COURT OF APPEAL FOR ONTARIO

CITATION: Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation, 2024 ONCA 105
DATE: 20240213
DOCKET: C70594

Roberts, Paciocco and Thorburn JJ.A.

BETWEEN

The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee

Plaintiffs (Appellants)

and

Barrick Gold Corporation, Aaron W. Regent, Jamie C. Sokalsky, Ammar Al-Joundi and Peter Kniver

Defendants (Respondents)

Joel P. Rochon, Peter R. Jervis, Golnaz Nayerahmadi, and Matthew W. Taylor for the appellants

Kent E. Thomson, Steven G. Frankel, and Maura O'Sullivan, for the respondents

Heard: December 13, 2023

On appeal from the order of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated July 18, 2022 with reasons reported at 2022 ONSC 1767, and supplementary reasons, reported at 2022 ONSC 4216.

Paciocco J.A.:

OVERVIEW

[1] The appellants, the Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee (whom I will refer to collectively, for convenience, as “Drywall”), are proposed representative plaintiffs in an intended class action proceeding relating to a failed South American gold mining project, the Pascua-Lama project. The proposed class action is based on allegations that the respondents, Barrick Gold Corporation and some of its officers and directors (whom I will refer to collectively, for convenience, as “Barrick”), made actionable misrepresentations about the project, contrary to s. 138.3(1) of the Ontario *Securities Act*, R.S.O. c. S.5 (“OSA”). Section 138.3(1) provides for one of several misrepresentation actions legislated in s.138.3 of the OSA.

[2] Leave is required under s. 138.8 of the OSA to bring a s. 138.3 action, including an action pursuant to s. 138.3(1). Drywall achieved only limited success in its initial leave application. Because the initial leave decision contained analytical errors, Drywall was successful on appeal in obtaining a second leave hearing on some of its misrepresentation allegations: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, leave to appeal denied, [2021] S.C.C.A. No. 202 (“*Drywall #1*”).

[3] At the second leave hearing, Drywall once again achieved only limited success. The motion judge[1] granted Drywall leave to pursue alleged misrepresentation claims found in Barrick's fourth quarter and 2011 year-end report ("Q4 and 2011 year-end report") issued on February 16, 2012, and its Annual Information Form ("AIF") for the year ended December 31, 2011, issued by Barrick on March 28, 2012. In substance, the alleged misrepresentations in the February 16, 2012 and March 28, 2012 statements are identical. Those alleged misrepresentations relate to Barrick's capital expenditure budget ("capex budget") and the projected date of its first gold production ("production schedule"). The motion judge denied Drywall leave to pursue the other misrepresentation allegations it had advanced.

[4] This is an appeal from the motion judge's decision in the second leave hearing. However, Drywall is not appealing the motion judge's decisions to deny it leave to pursue most of its misrepresentation allegations. It appeals only the motion judge's denial of leave to pursue its claims that Barrick also made capex budget misrepresentations and production schedule misrepresentations in its third quarter ("Q3") 2011 Report, which was made public on October 27, 2011 ("Ground

[1] Although this motion judge was the second motion judge to address Drywall's leave application, I will refer to her, for convenience, as "the motion judge".

of Appeal 1”). Drywall argues that the motion judge made extricable legal errors in arriving at this decision.

[5] Drywall also submits that the motion judge erred in identifying potential public correction dates for the alleged representations made on February 16, 2012, and March 28, 2012 for which she was granting leave (“Ground of Appeal 2”). Potential public correction dates are important because s. 138.3(1) actions are available to those who traded in securities between the time when a misrepresentation was made, and when it was corrected. The motion judge in the proceedings before us found that the “possible public correction(s) of [the] alleged misrepresentations [made on February 16, 2012, and March 28, 2012 for which she was giving leave] are Barrick’s disclosures on May 2, 2012, and July 26, 2012”. The effect of this latter order was to limit Drywall to pursing its action on behalf of persons who traded in Barrick securities between February 16, 2012 and July 26, 2012. Drywall argues that the motion judge made extricable legal errors in failing to find that further possible public corrections of the alleged February 16, 2012 and March 28, 2012 misrepresentations occurred on November 1, 2012, April 10, 2013, and June 28, 2013. This submission, if successful, would enlarge the class of potential plaintiffs.

[6] For the reasons that follow, I would deny both Ground of Appeal 1 and Ground of Appeal 2 and dismiss Drywall’s appeal.

MATERIAL BACKGROUND FACTS

[7] Pascua-Lama was a complex open-pit mining project in an environmentally sensitive area of Chile and Argentina that Barrick Gold Corporation announced in 2009. After several years, the Pascua-Lama project failed.

[8] While the project was underway, Barrick Gold Corporation made numerous public representations and millions of dollars in Barrick Gold Corporation shares were exchanged. Drywall claimed at the outset of its litigation that many of these representations were material misrepresentations. Specifically, Drywall alleged that material misrepresentations were made by Barrick about the environmental impact of the project, its accounting, its capex budget, and its production scheduling.

[9] As I have indicated, after the initial s. 138.8 OSA leave hearing in July 2019, Drywall achieved only limited success. Specifically, it obtained leave to pursue only a single environmental misrepresentation claim. During the second leave hearing, Drywall again sought leave to pursue damages arising from multiple alleged accounting, capex budgeting, and production scheduling misrepresentations. In keeping with the numerous allegations made and the complexity of the case, the second leave application hearing was lengthy – five days – conducted after the cross-examination of affiants, in which approximately 30,000 pages of

documentation was filed. The motion judge described the record before her as "enormous".

[10] On July 18, 2022, the motion judge issued her order, which she explained in two endorsements, the first released on March 22, 2022 (the "misrepresentation endorsement") and the second on July 18, 2022 (the "public correction endorsement").

