IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0116064 B.C. Ltd. v. Alio Gold Inc.,*
2023 BCSC 1310

Date: 20230728
Docket: S194929
Registry: Vancouver

Between:

O116064 B.C. Ltd.

Plaintiff

And

Alio Gold Inc.

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for the Plaintiff:	T.A. Hakemi M.A. Turcott
Counsel for the Defendant:	O. Ahmed K. Rogerson
Place and Dates of Hearing:	Vancouver, B.C. January 26-27, 2023
Place and Date of Judgment:	Vancouver, B.C. July 28, 2023

Table of Contents

I. OVERVIEW

[1] The Plaintiff, 0116064 B.C. Ltd., seeks an order certifying this action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] as a multi-jurisdictional class proceeding against the Defendant, Alio Gold Inc. (“Alio”).

[2] The Plaintiff is a former shareholder of common shares of Rye Patch Gold Corp. (“Rye Patch”). Its shares were sold to Alio on May 25, 2018 (the “Acquisition”), pursuant to a plan of arrangement approved by the Supreme Court of British Columbia on May 25, 2018 (the “Plan of Arrangement”). The Plaintiff alleges that the consideration paid for its shares pursuant to the Plan of Arrangement was affected by false representations made by Alio in the course of its acquisition of Rye Patch.

[3] The alleged misrepresentations are contained in two news releases and an information circular which were issued in early 2018, and relate to guidance projections Alio made with respect to its gold production at one of its gold mines. As a result of the misrepresentations, the Plaintiff alleges that it and the proposed class members did not receive fair value for their Rye Patch shares in the arrangement.

[4] This is the second certification hearing in this case. The first application for certification was dismissed by another judge of this Court in *0116064 B.C. Ltd. v. Alio Gold Inc.,* 2021 BCSC 540 (“*Alio BCSC 2021*”). The Plaintiff appealed the dismissal. In reasons for judgment indexed at 2022 BCCA 85 (the “Appeal Decision” or “*Alio BCCA*”) the Court of Appeal allowed the appeal and ordered that the certification application be remitted back to this Court for consideration of the Plaintiff’s reformulated proposed common issues (or “PCIs”), and to address matters that were not addressed at the original certification application.

[5] On September 29, 2022, I dismissed an application brought by the Defendant seeking postponement of a Notice to Mediate issued by the Plaintiff: see *0116064 B.C. Ltd. v. Alio Gold Inc.*, 2022 BCSC 1700 (“*Mediation RFJ*”).

[6] Subsequently, the parties attended mediation but were not successful in resolving the issues. However, the parties were able to come to an agreement on

many of the matters that divided them, such that the sole issue in dispute at this certification hearing is whether the reformulated common issues meet the criteria for certification.

II. BACKGROUND

[7] The following facts are uncontroverted.

[8] The proposed representative Plaintiff ("0116064 B.C. Ltd.") is a privately held BC company. Prior to May 25, 2018, the Plaintiff owned 54,000 common shares in Rye Patch.

[9] The proposed class is comprised of:

> …all individuals or entities, wherever they may reside or be domiciled, excluding the Defendant, whose Rye Patch shares were acquired by Alio in exchange for Alio shares and cash, on or about May 25, 2018, but excludes those individuals or entities who sold their Alio shares prior to August 10, 2018.

[10] Rye Patch is a gold mining company whose shares were publicly traded on the TSX Venture Exchange. Subsequent to the acquisition of its shares by Alio on May 25, 2018, Rye Patch became a wholly-owned subsidiary of Alio.

[11] Alio is a BC gold mining company which was listed for trading on the Toronto Stock Exchange. During the relevant period, Alio owned an open pit gold mine in Sonora, Mexico (the "San Francisco Mine"), a gold mine in Nevada, USA (the "Nevada Mine"), and was in the process of developing a third mine in Mexico called the Ana Paula Project.

[12] On March 18, 2018, Alio and Rye Patch entered into a plan of arrangement. The proposed terms of the arrangement were set out in an agreement between Alio and Rye Patch dated March 18, 2018 (the "Arrangement Agreement"). Under the Arrangement Agreement, Alio would purchase all of the outstanding shares of Rye Patch. Each common share of Rye Patch would be exchanged for 0.48 common shares of Alio and $0.001 in cash.

[13] On March 19, 2018, Alio and Rye Patch announced that they intended to merge pursuant to the Plan of Arrangement.

[14] On April 18, 2018, Rye Patch obtained an interim order from Master Dick of the BC Supreme Court which provided, among other things:[1]

> (i) that the Plan of Arrangement would require approval by a resolution passed by at least two-thirds of Rye Patch shareholders present in person or by proxy at a special meeting of the Rye Patch shareholders; and, (ii) for dissent rights for Rye Patch shareholders.

[15] On May 18, 2018, more than two-thirds of the Rye Patch shareholders voted to approve a resolution in favour of the Arrangement.

[16] The Plan of Arrangement was approved by Justice Silverman on May 25, 2018, with the Court having found that the terms and conditions of the plan were fair to the Rye Patch shareholders.[2]

III. LITIGATION HISTORY

[17] The Plaintiff commenced this action under the *CPA* in April 2019, by way of a Notice of Civil Claim ("NOCC") filed against Alio and some of its former directors and officers (the "individual Defendants").

[18] The NOCC sought damages for common law misrepresentations and misrepresentations alleged to have been made under the *Securities Act,* R.S.B.C. 1996, c. 418 [*Securities Act*]. The Plaintiff amended its NOCC on October 21, 2019 (the "ANOCC"), and advanced an additional allegation of insider trading contrary to the *Securities Act.*

[19] Thus, the claims advanced were for:

1) Primary market liability misrepresentation pursuant to Part 16 of the *Securities Act*;

[1] Affidavit # 1 of C. Hamilton, Exhibit ("Ex.") N.
[2] Affidavit # 1 of C. Hamilton, Ex. R, Order made after Application; *Alio BCSC* at para. 5.

2) Secondary market liability misrepresentation pursuant to Part 16.1 of the *Securities Act*;

3) Insider trading contrary to sections 57.2 and 136 of the *Securities Act* (added by way of the ANOCC); and

4) Common law misrepresentation.

