individual class members to be determined after the common issues trial.

[124] The defendant in *Kamrani-Ghadjar* argued, as the defendants do here, that the alleged material misstatements or omissions of fact ought to have been known on the date that the representation was corrected when the defendant released its restated financials. Agarwal, J. was persuaded that s. 138(b)(i) of the *OSA* requires actual knowledge and does not include a diligence requirement, which would consider what a plaintiff "ought to have known" without that express language being included in s. 138(b)(i). [44] In his analysis as to what can be inferred from the publication of a correction, Agarwal, J. reasoned:

> As discussed above, an actionable misstatement or omission must be material, which is often determined in securities actions through event studies done by experts (as here). It's inconsistent with this definition for the limitation period to require investors to retain a lawyer to investigate the share price's materiality, which would necessarily require the plaintiff to hire an expert, all within six months of financial restatements or updated guidance. In *Soper*, the Court of Appeal held that reasonable diligence in a medical negligence case may require a plaintiff to request and receive a medical opinion. But the limitation period for negligence claims is two years. The plain words of the statute, which don't include a due diligence requirement, reflect the legislature's acknowledgment that securities misrepresentation claims require complex evidence, which may take time to gather. That said, the legislature has given issuers the certainty of repose by invoking a short ultimate limitation period of three years.[45]

[125] I agree with this analysis and the underlying logic in *Kamrani-Ghadjar*. The statute requires a claim to be brought within 6 months of the plaintiff having knowledge of the claim, which includes questions of the materiality of the misrepresentation. Further, I would apply and follow Agarwal J.'s decision in this regard under the principles of horizontal *stare decisis* as articulated by the Supreme Court of Canada in *R. v. Sullivan* as follows:

> The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting stare decisis mean that prior decisions should be followed unless the Spruce Mills criteria are met. Correctly stated and applied, the Spruce Mills criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-

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[44] *Kamrani-Ghadjar,* at paras. 189-201.
[45] *Kamrani-Ghadjar,* at para. 199.

> handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
>
> 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
>
> 2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
>
> 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.[46]

Finding: The primary market claim is not time-barred for the purposes of s. 5(1)(a)

[126] I conclude that the issue of whether the primary market claim is time barred by operation of the limitation period in the *OSA* is a trial issue. I would not decline certification on this basis.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff

[127] I move next to the issues related to s. 5(1)(b). The defendants submit that if the primary market claim is certified, the class definition must exclude residents of Quebec due to a prior agreement of counsel. The plaintiffs have proposed a class definition that includes residents of Quebec in the primary market claims. Quebec residents are otherwise excluded from the secondary market claims based on the certification of a parallel secondary market action in Quebec and by an agreement among Ontario and Quebec counsel. The defendants submit that this agreement must be given effect in considering the primary market claims asserted by the plaintiffs for members of the class in Quebec.

[128] In 2018, plaintiff's counsel agreed that residents of Quebec would be excluded from the Ontario class, because there was active parallel litigation in Quebec. Several iterations of the amended Statement of Claim in the Ontario action followed that agreement, with Quebec residents shown as excluded from the class. Prior to finalizing that agreement, and at the beginning of this litigation, Ontario plaintiff counsel had pleaded the primary market claims of Quebec residents.

[129] In November of 2025, during the exchange of material for this certification motion, plaintiff counsel circulated their proposed fresh as amended statement of claim. That version reinserted Quebec class members into the primary market claim. While the parties disagree as to the plaintiffs' motivations for doing so, I do not need to resolve that question for the purposes of

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[46] *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 75.

the defendants' submission that this is an abuse of process.[47] The plain wording of the letter sent on behalf of all counsel to the Quebec Superior Court is dispositive in my view.

[130] On behalf of counsel in the Quebec and Ontario litigation, a letter was delivered to Justice Collier of the Quebec Superior Court on January 19, 2018. That letter describes various agreements among all counsel, including current plaintiff counsel, after "numerous discussions" and includes this agreement:

> The Plaintiffs in the Ontario class action will amend the class definition in their claim to carve out Québec class members by or before March 30, 2018.

[131] The plaintiffs agree that although the letter appears to reflect their agreement to remove Quebec class members from the Ontario action, the wording is imprecise. They submit that they should be permitted to re-add the Quebec class members to the primary market claims. This would ensure access to justice for those class members because the Quebec action did not include primary market claims based on the 2012 debt offering. The Ontario plaintiffs further submit that they have always protected the Quebec class members who purchased the Notes on the primary market.

[132] To summarize the plaintiffs' position: they deny that the agreement included the primary market claims in Quebec. Alternatively, if it did, they should be permitted to resile from that agreement because they had protected those class members from the beginning, have never abandoned that claim and there is no duplication because that the primary market claim they seek to advance did not proceed in Quebec.

[133] I would not give effect to these submissions. First, the wording of the letter is clear. It reflects an agreement among experienced counsel and was arrived at after "significant discussion." In the seven years following the articulation of that agreement, various drafts of the statement of claim shared with defendant counsel have reflected the agreement and excluded Quebec residents from the claim. Counsel for the plaintiff did not write to assert any mistake or inadvertence in agreeing to exclude Quebec residents. The primary market claims pursued in Quebec pleaded but ultimately did not include the 2012 claims relative to the Notes. There is no evidence to suggest this was because there was an agreement that those claims would be pursued in Ontario. Obviously, this litigation choice could have been the result of several considerations, which Quebec counsel would have been entitled to decide.