[11] As the first motion judge had done, albeit on different grounds, the second motion judge denied Drywall leave to bring claims relating to alleged accounting misrepresentations. Drywall was again denied leave relating to most of the capex budget and production scheduling misrepresentations it alleged on the basis that Drywall had failed to demonstrate that its claim had a reasonable or realistic chance of success at trial. However, she came to a different decision relating to Barrick's Q4 and 2011 year-end report, issued on February 16, 2012, and its AIF for the year ended December 31, 2011, issued on March 28, 2012. The motion judge concluded that there was a reasonable possibility that Drywall could establish that assertions made in these reports that management considered its $4.7 - $5 billion capex budget and its mid-2013 production scheduling forecasts to be reasonable were misrepresentations. The motion judge also found there to be a reasonable or realistic possibility that Barrick could be found to have misrepresented the reasonableness of these projections by failing to disclose information suggesting that those projections may not be accurate. The potentially

problematic non-disclosure consisted of: (1) information known to Barrick that the estimates prepared by its primary subcontractor Fluor-Techint ("F-T") which it relied upon in quantifying its capex budget were unreliable and inaccurate, and (2) internal estimates made by January 2012 that projected that Barrick's capex budget could be more than $4.7 - $5 billion.

[12] As I have indicated, the motion judge found that the "relevant possible public correction(s) of these alleged misrepresentations are Barrick's disclosures on May 2, 2012, and July 26, 2012."

[13] Drywall had argued against a finding that a public correction occurred on May 2, 2012, maintaining that "partial public corrections" occurred on four other dates, July 26, 2012; November 1, 2012; April 10, 2013; and June 28, 2013. The motion judge addressed Drywall's submissions in her public correction endorsement. She found that there was a reasonable possibility that Drywall could prove that the July 26, 2012 disclosure was a public correction, concluding that the July 26, 2012 statement, which I reproduce in material part below in the analysis section of this decision, "put the market on notice that the forecasts were not reliable." Reasoning that it was inescapable that this July 26, 2012 release "accurately corrected any pre-existing misrepresentation about the schedule and capex budget" she concluded that "no subsequent statement can be a public correction of the February and March 2012 alleged misrepresentations." On this basis she found that Drywall had failed to show a reasonable possibility that it could

succeed with its claims that the disclosures that Barrick made on November 1, 2012; April 10, 2013, and June 28, 2013 were public corrections.

[14] Because Drywall disclaimed that the May 2, 2012 disclosure was a public correction, the motion judge did not closely analyze whether there was a reasonable possibility that the release made on this date could be shown to be a public correction at trial. Although Drywall did express some dissatisfaction before us with the motion judge's finding relating to May 2, 2012, it has not appealed her decision that May 2, 2012 is a possible public correction date. I will therefore say no more about the motion judge's identification of that date as a possible public correction date.

THE ISSUES

[15] I have introduced Drywall's general Ground of Appeal 1 and Ground of Appeal 2 in paras. 4 and 5 above. Each of those general grounds of appeal are predicated on specific alleged extricable errors that I will identify in the analysis below. The issues presented by the two general grounds of appeal can be posed as follows:

A. Did the motion judge commit an extricable error in denying leave to pursue the alleged October 27, 2011 misrepresentations?

B. Did the motion judge commit an extricable error in concluding that the November 1, 2012, April 10, 2013, and June 28, 2013 disclosures were not

relevant possible public corrections of the alleged misrepresentations made on February 16, 2012, and March 28, 2012.

[16] The primary challenge that Drywall confronts in advancing these grounds of appeal is that unless the motion judge made extricable errors of law, the standard of review requires deference to her decisions, absent a demonstrated palpable and overriding error: *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, 166 O.R. (3d) 756, at paras. 9, 67; *Wong v. Pretium Resources Inc.*, 2022 ONCA 549, 163 O.R. (3d) 14, at para. 62. Drywall does not allege any errors by the motion judge in her articulation of the law relevant to either ground of appeal nor does it allege palpable and overriding errors of fact. It is fair to say that it argues, instead, that her legally erroneous evaluation is demonstrated by some of the reasoning she employed and is exposed by her failure to act on the evidence before her.

[17] Barrick disputes that the motion judge made extricable errors of law. It contends that Drywall's extricable error arguments represent no more than an impermissible attempt by Drywall to circumvent the deference that must be given to the leave decisions made by motion judges by rearguing the merits of its motion, including by introducing new submissions.

[18] I agree with Barrick.

ANALYSIS

A. DID THE MOTION JUDGE COMMIT AN EXTRICABLE ERROR IN DENYING LEAVE TO PURSUE THE ALLEGED OCTOBER 27, 2011, MISREPRESENTATIONS?

[19] In support of this ground of appeal Drywall argues that the motion judge committed extricable errors of law by:

(1) weighing and rejecting credible evidence, and conducting a mini-trial, and

(2) failing to consider or trivializing major evidentiary gaps.

[20] Drywall also raised two subsidiary arguments that should be addressed, namely, that the motion judge committed extricable errors by:

(3) failing to consider material evidence from a July 25, 2012, presentation, and

(4) misapplying the test for misrepresentations.

[21] These submissions can best be explained and analyzed after the applicable legal principles are described.

The Legal Principles

[22] Unlike most other misrepresentation actions, the statutory causes of action in s. 138.3, including s. 138.3(1), do not require the plaintiff to prove reliance on a

misrepresentation: *Green v. Canadian Imperial Bank of Commerce*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 11, 75, 183. In a s. 138.3(1) action such as this one, so long as the plaintiff traded in securities of the responsible issuer after the responsible issuer made a material misrepresentation, and before that misrepresentation was corrected, damages are available.

[23] Not only does s. 138.3(1) remove the usual requirement of proof of reliance applicable in other misrepresentation actions but it presumes that fluctuations in value during this period are attributable to the misrepresentation: *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 33.[2]

[24] All of the misrepresentation actions enacted by s. 138.3 are equally generous, and were developed by a pan-Canadian committee of securities regulators, the "Committee on Corporate Disclosure" (the "Allen Committee"),[3] to improve the enforcement of the disclosure regime in secondary markets, and to make remedies accessible to traders: *Theratechnologies Inc.* at para. 29.