[20] Over the course of time, the claims advanced in this litigation by the Plaintiff have significantly narrowed. Consequently, only the claim of common law misrepresentation against Alio remains. The individual Defendants are no longer parties to this litigation.

[21] The Plaintiff's application for certification was first filed in December 2019. It was followed by a cross-application in June 2020 to strike all of the claims made against the individual Defendants for failing to disclose a cause of action. Both applications were heard by Justice Fitzpatrick in July 2020. She dismissed the claims against the individual Defendants with leave for the Plaintiff to amend, and adjourned the certification application: reasons indexed at *0116064 B.C. Ltd. v. Alio Gold Inc*., 2020 BCSC 1214 ("*Alio BCSC 2020*").

[22] Justice McIntosh heard the Plaintiff's application for certification in February 2021 (the "first certification hearing"). On March 26, 2021, he issued reasons for judgment dismissing the certification application. Justice Macintosh also struck the insider trading claim for failing to disclose a cause of action: see *Alio BCSC* 2021.

[23] Justice McIntosh's decision denying certification was appealed by the Plaintiff, however, the Plaintiff did not appeal the decision to strike the insider trading claim. The appeal was heard in January 2022, and reasons were issued on March 3, 2022: see *Alio BCCA*.

[24] The three main issues under consideration by the Court of Appeal were:

1) Whether the chambers judge erred in finding that the pleadings did not disclose a cause of action based on the rule in *Foss v. Harbottle* (1843), 67 E.R. 189 (UKHL);

2) Whether the chambers judge erred in his preferability analysis; and

3) Whether the chambers judge erred in find that the claim is not a collateral attack on the order approving the plan of arrangement.

[25] The Plaintiff was successful on all three issues.

[26] The Court of Appeal allowed the Plaintiff's appeal and ordered that the certification application be remitted to the trial court, as follows:

> [81] In my view, we should not draft the common questions but, rather, permit the appellant to renew the certification application founded upon a description of the common questions that is consistent with the claim it now seeks to advance.

[27] The Court of Appeal also held at paras. 82–83, that two further issues which had not been addressed by the chambers judge, should also be addressed by the court before the action is certified:

1) whether there are two or more individuals who have the same claim as the representative Plaintiff; and

2) whether the Plaintiff is a suitable class representative.

[28] The parties have come to an agreement on both these issues, such that the only contentious matter remaining relates to the common questions. At this certification hearing, the Plaintiff presented revised common questions which it submits conform with the directions of the Court of Appeal.

IV. TEST FOR CERTIFICATION

[29] Pursuant to s. 2 of the *CPA*, a resident of BC who is a member of a class of persons, may commence a court proceeding on behalf of the members of that class.

[30] Section 4(1) of the *CPA* requires the court to certify a class proceeding if each of the following requirements are met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[31] The plaintiff bears the onus of satisfying each of these five certification requirements.

[32] Pursuant to s. 7 of the *CPA,* the court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[33] The first requirement under s. 4(1)(a) focuses on whether, assuming all the facts pleaded are true, it is plain and obvious that the claim has no reasonable prospect of success: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63 ("*Pro-Sys*").

[34] The remaining four criteria under s. 4(1)(b)–(e), require the plaintiff to show "some basis in fact" that the criteria for certification are met. There is no assessment of the claim on its merits, and the court should not weigh the evidence or try to resolve conflicting facts and evidence at this stage. The question is whether there is some basis in fact to establish each of the individual requirements for certification–not whether there is some basis in fact for the claim itself: *Lewis v. WestJet Airlines Ltd*., 2021 BCSC 228 at para. 39, rev'd in part 2022 BCCA 145.

[35] At a certification hearing, the court is not concerned with the merits of the action. Rather, the focus is on the form of the pleading and whether the action can properly proceed as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68, at paras. 16, 25; *Pro-Sys* at paras. 99–105.

[36] In *Thorburn v. British Columbia*, 2012 BCSC 1585, aff'd 2013 BCCA 480 ("*Thorburn BCCA*"), the Court noted the important gate-keeping role that is to be exercised by the certification judge:

> [117] …The goal of the *CPA* is to be fair to both Plaintiffs and Defendants… "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."

[37] In *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396 at para. 42 ("*Krishnan BCSC*"), aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72, Justice Branch noted that "the *CPA* must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behaviour modification".

[38] For the reasons that follow, I find that the test for certification of this proceeding as a class proceeding has been met.

A. The Pleadings Disclose a Cause of Action

[39] The first requirement under s. 4(1)(a) is that the pleadings must disclose a cause of action. This is assessed on the same test applicable to a motion to strike pleadings under Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009,

[*Rules*]. The court must ask whether, assuming that the facts pleaded are true, it is plain and obvious that each of the Plaintiff's pleaded claims are bound to fail: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14.

[40] The threshold is a low but meaningful one. In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, Justice Dickson explained the task of the Court in determining this threshold issue, as follows:

> [15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced. …[F]or an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice…

[41] The pleadings should be read generously "permitting novel but arguable claims and accommodating inadequacies in form to the extent reasonable by allowed for amendments to cure deficient drafting": *Escobar v. Ocean Pacific Ltd.,* 2021 BCSC 2414 at para. 7, citing *Sherry v. CIBC Mortgage Inc.,* 2020 BCCA 139 at para. 24.

[42] The court must consider the claims as they are, or as they may be amended: *Krishnan BCSC* at para. 45, citing *Sharp v. Royal Mutual Funds Inc.,* 2020 BCSC 1781 at para. 22.

[43] In applying this test, the facts plead must be assumed to be true. However, the court can consider if the facts are manifestly incapable of being proven or widely speculative: *Lewis v. WestJet Airlines Ltd.,* 2017 BCSC 2327 at para. 33, aff'd 2019 BCCA 63, leave to appeal to SCC ref'd, 38600 (18 July 2019).

[44] At this certification hearing, the Defendant did not dispute that the requirement of s. 4(1)(a) of the *CPA* has been met. Nevertheless, as the pleadings are relevant to the common issues analysis, I will briefly review them here.

[45] The Further Amended Notice of Civil Claim before me was filed on November 13, 2020 (“FANOCC”). It is the same pleading that was before the Court of Appeal and Justice Macintosh.