[134] The case law supports holding counsel to their agreements made during litigation. In *Gagro v. Morrison*, Wilkins, J. upheld an agreement among counsel to limit claims in a motor vehicle action to $500,000 based on the principle that the parties had formed an agreement earlier in the litigation, acted upon it and conducted themselves in accordance with that agreement.[48] The

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[47] The plaintiffs submit that the Quebec primary causes of action did not protect Quebec class members from the primary market claims asserted in Ontario. The defendants submit that the detailed affidavit of Barrick Treasurer, Leo van Wyk revealed that the scale of debt holdings in Ontario compared to Quebec make an Ontario only primary market claim uneconomical.

[48] (1995) 40 C.P.C. (3d) 331 (Ont. Gen. Div.), at pp. 13-14.

Divisional Court similarly applied this principle in *Kelly v Ontario,* (2008) 91 O.R. (3d) 100, in circumstances where counsel had agreed that a constitutional challenge would be heard in the Superior Court of Justice. Low, J. denied leave to appeal a decision of Himel, J., who upheld the agreement among counsel in dismissing a motion to strike.[49]

Finding: s. 5(1)(b): Quebec class members shall be excluded from the Primary Claim Class Definition

[135] I hold counsel to their longstanding, clearly worded agreement that they would exclude Quebec class members from the Ontario action, including in the primary claim class definition.

Section 5(1)(b): The class definition and the time posts for the Primary Market Claim

[136] The defendants flag a second issue. As discussed in the context of the secondary market claim, the proposed class definition for the primary market claims was bundled with the secondary market claims. This apparently enlarges the damages window into 2013, despite the finding of Akbarali J. relative to the secondary market claim that the capex/scheduling representations were fully corrected by July 26, 2012.

[137] Given my discussion of that issue above, I would apply the same logic to the primary market claims and require members of the class to have held the Notes until the date of either of the two potential corrections as found by Akbarali, J., that is May 2, 2012, or July 26, 2012.

Finding: s. 5(1)(b) Certified Class Definition for the Primary Market Claims

[138] Based on my findings, declining to permit the plaintiffs to include Quebec residents in the primary market claim and the findings on leave made by Akbarali, J. and, subject to my findings on preferability, below, the class definition which I would have approved for certification of the primary market claim reads:

> All individuals and entities, other than residents of Quebec and the Excluded Persons, who acquired by primary distribution in Canada (and not in the secondary market) either (i) Notes issued by Barrick pursuant to an offering that closed on or about April 3, 2012, or (ii) new Notes issued by Barrick from May 9, 2012 to June 8, 2012 in exchange for those initial Notes, and held some or all of those Notes through either of May 2, 2012 or July 26, 2012.

Section 5(1)(c): Proposed Common Issues in the Primary Market Claim

[139] The plaintiffs seek to include as part of the primary market claim, the common issue of aggregate damages. Given that the issue of aggregate damages has not been certified relative to the secondary market issues for the reasons given above, and the evidence from Mr. Leo van Wyk

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[49] *Kelly v. Ontario* at pp. 116-117.

that there are two institutional investors in the Notes that form the class in the primary claim, there is reduced utility in certifying aggregate damages as a common issue.

[140] The plaintiffs have proposed a methodology through their expert, Professor Micah Officer. Professor Officer provided a preliminary opinion for certification, that is not the product of an event study. Based on his analysis of publicly available information, Professor Officer opined that the April 10, 2013, and June 28, 2013, bond price declines were likely directly related to the correction of the capex/scheduling representations.

[141] The defendants challenge Professor Officer's opinion. They submit that this evidence should receive little weight because Professor Officer relies on publicly available data, and the opinion is based on incorrect time posts that do not correspond to the dates of the primary market offering, nor the findings of public correction relative to the representations as found in the secondary market claims by Akbarali, J.

[142] As with the issues surrounding the proposed expert evidence in support of an aggregate damages common issue in the secondary market claims, there is no evidence as to the methodology that could support a common issue of aggregate damages in the primary market claims. This issue will add time and complexity to this aspect of the claim that is disproportionate to the efficiencies to be gained by having this issue treated in common as between two class members.

[143] I decline to certify the question of aggregate damages relative to the primary market claim.

[144] The defendants made submissions on several other proposed common issues dealing with specificity of the representation and the individual nature of the damages assessment. As discussed below in detail, I conclude that a class proceeding is not the preferable procedure for the primary market claims. Had I concluded otherwise, I would have approved a more specific articulation of the question as to the representation, in line with that certified in the secondary market claim. On the question of the damages proposed common issue, likewise I would have considered whether to modify the damages questions, as above to respond to the defendants' objections. However, considering my finding on preferability, which I discuss below, I will not undertake a detailed analysis of that question.

Section 5(1)(d): Preferability of the Primary Market Claim

[145] The defendants submit that a class action is not the preferable procedure in a primary market claim where there is a class of (likely) two institutional investors in the Notes. They submit that the institutional class members can efficiently and fairly bring individual claims.

[146] The *CPA* provides that the court "shall" certify a class proceeding where all of the criteria are met including where it is a preferable procedure. The preferability inquiry requires the Court to consider:

> a) whether the class proceeding would be the fair, efficient, and manageable way to advance the claim; and

b) whether the class proceeding would be preferable to other procedures for resolving the common issues. [50]

[147] In the case of smaller class sizes, as Nordheimer, J. observed in *Ward-Price v. Mariners Haven Inc.*, (2002) 36 C.P.C. (5th) 189 (Ont. S.C.), at para. 38, "Simply put, the smaller the membership of the proposed class, the more difficult it is to see a class proceeding as accomplishing the goal of judicial economy." This observation applies to the case at bar.