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[2] *Theratechnologies Inc.* is not a case applying the OSA. It addresses an identical provision in s. 225.4 of Quebec's *Securities Act*, C.Q.L.R. c. V-1.1. Its reasoning has been found to be equally applicable to the regime under Part XXIII.1 of the OSA: *Green,* at paras. 121-122; *Rahimi v. SouthGobi Resources Ltd.,* 2017 ONCA 719, 137 O.R. (3d) 241, at para. 37, leave to appeal denied, [2017] S.C.C.A. No. 443. I will therefore rely on passages from *Theratechnologies Inc.* in stating the law, as if that decision speaks to s. 138.8 of the OSA.

[3] Committee on Corporate Disclosure, *Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change in the Definitions of 'Material Fact' and 'Material Change'*, (Toronto: Toronto Stock Exchange, CSA Notice 53-302, reproduced in (2000), 23 O.S.C.B. 7383)

[25] It was evident to the Allen Committee itself, and to Ontario's legislators that, given their generosity the s. 138.3 misrepresentation actions carry the risk of inviting unmeritorious claims and attracting "strike suits" launched to provoke unwarranted settlements: See *Green*, paras. 67- 69. Therefore, when the s. 138.3 misrepresentation actions were enacted, legislators included a leave requirement to address this risk, as recommended by the Allen Committee: see *Theratechnologies Inc.*, at para. 39; *Badesha v. Cronos Group Inc.*, 2022 ONCA 663, 163 O.R. (3d) 481, at para. 46, citing *Green*, at paras. 67-69; and *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241, at paras. 36 - 38, leave to appeal denied, [2017] S.C.C.A. No. 443.

[26] To ensure that this leave requirement is effective in preventing abusive actions, s. 138.8 of the OSA assigns a "robust" and "important gatekeeping role" to the judge conducting the leave hearing: *Theratechnologies Inc.,* at paras. 36, 38; *Mask v. Silvercorp Metals*, 2016 ONCA 641, 132 O.R. (3d) 161, at paras. 42, 67, leave to appeal requested but application for leave discontinued, [2016] S.C.C.A. No. 454. It imposes two statutory prerequisites to obtaining leave: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[27] Only the reasonable possibility of success requirement is in issue before us. Abella J. described this requirement in *Theratechnologies Inc.*, at para. 39. She said, "[w]hat *is* required is sufficient evidence to persuade the court that there is a

reasonable possibility that the action will be resolved in the claimant's favour" (emphasis original): *Theratechnologies Inc.*, at para. 39. Justice Abella then affirmed that this requirement is meant to "prevent … litigation with little chance of success": *Theratechnologies Inc.*, at para. 39.

[28] It can readily be seen that s. 138.8 calls for a qualitative evaluation of the proposed action. It is not enough under s. 138.8 to show that there is a triable issue: *Mask*, at para. 43. Similarly, it is not enough that the action has a "mere possibility of success": *Theratechnologies Inc.*, at para. 4. As the language of the provision directs, to secure leave "there must be a 'reasonable or realistic chance that [the action] will succeed'": *Green*, at para. 121, citing *Theratechnologies Inc.*, at para. 38.

[29] In order to satisfy this reasonable or realistic chance of success standard, a plaintiff must "'offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the [plaintiff's] claim'": *Green*, at para. 121, citing *Theratechnologies Inc.,* at para. 39. To meet the first of these conditions, the analysis of the applicable legislative provisions must provide a plausible legal foundation for the claim: *Markowich v. Lundin Mining Corp*., 2023 ONCA 359, 166 O.R. (3d) 732, at para. 67, leave to appeal to S.C.C. requested, 40853. To satisfy the second condition, the evidence relied upon by a plaintiff must be "credible". However, it must be emphasized that these two conditions – the plausible legal foundation, and the credible evidence inquiry - do not alone express

the leave standard. These conditions must be satisfied *plus* the record before the leave judge must demonstrate that there is a realistic or reasonable chance that the action will succeed. Notably, in *SouthGobi*, at para. 38, Hourigan J.A. described these inquiries conjunctively when summarizing the governing case law:

> These cases establish that for there to be a reasonable possibility that a misrepresentation action will be resolved at trial in favour of the plaintiff under s. 138.8(1)(b), 'there must be a reasonable or realistic chance that it will succeed' and the plaintiff must 'offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim [Emphasis Added].

[30] As I will discuss below, at times Drywall proceeded as if the entire standard for obtaining leave is the "some credible evidence" standard. It attempted on a number of occasions to identify "credible evidence" favouring its case and then submitted on this basis that the motion judge should have granted leave. However, as Hourigan J.A. went on to state in *SouthGobi*, at para. 38, the "plaintiff must adduce 'sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the [plaintiff's] favour'" (emphasis added), citing from *Theratechnologies Inc.*, at para. 39. Put simply, to be sufficient, evidence must be credible, but even credible evidence may not be sufficient to show that there is a realistic or reasonable chance that a claim will succeed.

[31] It is for this reason that s. 138.8 does not call for a review, in isolation, of only evidence that supports the plaintiff's theory. "The motion judge must review

all the evidence adduced by both parties to ascertain whether there is 'a reasonable or realistic chance that the action will succeed'": *Mask*, at para. 43, citing *Theratechnologies Inc.*, at paras. 38, 39; *SouthGobi*, at para. 46. Justice Abella commented in *Theratechnologies Inc*., at para. 38, that a motion judge "must undertake a reasoned consideration of the evidence to ensure that the action has some merit." As Hourigan J.A. further explained in *SouthGobi*, at para. 46, "[t]his must include some weighing of the evidence that both parties are required to proffer under ss. 138.8(2) and (3) and scrutiny of the entire body of evidence".