[46] In essence, the Plaintiff alleges that the consideration for its shares in Rye Patch (and those of the class members), was affected by false representations made by Alio between January and April 2018, through public news releases and an information circular issued on April 18, 2018.[3] The Plaintiff pleads common law negligent and fraudulent misrepresentation: FANOCC at paras. 2, 57–65.

[47] Particulars of the alleged misrepresentations were summarized by the Court in *Alio BCCA* at paras. 4–11. However, there are additional particulars, such as the dates of certain news releases, which are in evidence but have not been plead. I have included them below as they provide context for some of the differences that arise between the parties on the common issues.

[48] The Plaintiff alleges:

1) In a news release issued on January 30, 2018, Alio forecast that gold production at the San Francisco Mine would increase to between 90,000 and 100,000 ounces in 2018.

2) On February 21, 2018, Alio issued another news release where it continued to forecast that gold production at the San Francisco Mine would increase to between 90,000 and 100,000 ounces in 2018.

3) On March 19, 2018, Alio and Rye Patch issued a news release announcing the Plan of Arrangement. This news release stated, among other things, that the Plan of Arrangement would result in:

    a) 165,000 ounces of gold production in 2018, and

[3] The information circular was incorrectly referred to in the pleadings as having been issued on April 25, 2018: *Alio BCCA* at para. 4.

b) Cash flow generation from two mines to support development of the feasibility stage Ana Paula project which is anticipated to produce 115,000 ounces of gold per year.

4) In a news release issued on April 11, 2018, Alio described its first quarter production results, stating that, among other things:

a) Alio produced 17,624 ounces of gold at its San Francisco mine,

b) Alio's first quarter production was expected to be its lowest quarterly production for 2018; and

c) Alio maintained its previous guidance that it would produce between 90,000 and 100,000 ounces of gold in 2018.

5) Alio issued an information circular to its shareholders on April 18, 2018, indicating that its board was recommending the plan of arrangement because it believed that the combined companies would have:

> *Increased asset diversification* that may strengthen and de-risk Alio's existing asset portfolio through the addition of a second producing asset in Nevada. After the Arrangement, the Combined Company is expected to produce an approximate total of 165,000 ounces of gold in 2018 from two open-pit, heap leach operations at the San Francisco and Florida Canyon Mines based on the prior disclosure by each Company;
>
> …
>
> *Improved cash flow generation to support project development* as a result of expected cash flow generation from two mines to support the costs of the feasibility stage of the Ana Paula Project, which is anticipated to produce 115,000 ounces of gold per year based on the estimates included in the technical report entitled "NI 43-101 Technical Report, Amended Preliminary Feasibility Study, Guerrero, Mexico" …
>
> [Underlining emphasis added.]

6) Rye Patch also issued an information circular to its shareholders on April 18, 2018[4]. The Rye Patch information circular referred its shareholders to:

[4] Incorrectly dated as April 25, 2018 in the Plaintiff's Written Submissions at para. 17.

a) an appendix which contained information concerning Alio; and

b) Alio's information circular of the same date.

(collectively the "Alleged Misrepresentations")

[49] As noted elsewhere in these Reasons, the Plan of Arrangement was approved by the Court on May 25, 2018.

[50] On July 23, 2018 Alio issued a news release stating that it's second quarter 2019 production results would not be released until August 10, 2018.

[51] On August 10, 2018 – after the Arrangement had completed – Alio issued a news release stating that: (a) it would not meet its guidance of between 90,000 and 100,000 ounces of gold production for 2018; and (b) it was suspending development of the Ana Paula Project.

[52] The Plaintiff alleges that the share price of Alio decreased as a result of these disclosures. Consequently, the Plaintiff claims that as a result of the Alleged Misrepresentations the class members did not receive fair value of their Rye Patch shares in the plan of arrangement.

[53] As noted earlier, the Court of Appeal held that the chambers judge had erred in finding that the pleadings did not disclose a cause of action. The Court of Appeal acceded to the Plaintiff's argument that the rule in *Foss* had no application to this case, as follows:

> [26] In my view, it is clear from the pleadings, and made clearer by the appellant's submissions, that the claim advanced in this case is for harm to the interests of shareholders, suffered by them qua individuals. Rye Patch did not itself suffer any loss. This is a case where the rule in *Foss v. Harbottle* has no application. Not only is this an action brought by a shareholder to recoup a loss it claims to have suffered as a shareholder, it cannot be characterized as an action that is derivative in nature because Rye Patch did not suffer a loss. I would allow the appeal on this ground, and set aside the order dismissing the action as one founded upon a wrong to the corporation that cannot be brought by a shareholder.

[54] The Court of Appeal also disagreed with the Defendant that the proceeding should be dismissed as an abuse of process, on the ground that the claim was a collateral attack on the order approving the plan of arrangement. It held as follows:

> [77] In my view, that distinction is too subtle. It is difficult to characterize the appellant's claim as anything other than a claim for damages founded upon the fact the transfer ratio under the plan of arrangement was based upon a misrepresentation. In my view, however, that claim does not clearly amount to a collateral attack, despite the fact it raises an issue of asset values. It is a claim that was not raised on the application for approval of the plan. It could not have been raised, given that the alleged misrepresentation was unknown to the appellant at the time of approval. Perhaps most significantly, the claim can be addressed without invalidating the plan of arrangement, and invalidating the plan is no longer feasible.
>
> [78] In my view, the chambers judge was correct to find that the appellant's action should not be struck as an impermissible collateral attack on the May 25, 2018 order.

[55] After having reviewed the pleadings, the Court of Appeal's decision in *Alio BCCA*, and after hearing the submissions of counsel, I am satisfied that the pleadings disclose a cause of action for common law negligent and fraudulent misrepresentation, and are not bound to fail. Consequently, the Plaintiff has met the first part of the test for certification.

B. There is an Identifiable Class of Two or More Persons

[56] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons.

[57] In *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 ("*Dutto*n"), the Court noted at para. 38 that to meet the identifiable class requirement of the certification test, "the class must be capable of a clear definition". The Court elaborated as follows:

> [38] … Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that

> any particular person's claim to membership in the class be determinable by stated, objective criteria.
>
> [Citations omitted.]

[58] The class definition is intended to assist in identifying those persons who have potential claims; defining the parameters of the lawsuit; and describing who is entitled to notice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para 57.