[148] In addition, in the case of a small number of institutional investors, who purchased debt instruments pursuant to an accredited investor exemption, there are no significant access to justice concerns. The proposed class members do not have any identified financial, social or other barriers to pursuing individual claims.

[149] There is one factor which lends some support to the preferability of the class action. The secondary market action related to the capex/scheduling representations is proceeding. As a result, there is an issue in common across the class in that claim and the primary market claim, that being the materiality of the representations made to the secondary market purchasers which were incorporated by reference into the primary market materials. There is a remote possibility that if the primary market class members in Ontario were to bring individual claims, there could be a risk of inconsistent findings on that question, and judicial inefficiency. However, given the length of time since the purchases, an absence of any information that there are parallel proceedings and the amounts at stake, which the defendants submit are disproportionate to the cost of litigation, reduces such a risk, and supports my conclusion that this is indeed a remote possibility.

[150] In *Ward-Price*, Nordheimer J. held that it was problematic to unleash the "full panoply of procedural requirements" for a class of 26.[51] I conclude that for the class of two institutional investors, in the primary market claims, a class proceeding is not the preferable procedure. The nature of the primary market claim and the expert evidence is amenable to individual issues, or a joint trial. Excising the primary market claim from the secondary market claims will reduce this layer of added procedural complexity in an already complex claim.

Finding: Preferability of the Primary Market Claim

[151] I conclude that the primary market claim should not be certified on the basis that a class proceeding is not the preferable procedure.

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[50] *AIC Limited v. Fischer*, 2013 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 48.
[51] *Ward-Price,* at para. 38.

C. THE COMMON LAW CLAIMS IN NEGLIGENT MISREPRESENTATION

Section 5(1)(a): The pleadings disclose a cause of action

[152] I am satisfied, and the defendants do not dispute that the pleadings disclose a cause of action in negligent misrepresentation. The pleadings assert:

i. A duty from the defendants to the class to provide timely disclosure of material facts concerning the mine project, informed by Barrick's obligations as a reporting issuer under Canadian securities legislation;

ii. A breach of the defendants' duty by making the capex and scheduling representations and the environmental representation; and

iii. Reliance by the class members on these representations;

iv. Damages experienced by class members as a result of the negligent misrepresentations.

[153] The defendants submit that some of the plaintiffs' proposed common issues cannot be certified and others should be amended. This next group of proposed common issues proposed by the Plaintiffs read:

> PCI 7: Did the Defendants, or any of them, owe a duty of care to the Class Members?
>
> PCI 8: Did the Defendants, or any of them, make representations in the Impugned Documents of the Impugned Offering Documents that were untrue, inaccurate, or misleading?
>
> PCI 9: Did the Defendants, or any of them, act negligently in making those representations?
>
> PCI 10: Was it reasonable for the Class to rely on those representations?
>
> PCI 11: What damages were suffered by Class Members, due to any negligent misrepresentation" On what basis can they be assessed?"

[154] PCIs 7 and 9 are not controversial and may be certified as proposed by the plaintiffs.

PCI 8: Is greater specificity required?

[155] The defendants submit that PCI 8 should be clearly connected to the precise representations specified in the secondary market claim PCIs 1-3. I agree that this will aid the trial judge and will not prejudice the plaintiffs.

[156] I certify PCI 8 as follows:

> Are any of the statements identified in Proposed Common Issue 1, 2 and 3 representations that were untrue, inaccurate, or misleading?

Can PCI 10 be certified as a common issue?

[157] PCI 10 proposed by the plaintiffs reads: "Was it reasonable for the Class to rely on those representations?"

[158] The defendants submit that this is a question that is individual to each investor, that is whether the members of the class of investors in the secondary market relied on the impugned representations and suffered losses as a result.

[159] I agree. In *Green v. CIBC,* 2015 SCC 60, [2015] 3. S.C.R. 801, a majority of the Supreme Court of Canada confirmed that "reliance, a necessary element of a common law representation claim is not an issue that is capable of resolution on a common basis".[52]

[160] Proof of the tort of negligent misrepresentation involves evidence that:

(1) There must be a duty of care based on a "special relationship" between the plaintiff and the defendant;

(2) The defendant made an untrue, inaccurate, or misleading representation;

(3) The defendant made the representation negligently;

(4) The plaintiff reasonably relied on the misrepresentation; and,

(5) The plaintiff suffered damages as a consequence of relying on the misrepresentation.[53]

[161] The plaintiffs submit that PCI 10 is amenable to being certified because a similar question was certified in *Longair v. Akumin*.[54]

[162] I disagree. The issues in *Longair* involved the findings on leave and whether common law claims may be certified under the preferability analysis where there are statutory claims as well. The Court of Appeal upheld the motion judge on the appeal issues. The Court of Appeal cited *Green*, and the issue of not certifying individual issues such as reliance and damages. The parties focused on issues other than the questions of reliance. The Court of Appeal did not analyze the issue of whether "reasonable reliance" was the same as "reliance" because that common issue was included without controversy.

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[52] *Green v. CIBC* at para. 124; see also *Longair v. Akumin* at para. 76; *Coffin v Atlantic Power Corp*., 2015 ONSC 3686, 127 O.R. (3d) 199, at para. 132.
[53] *Queen v. Cognos*, [1993] 1 S.C.R. 87., at p. 110; *Jakab v. Clean Harbors Canada, Inc.,* 2023 ONCA 377, 33 C.C.L.I (6th) 174, at para. 28; *Sunrise Sunset Wellness Ltd., v. Ye,* 2026 ONSC 14, at para. 27; *Wright v. Horizons ETFS Management (Canada) Inc.,* 2020 ONCA 337, 448 D.L.R. (4th) 328, at para. 134*,* leave to appeal to S.C.C., 39293 (December 23, 2020).
[54] *Longair v. Akumin,* 2024 ONSC 3675, at paras. 213-214, aff'd 2025 ONCA 606, at paras. 72-80.