[32] Of importance, in applying the s. 138.8 leave test, evidence is not to be assumed to be true or taken at face value. As indicated, the credibility of the evidence is to be assessed, an inquiry that is facilitated by the cross-examination that is available under the OSA when supporting affidavits are filed during leave applications: *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at para. 56, leave to appeal requested but application for leave discontinued, [2015] S.C.C.A. No. 59; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22, 128 O.R. (3d) 481, at para. 33. Similarly, the evidentiary evaluation conducted during a s. 138.8 leave motion includes an assessment of the reliability of the evidence: *Bayens*, at para. 67. Therefore both the credibility and reliability of the evidence as a whole are

material considerations in gauging whether the plaintiff has established a realistic or reasonable chance that their claim will succeed.[4]

[33] Within limits, the comparative strength of competing evidence is also to be considered; the evidence must be sufficiently strong to show a reasonable or realistic chance of success. Therefore, if evidence relied upon by the defendant is so compelling that there is no reasonable possibility that the appellant would succeed at trial, leave may be denied: *Nseir v. Barrick Gold Corporation*, 2022 QCCA 1718, at para. 46. It follows that if critical evidence offered by a plaintiff is shown by other evidence to be "completely undermined by flawed factual assumptions" a motion judge may choose not to act on that evidence: *Mask,* at para. 48. In *Mask*, for example, the plaintiff's geologist provided evidence that the defendant underreported the amounts of material delivered from a mine, while overestimating the grade of ore produced. The motion judge did not err in finding that this evidence was undermined by competing, uncontroverted evidence provided by the defendant explaining why the testimony of the plaintiff's geologist was inaccurate: *Mask*, at paras. 20-26, 48.

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[4] The law of evidence draws a helpful distinction between "credibility" and "reliability": see *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41; *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.) at p. 314. Evidence is "credible" when it represents the honest belief of the witness. Credibility assessments therefore engage whether the witness has been honest in providing the information. Evidence is "reliable" when it is not likely to be mistaken. Reliability assessments therefore probe considerations that could cause honest evidence to be inaccurate.

[34] It is in this context that the oft-repeated admonition that a s. 138.8 inquiry should not be treated as a “mini-trial” needs to be understood. Regardless of the limitations this admonition imposes, a s. 138.8 motion judge cannot be found to have engaged in a mini-trial simply because their decision turned on considerations of the credibility and reliability or weight of the evidence.

[35] The reach of the prohibition on conducting mini-trials can best be identified by considering its underlying purpose. In explaining her direction to motion judges not to engage in mini-trials, Abella J. focused on the concern that “a full analysis of the evidence” is not only unnecessary but would defeat the objective of a screening mechanism by replicating the trial: *Theratechnologies Inc.,* at para. 39. A second related, and equally powerful, concern is that it would be unfair for a motion judge to purport to conduct a “full analysis of the evidence” at the leave stage, because the leave application will occur before the plaintiff has enjoyed the benefit of documentary and oral discovery procedures: *SouthGobi*, at para. 48. And a third concern is that if the analysis undertaken by the motion judge purports to finally resolve truly contentious factual controversies that arise, the motion judge will be usurping the role of the trial judge without the benefit of a complete record.

[36] These underlying concerns give rise to at least three clear limitations that arise from the prohibition on conducting mini-trials.

[37] First, it is the trial judge that is to determine whether the matter in issue has been proved on the balance of probabilities. It is not the motion judge's role to do so. In considering the comparative strength of the competing case, the motion judge is therefore required to keep in mind the "relatively low merits-based threshold" of a realistic or reasonable chance of success: *Mask*, at para. 45. A motion judge who effectively assesses the case against the ultimate burden rather than this standard will err by conducting a mini-trial: *Nseir*, at para. 46.

[38] Second, if a motion judge attempts to resolve realistic and contentious issues arising from conflicting credible evidence they will be lapsing into a mini-trial. In *SouthGobi*, at para. 75, the motion judge was found to have lapsed into a mini-trial by purporting to resolve a key issue that was in dispute because of conflicting, credible evidence. In *Cronos*, at paras. 77-78, the motion judge was found to have "tip[ped] into the realm of a mini-trial" by concluding that a misrepresentation was not material in the face of "credible, complex and competing evidence on whether misrepresentations have a material effect on share prices."

[39] Third, during the leave motion, judges must consider the evidence that is not before them: *SouthGobi*, at para. 48. More precisely, given the early stage at which leave inquiries are undertaken, motion judges must determine whether the lack of a complete record leaves uncertainty about whether a realistic or reasonable chance of success exists: *SouthGobi,* at para. 50. If a motion judge fails to inquire into whether the record is capable of determining the issue before them, the risk is

presented that a motion judge will have intruded on the province of the trial judge by proceeding as though they are conducting a full analysis of the evidence, when they are not.

[40] Therefore, the completeness of the record should affect how a motion judge proceeds. If a motion judge determines that the record is capable of identifying the potential merit of the case, the motion judge may proceed on that record. But if the lack of a complete record could impede the evaluation, the motion judge must take the incompleteness of the record into account in coming to their decision. This is not to say that motion judges should operate on speculative assumptions that missing evidence would favour the plaintiff. After all, the motion judge is to engage in a "reasoned consideration": *SouthGobi*, at para. 46, citing *Theratechnologies Inc.*, at para. 38. Instead, motion judges who have reason to be concerned about the incomplete state of the record should be mindful to not impose a standard that is so exacting that, given evidential limitations, it "can work to the prejudice of plaintiffs who have potentially meritorious claims": *SouthGobi*, at para. 48.

(1) Did the Motion Judge err by weighing and rejecting credible evidence, and conducting a mini-trial?

[41] In light of the legal principles I have just expressed, I am not persuaded that the motion judge impermissibly "weighed and rejected 'credible evidence'", as

Drywall suggests, or otherwise inappropriately conducted a mini-trial relating to Drywall's misrepresentation claim arising from Barrick's October 27, 2011 disclosure. I can best explain my reasoning by unpacking the alleged October 27, 2011 misrepresentations, the material evidence, and the underlying reasoning.

[42] The October 27, 2011 "misrepresentations" that Drywall sought leave to pursue are essentially the same statements that Barrick made on February 16, 2012, and repeated on March 28, 2012, for which the motion judge granted leave, namely that Barrick's management considered its capex budget and production scheduling forecasts – $4.7 to $5.0 billion and a mid-2013 expected production date – to be reasonable. However, the motion judge concluded that "there [was] no evidence in the record to suggest that, in October 2011, Barrick had any reason to be concerned about the accuracy of [F-T's definitive estimate] or schedule", and no other reason to believe its forecasts were inaccurate. Therefore, she found there to be no realistic or reasonable possibility that a trial court could find that on October 27, 2011, Barrick was making actionable misrepresentations rather than expressing reasonably mistaken conclusions. In contrast, the motion judge found that there was evidence before her that could cause a trial court to conclude that after October 27, 2011, and before February 16, 2012, Barrick had acquired information that exposed its capex budget and production schedules as unreasonable, rendering the repetitions of the

reasonableness of that same capex budget and projected production schedule on February 16, 2012 and March 27, 2012 misrepresentations.