[59] The Defendant does not dispute that this part of the certification test is met. The parties agree to the following amended class definition, if this Court makes an order certifying this action as a class proceeding:

> …all individuals or entities, wherever they may reside or be domiciled, excluding the Defendant, whose Rye Patch shares were acquired by Alio in exchange for Alio shares and cash, on or about May 25, 2018, but excludes those individuals or entities who sold their Alio shares prior to August 10, 2018.

[60] I am satisfied that the amended class definition clearly defines the persons that could have potential claims, and that there is some basis in fact that there is an identifiable class of two or more people. The Record suggests that the proposed class comprises hundreds of members, possibly upwards of 1,000 shareholders. I also find that the class is rationally connected to the common issues.

[61] Consequently, the Plaintiff has met this part of the certification test.

C. The Claims of the Class Members Raise Common Issues

[62] I turn now to the central matter before me: whether the common issues advanced are certifiable.

[63] Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members.

[64] This criterion has been described as a "low bar": *203874 Ontario Ltd. v. Quizno's Canada Restaurant Corp.,* [2009] O.J. No. 1874 at para. 31, 2009 CanLII

23374 (O.N.D.C.), aff'd 2010 ONCA 611, leave to appeal to SCC ref'd, 33865 (3 February 2011).

[65] The central question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": *Dutton* at para. 39.

[66] An issue is "common" where its resolution is necessary in order to resolve the claim of each individual class member: *Hollick* at para. 18.

[67] The common issue must advance the litigation towards a resolution, although it does not need to be determinative: *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223 at para. 30, see also *Pioneer Corp. v. Godfrey,* 2019 SCC 42 at paras. 108–109 ("*Pioneer"*).

[68] An overly broad common issue runs the risk of not yielding answers that will advance the litigation in a meaningful way, which inevitably breaks down into individual proceedings*: Thorburn BCCA* at para. 39.

[69] If resolution of an issue depends on individual findings of fact that must be made for each class member, it fails to meet s. 4(1)(c) as this does not avoid the duplication that the common issues criteria seeks: *Thorburn BCCA* at para. 42.

[70] The onus is on the Plaintiff to provide sufficient evidence to establish the existence of the common issues on a "some basis in fact" standard: *Dutton* at para 27. The "some basis in fact" standard is much less stringent than the "balance of probabilities" test: *Hollick* at paras. 16–26.

[71] This requires the Plaintiff to provide some evidence showing that: (a) there is in fact a common issue; and (b) the issue can be answered in common across the class: *Krishnan* BCSC at para. 115.

[72] Put another way, the answer to the common issue must be capable of extrapolation to each member of the class, and in the same manner: *Charlton v. Abbott Laboratories, Ltd*., 2015 BCCA 26 at para. 85.

[73] In *Pro-Sys* at para. 108, the Court set out the following principles which apply to a s. 4(1)(c) analysis:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify [a class proceeding]. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[74] In relation to the fifth principle, the SCC clarified in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45, that while success for one class member does not necessarily have to result in success for all, success for one class member must not mean failure for another: see also *Krishnan BCSC* at para. 114.

[75] Consequently, a class action should not be certified if there is a conflict of interest between the class members: *Dutton* at para. 40; *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 at para. 56.

1. Court of Appeal's Decision

[76] As noted elsewhere, this matter was remitted back to this Court to allow the Plaintiff to renew the certification application "founded upon a description of the common questions that is consistent with the claim it now seeks to advance": *Alio BCCA* at para. 81.

[77] At the appeal hearing, the Plaintiff had submitted 33 PCIs. Many of those have been removed or substantially revised. At this second certification hearing, the Plaintiff has a list of 19 PCIs for consideration. The Plaintiff submits that these issues align with the Appeal Decision.

[78] The Defendant says that the reformulated common issues continue to be fundamentally flawed. It is submitted that the PCIs are either not tied to the pleadings or do not properly conform to the theory of causation advanced by the Plaintiff before the Court of Appeal. Thus, substantive amendments must be made to the Plaintiff's PCIs in order to address the concerns raised by the Court of Appeal.

[79] It is evident that the Court of Appeal's primary concern with the PCIs is that they did not accord with the Plaintiff's theory of causation. Specifically, the Court noted:

> [80] On the hearing of the appeal, it became clear that the appellant's counsel's persuasive argument that a class action should be certified rested upon a description of the manner in which the causation case could be made out in the particular circumstances of this case, without becoming mired in investor-specific questions, which is not adequately described in the questions appended to these reasons. In particular, counsel conceded that proposed common question 6 must be reformulated.

[80] With this in mind, I turn now to the specific questions proposed as common issues.

2. The Alleged Misrepresentations

[81] Proposed common issues 1 to 3 relate to the alleged misrepresentations. They are as follows:

1. Did Alio make misrepresentations which were untrue, inaccurate and/or misleading and omitted to state material facts and material changes when it advised including, but not limited to, in the following documents:

    (a) Alio's March 19, 2018 news release;

    (b) Alio's April 11, 2018 news release; and

    (c) Alio's April 25, 2018 information circular

    (collectively, the "**Alleged Misrepresentations**")?

2. Did Alio make omissions of material facts or material changes in the period before May 25, 2018 (the "**Alleged Omissions**")?

> 3. If the answers to (1) and (2) are yes, what were the untrue, inaccurate or misleading Alleged Misrepresentations and Alleged Omissions; who made the Alleged Misrepresentations and Alleged Omissions; and when, where and how were the Alleged Misrepresentations and Alleged Omissions made?

[82] The issues raised by the Defendant in relation to PCI 1 are:

1) The use of the word “misrepresentation” in the first sentence is redundant and ought to be replaced with “representation”;

2) The words “including but not limited to” should be removed; and

3) The alleged misrepresentations should be specified to state “when [Alio] advised….that it projected it would produce 90,000 to 100,000 ounces of gold in 2018 (the “2018 Gold Production Forecast”)”.

[83] I agree with the Defendant on the first and second points. The first point is self-evident. In relation to the latter, I note that in the FANOCC, as well as at the Appeal hearing, the Plaintiff only identified misrepresentations alleged to have been made in relation to the three documents specified in PCI 1. No facts have been asserted that suggest that there are other documents which could ground the misrepresentation claim. Leaving in the words “including but not limited to” would therefore serve no useful purpose in advancing the litigation.