[163] That is not the case here. There is a live controversy. Each case will turn on the facts and issues as defined and briefed by the parties.[55] The fact that a similar question was certified in another case is not dispositive.

[164] I find that PCI 10 would import individual issues into the common issues trial, and thus it cannot be certified. I decline to certify PCI 10.

Can PCI 11 be certified as a common issue?

[165] The defendants challenge whether PCI 11 is capable of certification. This question asks: What damages were suffered by Class Members, due to any negligent misrepresentation" and "on what basis can they be assessed?"

[166] The question of what damages were suffered by the class members is an individual issue and thus cannot be certified as a common issue. [56]

[167] There is likewise no need to certify the second part of PCI 11, which is the basis for assessing damages. This issue can be addressed following the common issues trial.

FINDINGS: COMMON LAW CLAIM OF NEGLIGENT MISREPRESENTATION

To conclude this section, I decline to certify PCIs 10 and 11. I certify PCI 7, 8 and 9 as follows:

> PCI 7: Did the Defendants, or any of them, owe a duty of care to the Class Members?
>
> PCI 8: Are any of the statements identified in Proposed Common Issue 1, 2 and 3 representations that were untrue, inaccurate, or misleading?
>
> PCI 9: Did the Defendants, or any of them, act negligently in making those representations?

D. ANALYSIS OF THE ISSUES ON THE LEAVE TO AMEND THE STATEMENT OF CLAIM

[168] On the third day of argument on the certification motion, the plaintiffs delivered a new iteration of their proposed fresh as amended statement of claim.

[169] The defendants object to approximately 40 paragraphs within the proposed statement of claim on a variety of grounds. Their objections fall roughly into three categories of objection:

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[55] *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd*., 2011 ONSC 4914 at para. 188.
[56] *Green v. CIBC,* 2014 ONCA 90, 118 O.R. (3d) 641, at para. 104; *Bayens v. Kinross,* 2014 ONCA 901, 327 O.A.C. 156, at paras. 128-129.

i. Embarrassing or scandalous pleadings that are an abuse of process: Pleadings that are irrelevant, argumentative or inserted for colour are to be struck as scandalous.[57] Material facts are those which a party is entitled to prove at trial or can have an impact on the rights of a party. Such facts will not be "embarrassing".[58]

ii. No cause of action pleaded: Pleadings that relate to secondary market claims for which leave has not been granted under the *OSA* do not disclose a cause of action and may be struck on that basis.[59]

iii. Secondary market claim requirement of precision pleading: A plaintiff must plead a secondary market disclosure claim with precision meaning that it must include:

(a) the specific misrepresentations that are being pursued;

(b) the documents or statements containing the alleged misrepresentations;

(c) the dates of the alleged misrepresentations;

(d) the dates on which the misrepresentations were publicly corrected, and

(e) the documents or statements containing the corrections."[60]

[170] As a result of the findings above, rulings on many of the proposed amendments will be unnecessary. Those rulings will affect the next version of the fresh as amended statement of claim, including:

i. An objection to the plaintiffs' class definition on substantive grounds: the plaintiffs have leave to amend in accordance with these reasons;

ii. The defendants' objections to the primary market claims as statute-barred, abuse of process and on grounds of preferability; the plaintiffs shall amend the statement of claim in accordance with these reasons;

iii. The defendants' objection to a proposed common issue on aggregate damages; the plaintiffs shall amend the statement of claim in accordance with these reasons on the question of aggregate damages.

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[57] *Canadian National Railway Co. v. Brant,* (2009) 96 O.R. (3d) 734 at pp. 744-745.
[58] *Del Guidice v. Thompson*, 2021 ONSC 5379, aff'd 2024 ONCA 70, 169 O.R. (3d) 731, leave to the S.C.C refused, 41202 (September 19, 2024).
[59] *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.* 2017 ONCA 42, 135 O.R. (3d) 681, at para. 25; *Marks v. Ottawa (City)*, 2011 ONCA 248, 280 O.A.C. 251, at para. 19.
[60] *Mask v. Silvercorp Metals,* 2016 ONCA 641, 132 O.R. (3d) 161, at para. 15, leave to appeal requested but application for leave discontinued, [2016] S.C.C.A. No. 454; *DALI Akbarali Leave* at paras 27-31.

[171] For brevity and concision, the plaintiffs have leave to amend the statement of claim in accordance with these reasons. If the defendants object to any of those amendments, the parties shall arrange a case conference to schedule a timetable for supplementary submissions on the motion to strike any portions of the proposed fresh as amended statement of claim.

PART VIII. COSTS OF THE LEAVE MOTION: SHOULD COSTS BE AWARDED AND IF SO TO WHICH PARTIES?

The Parties' Positions

[172] The defendants seek costs of $2.5 million on the leave motions. They submit that they were the overwhelmingly successful party on the leave motions, having significantly reduced the plaintiff's potential separate claims of misrepresentation, and having had to respond to other claims which were abandoned just prior to the first leave motion. The defendants further submit that on the second leave motion before Akbarali, J. they successfully argued that two expert reports were inadmissible.

[173] The plaintiffs seek their costs of $4.5 million on the leave motions, based on their success in obtaining leave at the first motion on the environmental representation, and on the second motion, in adding the two capex/scheduling representations. From the plaintiffs' perspective, they won a significant, hard-fought motion, with the value of even a single of the three representations in damages amounting to potentially several billion dollars. The plaintiffs submit that their overall success counts for more than a line-by-line costing approach to the individual issues.