[43] First, evidence showed that after October 27, 2011, Barrick received a "definitive estimate" for its work from its primary subcontractor, F-T, that Barrick recognized to be unreliable. F-T then proved to be unable to generate a reliable definitive estimate, despite providing five total versions of its definitive estimate. Since F-T's budget influenced Barrick's own forecasts, the discovery that F-T could not generate a reliable definitive estimate raised real concerns about the reasonableness of Barrick's own forecasts.

[44] Second, by the end of 2011, Barrick's own project team and capital projects group began to raise concerns that its $4.7 to $5 billion forecast was "under pressure" as a result of a number of factors and was "too low".

[45] Drywall argues that the motion judge erred in coming to her conclusion about the October 27, 2011 statement, as there was "some credible evidence" before her that as of that date: (1) Barrick already knew that F-T's budget estimates were inaccurate, and (2) Barrick had received a July 2011 report prepared by its own consultant, Turner & Townsend (the "Report"), showing that its $4.7 to $5 billion

capex budget forecast and its proposed production schedule were “fundamentally unreliable”.[5]

[46] To put Drywall’s submissions into perspective it is important to appreciate the kind of evidence Drywall relied upon. It did not identify any direct evidence establishing that prior to its October 27, 2011 disclosure, Barrick knew that F-T’s budget was inaccurate or that its own capex budget forecast was “fundamentally unreliable.” Instead, Drywall argued, in effect, that these conclusions can be inferred from Barrick’s own documents, which were in evidence before the motion judge. In rejecting this submission, the motion judge did not take issue with the credibility of any of this documentary evidence or disregard it. Instead, she took issue with the inferences that Drywall was proposing, ultimately finding that there is no realistic or reasonable chance that those inferences would be drawn at trial. It is therefore inaccurate for Drywall to suggest that the motion judge weighed and disregarded credible evidence. Instead, she found as she was entitled to do, that on the record as a whole, there was no realistic or reasonable possibility that this claim would succeed.

[47] Drywall emphasizes two features of the Report as providing support for the inference that Barrick knew as early as October 27, 2011 that its own capex budget

[5] Although I have considered all of the “credible evidence” Drywall directed us to, I will follow its lead and focus on the F-T budget evidence and the Report, which clearly carry the weight of its submissions.

was “fundamentally unreliable”. First, the Report asserted that in its June 2011 forecast Barrick had used a “straight-line adjustment” from its earlier budget projections, an approach the Report is critical of as not adhering to general estimating principles. Second, the Report asserted that a model using high-altitude rates was needed to benchmark the project. The Report undertook that “[d]uring the 4-6 weeks finalization period [before Barrick would release its projections, Turner & Townsend would] endeavour to benchmark these rates”. Drywall argued before the motion judge, and again before us, that this information exposed methodological problems in Barrick’s June 2011 budgeting forecast which rendered the capex budget reported on October 27, 2011 fundamentally unreliable.

[48] The challenge Drywall experienced in convincing the motion judge that there was a realistic or reasonable possibility that a trier of fact would draw the inference that Barrick’s projections were fundamentally unreliable was the considerable, largely uncontested, evidentiary record to the contrary.

[49] In his affidavit, Augustus Calder, the person who conducted the review that led to the Report, rejected any suggestion that the Report showed Barrick’s June 2011 forecast to be inaccurate or unreliable, or that Barrick’s projections were prepared improperly. Mr. Calder’s evidence was that the Report offered a “high level” view that was undertaken in less than a week based on incomplete

information. Mr. Calder also attested that the problems the Report identified in the projections could be addressed with “relatively minor adjustments”.

[50] Moreover, after having reviewed the record as a whole, the motion judge described the evidence that the project budget was “reasonable” as “overwhelming”. For example, there was evidence before the motion judge that, unlike the high level and incomplete Report itself, the project budget had been carefully prepared and finalized over a long process based on numerous considerations. The evidence also showed that Barrick had “added a contingency to its base forecast that brought the confidence level to more than 95% - higher than the 85% confidence level the Pascua-Lama project team had recommended … which was already a high level of confidence for a project of this nature”. In addition, there was uncontested evidence that Barrick could adjust its production plan so as to stay on schedule, if necessary. Although she did not express it this way, the motion judge’s point, no doubt, was that there was a good deal of flexibility built into the capex budget to absorb adjustments without calling the budget itself or the proposed production schedule into question.

[51] In addition, there were contemporaneous documents showing that rather than losing faith in its capex budget as the result of the June Report, Barrick itself continued to rely on its forecast after October 27, 2011 and prior to January 2012. There was also an internal document entitled “Basis for Estimate for July 2011 Forecast Update” offering reasons why the claim in the Report that Barrick had

used a “straight-line adjustment” was incorrect. This document lends support to the conclusion that the Report did not cause Barrack to lose faith in its 2011 capex budget.

[52] In the motion judge’s view, when all of these circumstances are considered, there is simply no realistic or reasonable possibility that a trier of fact would infer from the Report that early as October 27, 2011, Barrick management knew that its budget projections were unreasonable.

[53] In my view, the motion judge was entitled to come to this conclusion. She did not engage in impermissible weighing in doing so. As I have pointed out, Drywall’s submissions about the Report did not give rise to credibility issues that should have been resolved at trial. Its submissions instead raised the question of whether there was a reasonable or realistic chance that the inferences Drywall promoted would be drawn at trial, and carry the day, in all of the circumstances. The motion judge engaged in an appropriate assessment of the whole of the record, and in effect concluded that given the strength of the case to the contrary, there was no such possibility.