[84] Regarding the Defendant’s third point, I agree that there should be some specificity in relation to the alleged misrepresentations, but not the precise wording suggested by the Defendant. In my view, that wording is too narrow and does not adequately capture the entirety of the misrepresentations alleged at para. 29 of the FANOCC. A more appropriate choice of words would be to add “pertaining to Alio’s projected gold production for 2018”.

[85] The issues raised by the Defendant in relation to PCI 2 are:

1) The words “by failing to publicly update its 2018 Gold Production Forecast” should be added; and

2) The end date for the period should be May 18, 2018, rather than May 25, 18, 2018.

[86] I agree that there needs to be further specificity in relation to the alleged omissions as the question's current wording is too broad and will not advance the litigation in any meaningful way. However, the Defendant's proposed wording is too narrow. A more appropriate choice of words would be to add in "by failing to publicly correct its prior representations pertaining to Alio's projected gold production for 2018". This is consistent with the change made to PCI 1.

[87] In relation to the Defendant's second point, the May 18 date correlates to the date that the shareholders voted to approve the Plan of Arrangement. However, the loss alleged by the Plaintiff flows from the date that the Plan of Arrangement was approved by the Court, i.e., May 25, 2018. This is consistent with the Plaintiff's theory of causation, which relates to two different groups of shareholders: those that voted in favour of the Plan of Arrangement, and those who did not. This was summarized by the Court in *Alio BCCA* as follows:

> [31] Shareholders who voted in favour of the plan can be presumed to have done so on the basis of the description of the advantages of the plan in the information circular drafted specifically for the purpose of inducing support for the plan. Shareholders who did not vote in favour of the plan were nevertheless compelled to tender their shares by virtue of the process. They too have a claim founded upon the manner in which the majority were induced to support the plan.
>
> [Emphasis added.]

[88] In this case, the compulsion to tender their shares did not occur until the plan had been approved by the Court. Consequently, I conclude that the period end date should be May 25, 2018.

[89] Finally, in regards to PCI 3, the Defendant states that this common issue is redundant and does not need to be asked. I disagree. Given that there are a number of different assertions made in the documents at issue, it is important to specify what the alleged misrepresentations or omissions were.

3. Fraudulent Misrepresentation

[90] Proposed common issues 4 to 7 deal with fraudulent misrepresentation. They are proposed as follows:

> 4. If the answers to (1) and (2) are yes, did Alio make the Alleged Misrepresentations and Alleged Omissions fraudulently in that they made the Alleged Misrepresentations and Alleged Omissions knowing them to be false or made them without belief in their truth or made them recklessly, not caring whether they were true or false?
>
> 5. Did Alio make the Alleged Misrepresentations and Alleged Omissions intending the Class Members to rely upon them to:
>
> (a) vote in favour of the Plan of Arrangement; or
>
> (b) not vote to oppose the Plan of Arrangement; and
>
> (c) ultimately tender their Rye Patch shares for Alio shares
>
> (collectively, "**Participate**") in the Plan of Arrangement?
>
> 6. But for the Alleged Misrepresentations and Alleged Omissions,
>
> (a) would the Class Members have been induced to tender their shares pursuant to the Plan of Arrangement; and
>
> (b) would the Class Members have been induced to tender their shares at the share exchange ratio?
>
> 7. Have the Class Members suffered a loss, damage and expense, including, *inter alia*, that the Alio shares used to purchase the Class Members were overvalued as a result of the Alleged Misrepresentations and Alleged Omissions?

[91] The Defendant does not take issue with PCIs 4 or 7.

[92] The Defendant's objections to PCIs 5 and 6, are as follows:

1) Proposed common issue 5 does not coincide with the Plaintiff's theory on causation and reliance as articulated before the Court of Appeal; and

2) Proposed common issue 6 was specifically referenced by the Court of Appeal as a question that needed reformulating, and the changes to it are still insufficient.

[93] Consequently, the Defendant asks that PCIs 5 and 6 be removed, and replaced with the following:

> 5. Was the management of Rye Patch induced to agree to the share price exchange ratio in the Arrangement Agreement as a result of the Alleged Misrepresentations or Alleged Omissions?
>
> 6. Did the management of Rye Patch recommend to its shareholders to approve the Plan of Arrangement and accept the shares at the ratio negotiated based on the Alleged Misrepresentations or Alleged Omissions?
>
> 7. If the answer to paragraphs [5] and [6] are yes, then can the shareholders who voted in favour of the Plan of Arrangement and/or those who abstained from voting in favour of the Plan of Arrangement but nevertheless still tendered their shares be said to have been induced to do so by the Alleged Misrepresentations or Alleged Omissions?
>
> 8. But for the Alleged Misrepresentations and/or Alleged Omissions, would the transaction pursuant to the Arrangement Agreement have nonetheless occurred at the same share exchange ratio as the one that was negotiated under the Plan of Arrangement?
>
> ("Defendant's Proposed Common Issues" or "DPCIs")

[94] I agree that PCI 5 is problematic, however, not for the reasons identified by the Defendant.

[95] It is well established that in order to succeed on a claim for fraudulent misrepresentation, the Plaintiff must prove the following essential elements:

1) A representation was made;
2) The representation was false in fact;
3) The party making the representation knew it was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
4) The party making the false representation intended the other party to act on the representation; and
5) The other party was induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.

   (see *Carom v. Bre X Minerals Ltd.,* [1999] Oj No. 1662 (QL) at para. 71, 1999 CanLII 14794 (O.N.D.C.); *Wang v. Shao,* 2018 BCSC 377 at para. 196)

[96] Proposed common issue 5 goes to (4) above, and in that sense is both consistent with the Plaintiff's theory and relevant to determining whether fraudulent misrepresentation is proven. I also have no difficulty with concluding that there is some basis in fact that this issue exists and is not a mere fiction: *Alio BCCA* at para. 23.

[97] However, a problem arises in that "intent" on the part of Alio is not plead in the FANOCC. In the circumstances, I am prepared to allow the Plaintiff an opportunity to amend the pleadings in order to specifically plead intent on the part of Alio. Provided that the Plaintiff makes this amendment, common issue 5 is sufficient to meet the requirement of s. 4(1)(c) of the *CPA*.