[174] The Law Foundation of Ontario (the "LFO") submits that the defendants are not entitled to costs on the leave motions on the basis that Barrick was the unsuccessful party. The LFO acknowledges that Barrick was able to limit the issues for which leave was granted, but that awarding costs to Barrick would amount to a distributive costs award, which is not available in the circumstances.

The Nature of the Leave Motions

[175] As the parties' cost outlines, submissions, and the reasons for decisions reveal, the parties devoted years and significant resources to preparation, gathering evidence and exchanging materials before the first leave motion. The parties argued the issues on the leave motions over multiple days. They filed volumes of materials into the tens of thousands of pages, but not all of this was necessary.

[176] After hearing the first leave motion, Belobaba J. commented on several aspects of the record, including his observation that approximately half of the material filed dealt with the environmental representation, and the fact that counsel "on both sides" provided unnecessary

detail and "minutia"[61]. He described the alleged environmental misrepresentation of July 26, 2012 (for which he ultimately granted leave) as the "main event" on the leave motion.[62]

[177] Justice Belobaba found that the defendants had presented impressive evidence to establish their reasonable belief in the environmental representation, including from Barrick executives, and contemporaneous documents such as minutes, emails, third party reports and experts retained in Chile.[63]

[178] Justice Belobaba noted that the parties had tendered significant evidence on the remaining two categories of representation, for which he refused leave: the capex/scheduling representations and the accounting representations.[64]

[179] On the second leave motion, Akbarali, J. discussed the failure of the plaintiffs to plead their case with precision, noting that their approach to describing the alleged misrepresentations was "unusual". Justice Akbarali wrote that the plaintiffs had advanced a "great deal too many" iterations (20) of the alleged misrepresentations for the purposes of arguing the second leave motion.

[180] Justice Akbarali discussed the volume of material filed on the leave motion before her, which fairly describes the nature of the leave motions, the complexity of the issues and both parties' approach to the litigation:

> **But First, a Word about the Record**
>
> [64] The record before me is enormous. Through 20 volumes of compendia, lengthy factums, and five days of argument, counsel have worked hard to ensure I understand the events underlying this motion, and I appreciate their efforts.
>
> [65] In argument, much was made about "gaps" in the evidence. I recognize that this proceeding, despite its age, remains at an early stage in the litigation process. Documentary discovery has not been made. Oral discoveries have not been held.
>
> [66] At the same time, the volume of documents produced on this motion dwarfs what the court sees in almost all of the trials that it hears. The record before me was pared down from that which was before Belobaba J. Lengthy cross-examinations have been held. Multiple expert reports have been exchanged.
>
> [67] Thus, while I am cognizant that production and discovery are not complete, and that there are categories of documents over which the plaintiffs sought production

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[61] *2019 Leave,* at para. 53.
[62] *2019 Leave,* at para. 103.
[63] *2019 Leave,* at para. 118.
[64] *2019 Leave,* at para. 128.

> but were refused, I am also cognizant that the record in this case is unusually well developed for a leave motion.
>
> [68] I have concluded that there are no obvious gaps in the evidence before me that affect my analysis below, notwithstanding the plaintiffs' lengthy request to inspect documents that was refused by the defendants.
>
> [69] I also note that, given the size of the record, there are facts and evidence to which I have not referred. Were I to take each fact or piece of evidence in the record and explain why it is either consistent with my conclusions, why I accorded it no weight, or why it was irrelevant to my conclusions, these reasons would be unworkably long, and the delay in releasing them would be significant. In dealing with a record of 30,000 pages, I have chosen to focus on the facts I consider to be key to the parties' positions and to my analysis. Really, there was no other option.[65]

[181] Justice Akbarali found that the plaintiffs tendered opinion evidence that was not admissible. She excluded evidence from a quantity surveyor and an engineer.[66] The defendants submit that none of these disbursements should be reimbursed if the plaintiffs are awarded costs because this evidence was not of assistance to the court.[67]

[182] Finally, the Court of Appeal referred to the plaintiffs having achieved only "limited success" at the two leave hearings.[68]

[183] The defendants' public disclosure about the status of this litigation after the leave and appeal motions reflects their potential damages exposure and the difficulty in predicting the outcome:

> **Contingencies – 2024 Annual Report**
>
> Pascua-Lama – Proposed Canadian Securities Class Actions In 2014, proposed secondary market liability securities class actions were initiated in Ontario and Quebec against Barrick Gold Corporation and certain of its former senior executives. These actions relate to public disclosures concerning Barrick's Pascua-Lama Project. The Ontario case focuses on disclosure regarding capital cost and schedule estimates for Pascua Lama and environmental matters in Chile between February 2012 and June 2013, while the Quebec case pertains only to disclosure regarding environmental matters in Chile between July 2012 and October 2013. In the Ontario proceedings, plaintiffs are seeking damages exceeding $3 billion. …In the Ontario case, the Plaintiffs' application for leave to appeal to the Supreme Court of Canada from the February 13, 2024 decision of the Court of Appeal was dismissed on

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[65] *Leave #2*, at paras 64-69.
[66] *Leave #2*, at paras. 148-160.
[67] *Fuller v. Aphria Inc*., 2020 ONCA 465, at para. 7.
[68] *Drywall #2,* at paras. 3-4, 9 and 11.

> September 26, 2024. The Plaintiffs' motion for class certification has not yet been scheduled. The Company intends to vigorously defend these actions. No amounts have been recorded for any potential liability arising from either of the actions, as the Company cannot reasonably predict the outcome in Ontario or Quebec.