[54] In my view, Drywall’s associated attempt to promote the inference that by October 27, 2011, Barrick management no longer trusted F-T’s budget estimates fares no better. In support of this proposed inference, Drywall pointed to documentary evidence from Barrick showing that prior to October 27, 2011, Barrick

had commenced a reforecasting process in which it asked F-T to prepare a definitive estimate. Drywall argued that the fact that Barrick undertook a reforecasting exercise and asked F-T to prepare a definitive estimate showed that Barrick believed before October 27, 2011 that F-T's budget, and hence its own project budget, was unreliable.

[55] Again, it is evident from her reasons that the motion judge was not persuaded that there was a reasonable or realistic possibility that this inference would be drawn at trial. There was evidence before her that budget reforecasting is not unusual. Moreover, uncontradicted evidence showed that Barrick asked F-T to complete a definitive estimate in order to pin down the cost of its work. Based on this evidence, and the "overwhelming" evidence that Barrick's October 27, 2011 budget was not only reasonable but cautious, the motion judge concluded that although there is a reasonable possibility that it may be inferred that "by sometime in October 2011, Barrick may have begun to wonder whether the ongoing pressures on the project might result in an increase in [F-T's] budget or schedule", there was no reasonable possibility that a trier of fact would infer that by October 27, 2011, Barrick no longer believed that its capex budget was inaccurate or unreasonable. Once again, I would not find that the motion judge committed any extricable errors of law in coming to this conclusion. She discharged the responsibilities that were assigned to her as a s.138.8 motion judge.

[56] I would also reject Drywall's related submission that once the motion judge recognized that "by sometime in October 2011, Barrick may have begun to wonder whether the ongoing pressures on the project might result in an increase in [F-T's] budget or schedule" she had recognized that there was some credible evidence supporting its misrepresentation claim and should have granted leave on this basis alone. With respect, this submission illustrates the tendency that Drywall exhibited in its submissions to attempt to isolate credible evidence that supports its case, and to argue on this basis that it met the test for leave. As I have endeavoured to explain, the "some credible evidence" inquiry is not the leave test. The "some credible evidence" requirement is a necessary but not the sole sufficient condition to successfully establishing a realistic or reasonable chance of success, which is the leave test. Moreover, it is not enough to characterize evidence as sufficient when viewed in isolation. The record must be reviewed in its totality. The motion judge approached matters correctly.

[57] I would therefore reject Drywall's submission that the motion judge committed extricable errors by impermissibly weighing the evidence or its credibility, or otherwise engaging in a mini-trial.

(2) Did the motion judge err by failing to consider or trivializing major evidentiary gaps?

[58] I would also reject Drywall's associated submission that the motion judge erred in her application of the leave test by failing to consider or trivializing the evidentiary gaps, contrary to the direction of this court in *SouthGobi*. In its submissions, Drywall featured the refusal by Barrick to produce documentation Drywall had been requesting, It also sought to illustrate the absence of evidence by referencing the remaining uncertainty as to whether Turner & Townsend developed and forwarded the project benchmark it believed to be appropriate.

[59] In my view, there is no basis for concluding that the motion judge failed to consider the evidentiary gaps in the record. She recognized that she was "obligated to consider what evidence is *not* before her" (emphasis original): quoting from *SouthGobi*, at para. 48. The motion judge noted that the proceeding "remains at an early stage" and said that she was "cognizant that production and discovery are not complete, and that there are categories of documents over which [Drywall] sought production but were refused." However, she found that given the "unusually well developed" record, which was massive consisting of thousands of pages of contemporaneous documents as well as affidavits from key witnesses that had been cross-examined, there were "no obvious gaps in the evidence before [her] that affect [her] analysis."

[60] In my view, this is all that was required of the motion judge. As I have explained, her obligation was to consider whether the record "was sufficient, even without the benefit of discoveries and production, to properly assess whether there was a reasonable possibility of the success of the appellants' statutory action at trial": *Bayens*, at para. 73. The motion judge did this, concluding, as she was entitled to, that the record was adequate. Her reliance on the size of the record before her in making this determination was entirely appropriate: *Peters,* at para. 109. I see no basis for interfering with her conclusion in this regard. This evaluation was made without extricable error and is entitled to deference.

(3) Did the motion judge err by failing to consider material evidence from a July 25, 2012 presentation?

[61] In its submissions before us, Drywall placed heavy reliance on a July 25, 2012 presentation prepared by Barrick. It argued that this document shows that that Barrick knew its budget was not reasonable before the October 27, 2011 disclosure. Yet, the motion judge did not give this document close attention in either of her endorsements. On this basis, Drywall submits that the motion judge erred by failing to consider the record before her.

[62] I would not accept this submission. The motion judge refers to this document in her misrepresentation endorsement when addressing Barrick's decision to replace its in-house management team. She clearly considered it. Even if the

motion judge had made no mention of July 25, 2012 presentation, I would not find on this record that she failed to give this evidence consideration. To be sure, the failure to mention evidence capable of supporting one of the parties can indicate a failure by a judge to consider that evidence, but whether this is so "will depend on a number of factors, including the nature of the evidence itself, the entirety of the evidence, the issues raised and the arguments made": *R. v. Sheeller*, 2014 ONCA 867, at para. 1. None of those factors support Drywall's submission.

[63] In terms of the nature of the evidence itself, where evidence does not strongly favour a submission, the failure of a judge to mention it may be attributable to nothing more than a determination by the judge that the evidence is not worthy of mention, or has minimal significance: *R. v. Curry*, 2019 ONCA 754, leave to appeal denied, [2014] S.C.C.A. No. 185, at para. 9; *R. v. K.C.,* 2015 ONCA 39, at para. 39. In my view, the July 25, 2012 presentation is not compelling enough to support an inference that the motion judge must have missed it or missed its significance. This document was created months after October 27, 2011 to explain the large budget increase that was reported in July 2012. It provides no basis for inferring that the concerns that gave rise to the review that led to those subsequent budget increases ought reasonably to have been recognized by Barrick prior to October 27, 2011. Although the July 25, 2012 presentation does allude to historical concerns that arose prior to October 27, 2011, they are described broadly, without reference to dates, and some of those concerns, such as the initial ineffective

management structure, were publicly disclosed prior to October 27, 2011. This is not the kind of evidence one would necessarily have expected the motion judge to have addressed.