[98] I turn then to PCI 6, which, as submitted to the Court of Appeal, asked:

> Were the Class Members induced by the Representations and Omissions to Participate in the Plan of Arrangement?

[99] This question was found to be deficient as it did not reflect or connect to the Plaintiff's theory of causation. That theory of causation was succinctly summarized by the Court of Appeal at para. 43, as follows:

> The appellant says causation can be established in the case at bar by showing that if Alio had disclosed accurate production figures before the approval of the plan of arrangement, the share exchange ratio would have been different. The claim the class will advance is that it is irrelevant whether shareholders were aware of the specific alleged misrepresentation contained in the news releases or the information circulars. The appellant says a claim can be made out on behalf of the shareholders if they relied upon management's recommendation that they approve the plan of arrangement and accept the exchange of shares at the ratio negotiated, because that recommendation was based upon Alio's misrepresentation with respect to its production figures.

[100] The following key points emerge from the Appeal Decision regarding the Plaintiff's case:

- The Plaintiff argues that reliance and causation are addressed by asking "whether the representation by Alio induced the Rye Patch shareholders to

approve the plan of arrangement as proposed, including the share transfer ratio": at para. 30

- The Plaintiff's claim for damages is "founded upon the fact the transfer ratio under the plan of arrangement was based upon a misrepresentation": at para. 77.

- The Plaintiff says that "causation can be established…by showing that if Alio had disclosed accurate production figures before the approval of the plan of arrangement, the share exchange ratio would have been different": at para. 43.

- The Plaintiff says that "it is irrelevant whether shareholders were aware of the specific alleged misrepresentations contained in the news releases or the information circulars": at para. 43.

- The Plaintiff argues that "a claim can be made out on behalf of the shareholders if they relied upon management's recommendation that they approve the plan of arrangement and accept the exchange of shares at the ratio negotiated, because that recommendation was based upon Alio's misrepresentation with respect to its production figures": at para. 43.

- The "resolution of the question whether production estimates directly affected the price paid for Rye Patch shares as a common question will potentially significantly advance the litigation": at para. 53.

[101] In light of the above, I find that PCI 6 continues to be flawed. The fraudulent misrepresentation test requires that the Plaintiff establish that it was induced to enter into the contract in reliance upon the false representation. Indeed, the Plaintiff advanced such an argument before the Court of Appeal: *Alio BCCA* at para. 30. However, the question proposed before me is not the one raised by the Plaintiff in its submissions to the Court of Appeal.

[102] The additional problem with PCI 6 is that it fails to address the other aspects of the Plaintiff's theory regarding the role of management in the approval of the Plan of Arrangement and share transfer ratio.

[103] To that end, it is appropriate to revise PCI 6 to align with those changes suggested by the Defendant, with the exception that the Defendant's PCI 5 is not needed. In my view, the focus of this question should remain on the shareholders being induced – and not management (as proposed by DPCI 5). This is appropriate given the comments of the Court of Appeal. Further, some adjustments to the wording of Defendant's PCI 7 need to be made for clarity.

4. Negligent Misrepresentation

[104] Proposed common issues 8 to12 deal with negligent misrepresentation. They are:

> 8. If the answers to paragraphs 1 and 2 are yes, should Alio ought reasonably to have foreseen that the Class Members would rely on the Alleged Misrepresentations and/or Alleged Omissions?
>
> 9. Was there a special relationship between Alio and the Class Members such that Alio owed a duty of care to the Class Members to ensure that Alio's news releases and information circulars did not contain any misrepresentations and otherwise make full, true and plain disclosure of all materials facts or material changes?
>
> 10. What was Alio's requisite standard of care applicable to the Class Members?
>
> 11. If the answers to (1) or (2) or both are yes, did Alio breach the applicable standard of care in making the Alleged Misrepresentations and Alleged Omissions?
>
> 12. But for the Alleged Misrepresentations and Alleged Omissions,
>
> (a) would the Class Members have tendered their shares pursuant to the Plan of Arrangement; and
>
> (b) would the Class Members have tendered their shares at the share exchange ratio?

[105] The Defendant does not take issue with PCIs 8, 9 and 10 as they are worded above. In relation to PCI 11, the Defendant asks that the following change be made:

> 11. If the answers to (1), (2), and (9) are yes, did Alio breach the applicable standard of care in making the Alleged Misrepresentations and/or Alleged Omissions?

[106] The elements to prove negligent misrepresentation are set out in the seminal case of *Queen v. Cognos*, [1993] 1 S.C.R. 87 at 110, 1992 CanLii 146 (S.C.C.) as follows:

> The required elements for a successful *Hedley Byrne* claim…have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[107] I agree with that the changes proposed by the Defendant to PCI 11 should be made. This change is consistent with the elements of negligent misrepresentation that must be proven to succeed in such a claim.

[108] In relation to PCI 12, the Defendant argues that this should be replaced with the following questions:

> 13. Did the management of Rye Patch reasonably rely on the Alleged Misrepresentations or Alleged Omissions in agreeing to the exchange of shares ratio in the Arrangement Agreement?
>
> 14. Did the management of Rye Patch recommend to its shareholders to approve the Plan of Arrangement and accept the shares at the ratio negotiated based on the Alleged Misrepresentations or Alleged Omissions?
>
> 15. If the answers to paragraphs [13] and [14] are yes, then can the shareholders who voted in favour of the Plan of Arrangement and/or those who abstained from voting in favour of the Plan of Arrangement but nevertheless still tendered their shares be said to have reasonably relied on the Alleged Misrepresentations and/or Alleged Omissions?

[109] My concerns about PCI 12 are similar to what was raised in relation to PCI 6. In my view, these concerns can be addressed with the questions proposed by the Defendant.

5. Damages

[110] The Plaintiff proposes the following common issues in relation to damages:

13. What was the impact on Alio's share prices, on a total and per share basis, of the Alleged Misrepresentations and Alleged Omissions?

14. If Alio is liable to the Class Members for fraudulent or negligent misrepresentation, what is the procedure for assessing damages?