Applying the Costs Principles to the Leave Motions

[184] I begin with the general principles on costs, followed by the question of whether this is a case in which the defendants ought to receive their costs because they were able to defeat many but not all of the claims on the plaintiffs' two motions for leave under the *OSA*.

[185] The principles to be applied in making a discretionary costs award are set out in rule 57.01(1), which states:

> *Factors in Discretion*
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> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
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> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (e) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
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> (f) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

Should the Plaintiffs Pay the Defendant's Costs of the Leave Motions?

[186] The starting point in Ontario is that costs are usually awarded to the party who has prevailed in a motion on a partial indemnity scale, including in class proceedings.[69]

[187] The overriding principle in a costs award is reasonableness, measured in part by the expectations of the unsuccessful party. As Perell, J. noted in *Banman v. Ontario*:

> The assessment of reasonableness is discretionary and very much dependent upon the circumstances of each case. In some cases, it may be reasonable for the successful party to make exhaustive efforts and to commit enormous legal resources, and in those cases, it might be said that the unsuccessful party could reasonably expect to pay those costs. In other cases, however, the successful party may have been well served by giving his or her lawyer instructions to make exhaustive efforts, but it might be disproportionate and unreasonable to expect the unsuccessful party to pay those costs, even if he or she would have expected or anticipated that his or her foe would have marshalled those legal resources.[70]

[188] Where the parties achieve divided success on a motion, the court has a discretion to make no order as to costs. As Perell, J. noted in *Banman*, the r. 57.01 factors which may assist in the question of whether to make an order to reduce or order no costs include: the amount claimed, the amount recovered, the apportionment of liability, the complexity of the proceeding; the importance of the issues; and the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.[71]

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[69] *Curtis v. Medcan Health Management Inc*., 2023 ONSC 552, 84 C.C.E.L. (4th) 324, at para. 11; *McCracken v. Canadian National Railway*, 2012 ONSC 6838, 31 C.P.C. (7th) 237; *Hague v. Liberty Mutual Insurance Co*., (2005) 13 C.P.C. (6th) 37 (Ont. Sup. Ct.); *Pearson v. Inco Limited et al.,* (2006) 79 O.R. (3d) 427 (C.A.), at pp. 430-431., leave to appeal dismissed, [2006] S.C.C.A. No. 1; *Pike's Tent and Awning Ltd. v. Cormdale Genetics Inc.,* (1998) 27 C.P.C. (4th) 352 (Ont. Gen. Div.); *Bell Canada v. Olympia & York Developments Ltd.,* (1994) 17 O.R. (3d) 135 (C.A.).

[70] *Banman v. Ontario*, 2023 ONSC 7187, at para. 19.

[71] *Banman,* at para. 22.

[189] Finally, the court retains a discretion to order costs against a successful party in exceptional circumstances, such as:

i. Misconduct on the part of the successful party;[72]

ii. Significant public interest cases;[73]

[190] The defendants do not rely on these exceptions in support of their submission that costs should be awarded against the plaintiffs. Instead, the defendants seek to apply the decision of the Court of Appeal for Ontario in *Eastern Power Ltd. v. OEFC*, to the case at bar.

[191] In *Eastern Power*, the plaintiff took claims valued at $121 million in damages to trial and succeeded with one of six causes of action. The trial judge awarded no damages for the single breach of contract, finding no reliable evidence on which to calculate those damages. There had been a r. 49 offer made by the defendant, which the trial judge used to factor in substantial indemnity costs from the date of the offer. On appeal, the Court of Appeal found that the trial judge erred in not awarding damages for the single ground on which the plaintiff succeeded. The Court of Appeal ordered a new trial on the issue of damages.[74]

[192] The Court of Appeal ordered costs of the trial payable to the defendant based on the narrow success achieved by the plaintiff ("at most, $8.5 million in damages") and the "peculiar features" of this case. The Court of Appeal emphasized that it was not making a distributive costs award.

[193] I would not apply the reasoning in *Eastern Power* to the issue of costs on these leave motions under the *OSA*. First, the costs order in *Eastern Power* was made on appeal, after a trial and with the Court of Appeal highlighting the fact that there were "peculiar features" in that case, including the amounts claimed and the amounts which the plaintiff could achieve. As counsel to the LFO pointed out, there is no such available metric at certification.

[194] Second, *Eastern Power* was not an action under the *OSA*, which has its own costs principles and jurisprudence which apply to the award of costs following a trial: s. 138.11 provides that "the prevailing party" in an action under section 138.3 is entitled to its costs: that is, costs will follow the event.

[195] Third, *Eastern Power* was not a class proceeding, and questions of broader public interest were not involved in that litigation. As can be seen from decisions that were decided after *Eastern Power*, including in *Green v. Canadian Imperial Bank of Commerce,*[75] and in *Abdula v. Canadian Solar,*[76] there are additional policy and structural considerations involved in class action litigation.

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[72] *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.,* 2008 ONCA 703, 93 O.R. (3d) 257, at para. 32.
[73] *Polowin,* at para. 32.
[74] *Eastern Power Ltd. v. OEFC*, 2012 ONCA 366.
[75] 2016 ONSC 3829.
[76] 2015 ONSC 1421.