[64] In terms of the entirety of the evidence, the record was enormous, and the motion judge issued two lengthy judgments addressing multiple issues and submissions. Given the scope or her task, it is not surprising that the motion judge may not have explicitly mentioned all of the evidence that she considered.

[65] Moreover, if a litigant does not consider a document to be sufficiently important to focus on in their submissions, an appeal court is not likely to infer that the document is of sufficient importance that it should have been referred to in the judge's ruling. This, essentially, is the situation before us. Drywall presented no confirmation that this document was featured, let alone referred to, in its written or oral submissions before the motion judge relating to the alleged October 27, 2011 misrepresentations that are now under appeal.

[66] Therefore, I would not find that the motion judge failed to consider this document or the record before her. Nor, for the same reasons I have expressed in para. 62 above, would I accept Drywall's submission that the July 25, 2012 presentation shows that it has a reasonable possibility of succeeding with its October 27, 2011 misrepresentation claim.

(4) Did the motion judge err by misapplying the test for misrepresentations?

[67] Drywall submits that the motion judge erred by conducting a purely subjective inquiry when considering whether a misrepresentation occurred on October 27, 2011. I take no issue with the general proposition that the disclosure requirements under the OSA are not to be determined based on the subjective beliefs of the responsible issuer and must ultimately turn on how those representations would reasonably be viewed: see *Wong*, at para. 103; *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, at para. 55. However, I am not persuaded that the motion judge conducted a purely subjective inquiry.

[68] First, as the passage from her misrepresentation endorsement that I quoted above in para. 42 demonstrates, the motion judge considered whether there was any evidence on the record "to suggest" that "Barrick had any reason to be concerned". This is an objective inquiry, and on its own, undermines Drywall's submission.

[69] Second, when the motion judge spoke in her misrepresentation endorsement to what Barrick knew, she was responding to Drywall's own claims about Barrick's subjective knowledge, namely, that Barrick knew as early as October 2011 that F-T's budget was unreliable, and that its own projections were

fundamentally flawed. Put simply, since Drywall put Barrick's subjective knowledge in issue, it cannot fairly be inferred from the motion judge's reference to Barrick's subjective knowledge that she misconceived the law relating to misrepresentations.

[70] I would therefore deny this ground of appeal. I am not persuaded that the motion judge committed any extricable errors of law in denying Drywall leave to pursue its October 27, 2011 misrepresentation allegation.

B. DID THE MOTION JUDGE COMMIT AN EXTRICABLE ERROR IN CONCLUDING THAT NOVEMBER 1, 2012, APRIL 10, 2013, AND JUNE 28, 2013 WERE NOT RELEVANT POSSIBLE PUBLIC CORRECTIONS OF THE ALLEGED MISREPRESENTATIONS MADE ON FEBRUARY 16, 2012 AND MARCH 28, 2012?

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

[72] Recall that the material alleged misrepresentations in this case made on February 16, 2012 and March 28, 2012 were that Barrick's management considered its capex budget and production scheduling forecasts – $4.7 to $5.0 billion and a mid-2013 expected production date – to be reasonable and presented these projections as accurate without disclosing information that indicated otherwise. The motion judge accepted Drywall's submission that there was a reasonable possibility that Barrick's disclosure made on July 26, 2012 was a public correction of these alleged misrepresentations.

[73] This determination is solidly grounded in the evidence. In the July 2012 public disclosure, Barrick described challenges it had encountered with the Pascua-Lama project, admitted that its earlier projections had proved incorrect, and disclosed that a detailed review of its schedule and costs estimate was required. It then stated, in material part:

> While the review is not yet complete, preliminary results currently indicate that initial gold production is now expected in mid-2014, with an approximate 50-60 percent increase in capital costs from the top end of the previously announced estimate of $4.7-$5.0 billion …

[74] This disclosure was followed by a $1.45 drop in the value of each share. Evidence showed that it was greeted with shock by analysts and the market given its magnitude.

[75] Not surprisingly, the motion judge concluded that this disclosure "put the market on notice that the forecasts were not reliable." She then found it to be inescapable that this July 26, 2012 release "accurately corrected any pre-existing misrepresentation about the schedule and capex budget" and concluded that "no subsequent statement can be a public correction of the February and March 2012 alleged misrepresentations". In making this point, the motion judge commented, at paras. 26 and 27 of her public disclosure endorsement, that "it was not reasonably possible that [Drywall] could prove that, in July 2012, Barrick misrepresented that its then-disclosed budget and schedule were based on assumptions Barrick considered reasonable". The motion judge said that this "finding leads inescapably to the conclusion that Barrick had accurately corrected any pre-existing misrepresentation about the schedule and capex budget by July 2012."

[76] Drywall argues that in finding the July 26, 2012 public correction to be a complete correction of the material alleged misrepresentations that the motion judge was granting leave to pursue, and in finding that as a result no subsequent disclosures could be possible corrections of the alleged misrepresentations, the motion judge misapplied the test and exceeded her role by encroaching on the jurisdiction of the common issues judge.

[77] I am not persuaded by these submissions. In identifying possible public correction dates a motion judge's ultimate task is to determine if there is a reasonable possibility that a trial court will find that a public disclosure was a public

correction, an inquiry that requires a reasoned consideration of the evidence: *Drywall #1*, at para. 53. As I have indicated above, this inquiry may alternatively be profitably framed by asking "whether the alleged public correction was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Drywall #1*, at para. 76; *Imperial Metals*, at paras. 47, 54. The motion judge stated this test correctly, and came to a reasoned conclusion on its application. Indeed, her logic is unassailable. Once Barrick disclosed on July 26, 2012 that its capex budget was being revised and that 50-60 percent increases were then being anticipated, and that its projected production date was now expected to be a year later than it had claimed on February 16, 2012 and March 28, 2012, there was no longer a realistic or reasonable possibility that investors could credibly treat Barrick as continuing to represent that its February 16, 2012 and March 28, 2012 representations were reasonable or accurate. It follows, as well, that public disclosures made after July 26, 2012 are not reasonably capable of being understood in the secondary market as correcting the already completely corrected impugned statements that had been made on February 16, 2012 and March 28, 2012.