15. Can the court assess damages in the aggregate, in whole or in part, for the Class Members pursuant to part 4, division 2 of the *Class Proceedings Act*? If so, what is the amount of the aggregate damage assessment and who should pay it to the Class Members?

16. If Alio is liable to the Class Members for fraudulent or negligent misrepresentation, is Alio guilty of conduct that justifies punishment?

17. If the answer to (16) is "yes" and if the aggregate compensatory damages awarded to the Class Members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages should be awarded against Alio?

[111] The Defendant does not object to PCI 14 and 15.

[112] In relation to PCI 13, the Defendant argues that this should be removed as the Court has not endorsed any particular methodology for calculating damages as a common issue.

[113] The Court in *Alio BCCA* held at para. 45 that:

> This case, unlike others in which certification was refused, hinges upon a limited number of specific representations. It involves essentially one transaction, the exchange of all outstanding Rye Patch shares for Alio shares pursuant to a court order. The claim turns upon shareholders being compelled to act in a particular fashion based upon a transaction approved on the basis of inaccurate production forecasts. The appellant says because there were few specific representations that are said to have been false, all made at the same time to all shareholders, a determination that those representations were not true, and a determination that they affected the calculation of the share exchange ratio, will advance the litigation significantly.

[114] I agree with the Plaintiff that there is sufficient basis upon which this Court can conclude that there exists a workable methodology for determining damages on a class wide basis. The Plaintiff has presented some evidence that the valuation issue can be addressed with expert evidence in respect to the extent to which production estimates affected the negotiated price in this case.

[115] In his affidavit made March 24, 2022, Daniel Sturgess, Chartered Professional Accountant, provided a methodology (a market-based approach) for assessing the loss to the class members. Mr. Sturgess explained in his affidavit that such an approach looks to observable transactions taking place in the market to determine value at a given point of time.

[116] It is important to note at this stage that the Plaintiff does not have to present a methodology that is certain to work – it need only show that there is some basis in fact that the methodology proposed can be applied on a class wide basis: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 8, leave to appeal to SCC ref'd, 38784 (19 December 2019).

[117] Though the proposed methodology needs to be "realistic", it need not be "compelling", nor does it always require expert evidence: *Ewert* at paras. 9 and 104; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.

[118] The methodology must be grounded in the facts of the particular case and there must be some evidence of the availability of the data to which the methodology is to be applied: *Pro-Sys* at para. 118.

[119] I note also that whether this Court later finds that the proposed methodology will in fact work is of no import at the certification stage: *Pioneer* at paras. 120–121. As explained by the SCC in *Pioneer*, at para. 120 "[a]t the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach". Further the SCC noted:

> [121] …neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue. As was the case in *Microsoft*, "[t]he aggregate damages questions [the certification judge] certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount" (para. 135). The certification judge's decision to certify the questions related to aggregate damages for the non-umbrella purchasers should therefore not be disturbed.

[120] I conclude that PCI 13 meets the common issues criteria.

[121] The Defendant also argues that PCIs 16 and 17 should be removed as they are not particularized enough.

[122] An award of punitive damages is non-compensatory and is intended to punish the Defendant for their conduct. The award is to be made only in exceptional cases. In *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at para. 196, 1995 CanLII 59 (S.C.C.), the Court provided the following guidance when considering an award for punitive damages:

> Punitive damages may be awarded in situations where the Defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the Plaintiff should receive by way of compensation. Their aim is not to compensate the Plaintiff, but rather to punish the Defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the Defendant. They are in the nature of a fine which is meant to act as a deterrent to the Defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[123] In *Krishnan BCSC* Justice Branch noted the availability of punitive damages as a certifiable common issue, explaining at para. 34 that "entitlement to punitive damages is frequently certified as a common issue in class proceedings: see also *Rumley v. British Columbia*, 2011 SCC 69 at para. 34, *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at paras. 25–35.

[124] The problem in this case, is that the Plaintiff has failed to sufficiently particularize the foundation for a claim for punitive damages. In *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at paras. 36, 86–87, the Court held that a party must expressly plead the misconduct which it argues grounds the basis for a punitive damages award. In this case, aside from stating that it is seeking punitive damages, the Plaintiff provides nothing in its FANOCC that provides the factual foundation for such a claim.

[125] Consequently, PCIs 16 and17 must fail.

6. Additional Issues

[126] The Plaintiff has proposed the following additional issues for certification:

> 18. Should Alio pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?
>
> 19. Should Alio pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compounded interest?

[127] The Defendant agrees that they meet the common issues criteria.

7. Conclusion on Common Issues

[128] The amended common issues consistent with the above comments, are found at Schedule A, attached to these Reasons. I conclude that those common issues meet the common issues criteria: there is some basis in fact for their existence; they can be determined on a class-wide basis; and they have the potential to significantly advance the litigation.

D. A class proceeding is the preferable procedure

[129] Section 4(1)(d) of the *CPA* requires that a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues.

[130] This means that the Plaintiff must show some basis in fact that a class proceeding: (1) would be a fair, efficient and manageable method of advancing the clam; (2) would be preferable to any other reasonably available means of resolving the claims of the class members; and (3) will facilitate the goals of judicial economy, behaviour modification, and access to justice: *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584 at para. 96.

[131] In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, s. 4(2) of the *CPA* requires the court to consider the following non-exhaustive list of factors:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[132] The Defendant does not dispute that a class proceeding is preferable procedure to individual claims.

[133] The Court of Appeal in *Alio BCCA* also agreed with the Plaintiff that a class proceeding was a preferable procedure to individual claims. It held as follows:

> [56] No counsel was able to point us to a class action founded upon a misrepresentation made in support of a plan of arrangement. In my view, the specific facts of this case support the appellant's argument that there are common questions, the resolution of which will so significantly advance the litigation that certification of those questions is strongly preferable to the alternative: numerous, lengthy, difficult and uneconomic claims.

[134] Consequently, I am satisfied that the criteria under s. 4(1)(d) has been met.

E. The Representative Plaintiff is Suitable

[135] Section 4(1)(e) of the *CPA* requires that there is a representative Plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[136] The proposed representative Plaintiff need not be "typical" of the class but must be "adequate" in the sense that they are willing to vigorously prosecute the claim: *Dutton* at para. 41.

[137] The Defendant does not dispute that the Plaintiff is suitable as a representative Plaintiff.