[196] The leave motions involved matters of public interest. This litigation involves allegations of environmental misrepresentations made by a major Canadian gold mining company in a mega-project. These elements can be fairly described as having broader public interest concerns. In addition, the leave motions and the appeals of each, developed the jurisprudence on the issue of partial public corrections.[77] The Court of Appeal observed in its reasons on appeal that, "The interpretation of 'public correction' under s. 138.3(1) has not received significant consideration at this court."[78]

[197] As Doherty, J. wrote in *Das v. George Weston Limited*, "Claims that raise issues that transcend the immediate interests of the litigants and engage broad societal concerns of significant importance are matters of public interest."[79]

[198] Plaintiffs who succeed in obtaining leave are normally entitled to their costs.[80] Plaintiffs who successfully cross the screening and certification thresholds in *OSA* cases have been found to be entitled to receive compensation, even in circumstances where they have not succeeded on all of the claims at the leave stage.[81] The defendants have not provided a case where a plaintiff has successfully crossed the leave barrier under the *OSA*, yet was not awarded costs.

[199] The plaintiffs succeeded in obtaining leave following two separate motions. The parties devoted significant legal resources to the issues which are objectively complex and involve the public interest. Success by the defendants would have ended the litigation entirely. The plaintiffs' partial or limited success in obtaining leave on three representations has pared down the number of claims, but the case continues. The action that remains is complex litigation, with the potential for a significant award of damages against the defendants. I am satisfied that the presumptive rule that costs should be paid to the successful party should be applied in these circumstances. I decline to find that the defendants should receive their costs of the leave motions.

[200] I turn next to fixing the quantum of costs in favour of the plaintiffs.

Quantum of Costs

[201] The defendants submit that if costs are awarded to the plaintiffs any costs award must be substantially reduced to reflect their limited success on the leave motion, the fact that access to justice concerns are less important at the leave stage,[82] and to reflect that they should not have to

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[77] *Leave Decision,* at paras. 25-27.
[78] *Drywall #1,* at para. 22.
[79] *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 248, leave to appeal dismissed, [2019] S.C.C.A. No. 69.
[80] *Green v. Canadian Imperial Bank of Commerce*, 2016 ONSC 3829, at para. 19.
[81] *Green,* at para. 26; See also: *Abdula v. Canadian Solar*, 2015 ONSC 1421, at para. 6: The motion judge decided that "The fact that the plaintiff was denied leave to pursue the statutory claim with respect to some of the claimed misrepresentations and certain aspects of the claims were not certified does not mean that the plaintiff was not largely successful on both motions."
[82] *Mask v. Silvercorp Metals*, 2016 ONCA 641, 132 O.R. (3d) 161, at paras. 66-68, leave to appeal requested appeal discontinued, [2016] S.C.C.A. No. 454.

pay for disbursements for expert reports that were either irrelevant, inadmissible or otherwise unhelpful to the leave motions.

[202] The plaintiffs attached a summary of the time and disbursements incurred by plaintiffs' counsel which shows that counsel spent 7,670 hours in bringing the leave motions. The time spent accords with $3,793,219 of actual time billed and $2,275,931.40 on a partial indemnity rate (plus HST $295,871.08). The hours required reveal the "substantial risk" that class counsel take in pursuing claims of this nature.[83]

[203] The plaintiffs' disbursements include significant expenses for expert reports. Those amounts total $1,830,152.09 plus HST of $102,051.85.

[204] In submissions, the plaintiffs recognized that the costs awarded for the leave motions should be subject to some reduction to account for the findings of the leave motion judges declining to grant leave for the accounting representations.

[205] The LFO took no position on the quantum of costs to be awarded in favour of the plaintiffs.

[206] The plaintiffs described the steps required through the years leading up to the leave motion in their material, including those related to locating witnesses, travel, language barriers and regulatory/legal frameworks in place in Chile in addition to the Canadian work to prepare the record for the leave motions argued over 14 days in Canada:

i. Time required for travel to Chile for meetings with community members in the Del Carmen Valley, participant and litigation experts, and confidential consultants.

ii. Plaintiffs' counsel needed to obtain briefings to understand Chilean environmental law and water law, noting an "informational asymmetry between the plaintiffs and the defendants who would have had superior understanding of the facts and the Chilean legal context due to Barrick's direct involvement in the events underlying the proceeding.

iii. Document translation from Spanish to English in order for them to be used in preparation.

iv. On the environmental issues, the parties tendered at least 25 affidavits. The parties required three weeks solely for the cross-examination of the Chilean fact witnesses and experts, using interpreters and Canadian court reporters.

[207] Although subsequent events, including the appeal which led to the second leave motion, displaced Belobaba J.'s finding on costs, he would have ordered no costs at the end of the first leave motion (albeit it appears without having the benefit of costs submissions at that point):

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[83] *Green*, at para. 13.

> The costs incurred by both sides on this mega-motion are undoubtedly significant. In my opinion, however, that no costs should be awarded because success was almost evenly divided. My reasoning is this: about half of the filed material and hearing time related to the Capex and Accounting sections and half to the Environmental section. Almost the entirety of the Environmental section was rooted in the July 26, 2012 representation or its various permutations. The defendant prevailed in the Capex and Accounting sections; the plaintiff prevailed on the core representation in the Environmental section. Success being divided, this is not a case for costs.[84]

[208] The plaintiffs submit that given their success on the capex/scheduling representations before Akbarali, J. they have surpassed "divided" success as Belobaba, J. described it, to "substantial" success, given the subordinate status of the accounting claims from the "core' environmental representation and the significant capex/scheduling representations for which leave was granted.