[78] Drywall offered a volley of contrary arguments as to why this reasoning cannot be accepted as a proper application of the test. I would not accept any of them.

[79] First, Drywall proposes that, at the leave stage, the question is whether there is "some linkage or connection between the alleged misrepresentation and the alleged public correction", and it argues that the fact that the disclosures of November 1, 2012, April 10, 2013, and June 28, 2013 also address the capex budget and projected production schedules is enough to satisfy the linkage test. In my view, a mere coincidence in subject matter is not enough on its own to establish a sufficient linkage or connection. As Strathy C.J.O., as he was then, explained "[a] linkage or connection will assist the judge in determining how the alleged corrective disclosure would be understood in the secondary market" (emphasis added): *Imperial Metals*, at para. 54. Chief Justice Strathy described the "overarching question", namely, "whether the alleged public correction [is] reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Imperial Metals*, at para. 47, quoting *Barrick #1*, at para. 76. It necessarily follows that a sufficient linkage or connection will exist if the alleged public correction can reasonably be taken as correcting the alleged misrepresentation, but not otherwise. A mere coincidence in subject matter will not suffice. The motion judge cited the linkage or connection inquiry and, in my view, applied it correctly.

[80] I would also reject Drywall's submission that the motion judge encroached on the jurisdiction of the common issues judge administering the class action. The motion judge recognized the overlap that arises in proposed class action proceedings under s. 138.3(1) between leave inquiry determinations relating to public corrections, and the identification of sub-classes on a certification motion. She also recognized that the usual practice of having those issues resolved by the same judge in a single hearing was not possible in this instance, given that this court's order to retry the leave issue resulted in separate judges addressing the leave and certification questions. After considering the purpose of the screening role at a leave hearing, the motion judge reasonably concluded that she could best achieve judicial economy and access to justice by using the leave test to screen possible public corrections, thereby avoiding a duplication of efforts by the parties and the courts. As I have indicated, the motion judge confined herself to the leave test when determining the possible public correction dates. I can find no error in the sensible and careful manner in which she proceeded.

[81] I would reject, as well, Drywall's narrower challenges to the motion judge's reasoning. Specifically, I do not accept its submission that, in paras. 26 and 27 of her public disclosure endorsement, the motion judge erred by "improperly concluding that a disclosure that is not a misrepresentation cannot constitute a partial public correction." The motion judge made no such finding. As I have explained, she reasoned, in effect, that after the alleged misrepresentations of

February 16, 2012 and March 28, 2012 had been completely corrected by the July 26, 2012 disclosure, there was no reasonable possibility that post-July 26, 2012 investors could reasonably link their investments to those alleged misrepresentations and no realistic or reasonable possibility that the subsequent disclosures would be found to be corrections for what had already been corrected. She did not confuse the misrepresentation and public correction issues.

[82] Similarly, I see no error by the motion judge in deciding, without examining the specific evidence relating to November 1, 2012, April 10, 2013, and June 28, 2013, that these disclosures are not reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement. Given her finding that "inescapably" the July 26, 2012 disclosure fully corrected the alleged misrepresentations of February 16, 2012 and March 28, 2012, there can be no reasonable possibility that the November 1, 2012, April 10, 2013, and June 28, 2013 disclosures would be accepted as publicly correcting what had already been fully corrected. The "robust analysis" that Drywall insists upon would have been pointless.

[83] Nor do I accept Drywall's related argument that the motion judge erred by resolving this issue based on a literal interpretation of the public disclosure of July 26, 2012 without considering Drywall's econometric expert evidence relating to how the November 1, 2012, April 10, 2013, and June 28, 2013 alleged corrections would be understood in the market. I fully agree that where there may

be multiple explanations for a negative market response to a public disclosure, including a possible correction of the alleged misrepresentation, a purely semantic and mechanical approach cannot be taken in determining whether a public correction of the alleged misrepresentation has occurred, and available expert evidence must be closely consulted: see *Barrick #1*, at para. 50, citing with approval, *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin*, 2016 ONSC 5784, at para. 45. However, that is not the issue the motion judge was facing. The questions she was addressing on the facts before her were whether the July 26, 2012 disclosure completely corrected the alleged misrepresentations of February 16, 2012 and March 28, 2012 and if so, whether given this, the November 1, 2012, April 10, 2013, and June 28, 2013 releases could reasonably be found to be public corrections.

[84] The former question – whether the July 26, 2012 disclosures completely corrected the alleged misrepresentations – had everything to do with the semantic or mechanical language used, and the motion judge came to the only conclusion that was reasonably available to her. Given that on July 26, 2012, Barrick publicly disclosed that the capex budget it had included in its February 16, 2012 and March 28, 2012 disclosures was now expected to increase 50 - 60 percent, and its project completion date was now believed to have been one year too early, it was indeed inescapable that the alleged misrepresentations had been completely corrected.

[85] The latter question – whether, given that the July 26, 2012 disclosures completely corrected the misrepresentations, the November 1, 2012, April 10, 2013, and June 28, 2013 disclosures could reasonably be found to be public corrections of the already corrected alleged misrepresentations – was a matter for judicial evaluation, not economic calculation by econometric experts. I can see no fault with the motion judge's judicial evaluation. I agree with her that if a misrepresentation is already completely corrected, it would not be reasonable to credit subsequent statements with doing so.

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

[87] I therefore see no extricable legal errors in the motion judge's rejection of November 1, 2012, April 10, 2013, and June 28, 2013 as possible public corrections of the alleged misrepresentations of February 16, 2012 and March 28, 2012. I would deny this ground of appeal.

CONCLUSION

[88] I would dismiss the appeal.

[89] As agreed between the parties. I would award costs on this appeal of $60,000 to the respondents on a partial indemnity basis, inclusive of all applicable taxes and disbursements.

Released: February 13, 2024 “L.B.R.”

“David M. Paciocco J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. Thorburn J.A.”