[138] I am satisfied that the Plaintiff will fairly and adequately represent the interests of the class and that it does not have an interest on the common issues that is in conflict with the interests of other class members.

[139] The Defendant has also come to an agreement with the Plaintiff for the Notice and Litigation Plan.

[140] The following passage from *Caputo v. Imperial Tobacco Ltd.,* [2004] O.J. No. 299, 2004 CanLII 24753, quoted by Justice Branch in *Krishnan BCSC* at para. 237:

> [75] The *Act* mandates that the representative Plaintiff produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class…". McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[141] The litigation plan is sufficient, and meets the requirements of s. 4(1)(e)(ii) of the *CPA*. Specifically, I am satisfied that there is a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class. The litigation plan includes provisions for pre-certification, notice of certification and opt-outs, a discovery process, and individual issues determinations.

V. CONCLUSION

[142] The case is certified as a class proceeding.

[143] The Plaintiff O116064 B.C. Ltd. is appointed as the representative plaintiff for the following class:

> The class action comprises of all individuals or entities, wherever they may reside or be domiciled, excluding the Defendant, whose Rye Patch shares were acquired by Alio in exchange for Alio shares and cash, on or about May 25, 2018, but excludes those individuals or entities who sold their Alio shares prior to August 10, 2018.

[144] The common issues attached as Schedule A to these Reasons are approved, subject to:

(1) the Plaintiff amending the pleadings in order to specifically plead intent on the part of Alio, in accordance with paragraph 97 of these Reasons; and

(2) any feedback from the parties regarding possible misnomers or errors in wording that may requirement minor adjustments to the common issues.

[145] The Notice and Litigation Plan in the form agreed to by counsel, and attached to Plaintiff's counsel's submissions as Schedules B and C, respectively, are approved.

[146] The parties are to arrange for a further hearing to discuss the next steps in this litigation.

"Shergill J."

SCHEDULE "A" – CERTIFIED COMMON ISSUES

The Alleged Misrepresentations

1. Did Alio make representations which were untrue, inaccurate and/or misleading and omitted to state material facts and material changes, pertaining to Alio's projected gold production for 2018, in the following documents:

    (a) Alio's March 19, 2018 news release;

    (b) Alio's April 11, 2018 news release; and

    (c) Alio's April 25, 2018 information circular

    (collectively, the "Alleged Misrepresentations")?

2. Did Alio make omissions of material facts or material changes, by failing to publicly correct its prior representations pertaining to Alio's projected gold production for 2018, in the period before May 25, 2018 (the "Alleged Omissions")?

3. If the answers to (1) and (2) are yes, what were the untrue, inaccurate or misleading Alleged Misrepresentations and Alleged Omissions; who made the Alleged Misrepresentations and Alleged Omissions; and when, where and how were the Alleged Misrepresentations and Alleged Omissions made?

Fraudulent Misrepresentation

4. If the answers to (1) and (2) are yes, did Alio make the Alleged Misrepresentations and Alleged Omissions fraudulently in that they made the Alleged Misrepresentations and Alleged Omissions knowing them to be false or made them without belief in their truth or made them recklessly, not caring whether they were true or false?

5. Did Alio make the Alleged Misrepresentations and Alleged Omissions intending the Class Members to rely upon them to:

    (a) vote in favour of the Plan of Arrangement; or

    (b) not vote to oppose the Plan of Arrangement; and

    (c) ultimately tender their Rye Patch shares for Alio shares

    (collectively, "Participate") in the Plan of Arrangement?[1]

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[1] Certification of common issue 5 is subject to the plaintiff amending the FANOCC to plead intent.

6. Did the management of Rye Patch recommend to its shareholders to approve the Plan of Arrangement and accept the shares at the ratio negotiated based upon the Alleged Misrepresentations or Alleged Omissions?

7. If the answer to (6) is yes, then can the shareholders who Participated in the Plan of Arrangement, be said to have been induced to do so by the Alleged Misrepresentations or Alleged Omissions?

8. But for the Alleged Misrepresentations and/or Alleged Omissions, would the transaction pursuant to the Arrangement Agreement have nonetheless occurred at the same share exchange ratio as the one that was negotiated under the Plan of Arrangement?

9. Have the Class Members suffered a loss, damage and expense, including, *inter alia*, that the Alio shares used to purchase the Class Members were overvalued as a result of the Alleged Misrepresentations and Alleged Omissions?

Negligent Misrepresentation

10. If the answers to (1) and (2) are yes, should Alio ought reasonably to have foreseen that the Class Members would rely on the Alleged Misrepresentations and/or Alleged Omissions?

11. Was there a special relationship between Alio and the Class Members such that Alio owed a duty of care to the Class Members to ensure that Alio's news releases and information circulars did not contain any misrepresentations and otherwise make full, true and plain disclosure of all materials facts or material changes?

12. What was Alio's requisite standard of care applicable to the Class Members?

13. If the answers to (1), (2), and (11) are yes, did Alio breach the applicable standard of care in making the Alleged Misrepresentations and/or Alleged Omissions?

14. Did the management of Rye Patch reasonably rely on the Alleged Misrepresentations or Alleged Omissions in agreeing to the exchange of shares ratio in the Arrangement Agreement?

15. Did the management of Rye Patch recommend to its shareholders to approve the Plan of Arrangement and accept the shares at the ratio negotiated based on the Alleged Misrepresentations or Alleged Omissions?

16. If the answers to (14) and (15) are yes, then can the shareholders who voted in favour of the Plan of Arrangement and/or those who abstained from voting in favour of the Plan of Arrangement but nevertheless still tendered their shares be said to have reasonably relied on the Alleged Misrepresentations and/or Alleged Omissions

Damages

17. What was the impact on Alio's share prices, on a total and per share basis, of the Alleged Misrepresentations and Alleged Omissions?

18. If Alio is liable to the Class Members for fraudulent or negligent misrepresentation, what is the procedure for assessing damages?

19. Can the court assess damages in the aggregate, in whole or in part, for the Class Members pursuant to part 4, division 2 of the *Class Proceedings Act*? If so, what is the amount of the aggregate damage assessment and who should pay it to the Class Members?

Additional Issues

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

21. Should Alio pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compounded interest?