[209] In assessing the appropriate quantum of costs in this case, I consider the following:

i. The plaintiffs' success in obtaining leave on the "main event" at the first leave motion, the environmental representation, which accounted for approximately half of the material filed before Belobaba, J.. This factor is attenuated by Belobaba J.'s observation that counsel on both sides provided unnecessary detail and his comment that success was "divided" on the first leave motion. Given that the plaintiffs prosecuted the action, their choices to load up the record reflect their choice to complicate the first leave motion unnecessarily and thus can be seen to have added to the time required.

ii. The plaintiffs' success in obtaining leave on the motion heard by Akbarali, J. for the capex/scheduling representations, which improved their position. This factor is attenuated by the plaintiffs' failure to plead with precision and their delivery of too many versions of their claim and the schedule of representations, which drew comments from Akbarali, J. Further, although the plaintiffs pared down the record on the second leave motion, it remained at approximately 30,000 pages, much of which was not required to address the issues before Akbarali, J.[85] Costs awards should not reward bulk filings.

iii. The findings of Akbarali, J. that two of the plaintiffs' proposed expert reports were not admissible, one on the grounds qualifications, and the second for not meeting the cost-benefit analysis of the *White Burgess* test. A third witness addressed solely the accounting representations which did not pass the leave test. This evidence added to the cost of disbursements. It is appropriate that I reduce the costs payable accordingly.[86]

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[84] *Leave #1* at para. 143.
[85] *Leave #2* at para. 69.
[86] *Aphria,* at para. 7.

iv. The plaintiffs' decision shortly before the leave motions to abandon claims from the two years prior to the class period sought, and their failure to obtain leave on any of the accounting representations, as well as other representations in the environmental and capex/scheduling categories.

v. The case was legally and factually complex. All counsel acknowledge that this case is complex due to the issues, the amounts at stake, the location of the mine and the legal issues. Two separate leave motions, spanning 13 days in total were required to finally dispose of the leave questions.

vi. The outcome of the leave motions was important to all parties. Without leave, the action is over. Having granted leave, the defendants put the market on notice that it faces an uncertain outcome in a claim that the plaintiffs have estimated could reach several billion dollars in damages. The fact that the questions on leave were appealed twice to the Court of Appeal are a further indication of the importance of the case to the parties.

vii. The expectations of the defendants who seek costs in the amount of $2.5 million. The defendants vigorously defended the leave motions. Although the plaintiffs' costs are substantially higher than the defendants, I have considered the asymmetry of information between the parties which would contribute to the time required for the plaintiffs to prepare their case for leave, and which favours the defendants as respondents on leave.

viii. The reasonableness of costs in secondary market representation class proceedings for which leave has been granted should be considered against similar cases. In *Green v. CIBC*, involving a 7-day leave and certification hearing, the leave judge awarded the "substantially successful" plaintiffs $2,679,277.82.[87] Complex certification motions in the past ten years have similarly yielded costs orders in the $1 million to $2.6 million range.[88]

[210] I conclude that a reasonable costs award, considering the relevant factors and the circumstances summarized above would have the defendants pay to the plaintiffs $2.75 million in costs, inclusive of fees on a partial indemnity basis, disbursements and HST.

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[87] 2016 ONSC 3829, at para. 34.

[88] *Hughes v. Liquor Control Board of Ontario*, 2018 ONSC 4862*; Stolove v. Waypoint Centre for Mental Health Care*, 2024 ONSC 4558, aff'd 2025 ONCA 376, leave to appeal requested, [2025] S.C.C.A. No. 313; *Das v. George Weston Limited*, 2017 ONSC 5583, aff'd 2018 ONCA 1053, 43 E.T.R. (4th) 173, leave to appeal dismissed, [2019] S.C.C.A. No. 69; Del Giudice v. Thompson, 2021 ONSC 6974, 92 E.T.R. (4th) 1, aff'd 2024 ONCA 70, 169 O.R. (3d) 731, leave to appeal to S.C.C. refused, 41202 (September 19, 2024); *Vester v. Boston Scientific Ltd*., 2017 ONSC 2498.

[211] In terms of when costs shall be payable, I have considered and rejected making costs payable in the cause. The defendants resisted every issue on leave. The leave motions have taken years to complete, and the litigation is now just at the certification stage.

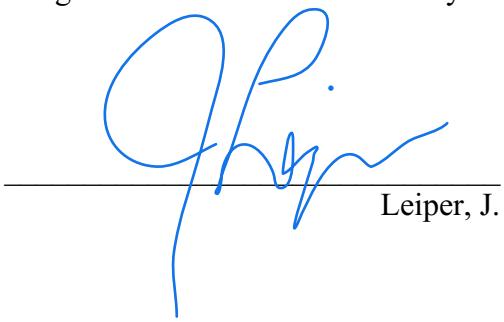
[212] I conclude that costs should be payable to the plaintiffs in accordance with these reasons, forthwith or on such further timetable as the parties agree upon.

PART IX: CONCLUSION

[213] I certify this proceeding in accordance with these reasons. I order costs of the leave motions payable by the defendants to the plaintiffs in the amount of $2.75 million.

[214] If the parties are unable to agree as to the costs of the certification motion, they may propose a timetable for the exchange of submissions on costs.

[215] Any further matters concerning the orders required to give effect to this decision may be discussed at a further case conference.



Leiper, J.

Released: March 4, 2026

CITATION: DALI Local 675 Pension Fund (Trustees) v. Barrick Gold Corporation, 2026 ONSC 991
COURT FILE NO.: CV-14-502316-00CP
DATE: 20260304

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND AND ROYCE LEE

Plaintiffs

– and –

BARRICK GOLD CORPORATION, AARON W. REGENT AND JAMIE SOKALSKY, AMMAR AL-JOUNDI AND PETER KINVER

Defendants

REASONS FOR DECISION

Leiper, J.

Released: March 4, 2026