IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Larouche v. Pure Gold Mining Inc.,* 2024 BCSC 1889

Date: 20241015
Docket: S222826
Registry: Vancouver

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Between:

Linda Larouche

Plaintiff

And

Pure Gold Mining Inc., Darin Labrenz, Sean Tetzlaff, Mark O'Dea, Graeme Currie, Clarus Securities Inc., Sprott Capital Partners L.P., Stifel Nicolaus Canada Inc., Canaccord Genuity Corp., PI Financial Corp., National Bank Financial Inc., Desjardins Securities Inc. and Haywood Securities Inc.

Defendants

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

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. September 3-6, 2024
Place and Date of Judgment:	Vancouver, B.C. October 15, 2024

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Introduction

[1] The personal defendants in this putative class action proceeding apply (by way of two applications) for an order striking the amended notice of civil claim ("ANOCC") with liberty to the plaintiff to apply to deliver an amended pleading, per Rule 9-5(1) of the *Supreme Court Civil Rules* [*Rules*]. They contend that the ANOCC fails to comply with the *Rules* in so many respects that it must be struck. They assert that they are unable to decipher the claim they must meet in this class action, seemingly grounded on alleged misleading and false representations in documents issued by or on behalf of the defendant, Pure Gold Mining Inc. ("PGM"), a reporting issuer governed by provincial securities legislation. They say the claim is obscured in a wholly deficient and prolix pleading that contains inconsistent allegations and is replete with irrelevant narrative, argument, evidence, and legal conclusions. They also say the ANOCC includes a claim known as a secondary market claim that is a nullity because leave required by s. 140.8 of the *Securities Act*, R.S.B.C. 1996, c. 418 [*Sec. Act*], has not been sought, let alone obtained. Embedded in the dispute concerning the propriety of the secondary market claim is whether leave must be sought by a separate petition or whether it is appropriate – as the plaintiff, Ms. Larouche, is attempting to do – to seek leave by way of a notice of application in this action. Other defendants involved in the sale of PGM's securities, referred to as "Underwriters", take the same position as the personal defendants regarding deficiencies in the ANOCC. Some Underwriters also contend that the ANOCC fails to disclose a cause of action against them.

[2] The claim advanced by Ms. Larouche on behalf of a purported class is grounded in the *Sec. Act*, in negligence, and vicarious liability.

[3] A claim premised on s. 131 of the *Sec. Act* (called a primary market claim) is advanced against all of the defendants. A claim founded on s.140.3 (called a secondary market claim) was advanced against PGM but is now, as a result of an amendment to the claim (discussed below), pursued against an entity known as PGM ResidualCo Holdings ("ResidualCo") in place of PGM. The secondary market claim is also made against the personal defendants who were PGM's former

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directors and officers (“Ds&Os”). The negligence claim is premised on an alleged breach of a duty to investigate with appropriate diligence to ensure that PGM’s securities would be issued, distributed, and sold to investors only after general disclosure of material facts (as that term is defined in the *Sec. Act*). It is made against PGM (now ResidualCo), two of the four Ds&Os and four of the eight Underwriters. The vicarious liability claim is made against ResidualCo and the Underwriters.

[4] Before turning to the applicable law and my analysis and determination, it is useful to identify the parties in this action and to provide a brief summary of the claims made against them.

The Parties

[5] Ms. Larouche, who resided in British Columbia at the time the action was commenced, purchased securities of PGM during the class period. She alleges that she suffered damages and losses on her investment on account of false and misleading representations and the defendants’ failure to correct them.

[6] PGM, incorporated in British Columbia in 2005, was, at all material times, a reporting issuer under the *Sec. Act*. Its shares were listed for trading on the TSX Venture Exchange, the London Stock Exchange, and the over-the-counter market in the United States. By June 2023, PGM’s securities were delisted from all exchanges.

[7] PGM held a 100% interest in a mine located in Ontario until mid-2023 when West Red Lake Gold Mines Ltd. acquired all of PGM’s issued and outstanding shares in proceedings (VA S228723) brought under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

[8] During the hearing of the instant applications, ResidualCo, an entity who assumed PGM’s unwanted assets and liabilities per a reverse vesting order issued during the *CCAA* proceeding, was substituted as a defendant in place of PGM. Substitution went by consent after Zurich Insurance Company Ltd. (“Zurich”), the

insurer who issued a primary directors' and officers' liability insurance policy in favour of PGM and its the directors and officers, confirmed, *inter alia*, that the terms of the insurance policy and any available coverage, if any, applicable to PGM at the time the action was commenced were also applicable to ResidualCo, and that Zurich would not refuse indemnity or coverage simply and merely as a result of the substitution of ResidualCo in place of PGM.

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Outline of the Claims Against the Defendants

[9] The primary market claims are advanced against:

(a) ResidualCo (once it was substituted for PGM);

(b) the Ds&Os, who are the personal defendants, Darin Labrenz (president and chief executive officer), Sean Tetzlaff (chief financial officer), Mark O'Dea (interim president), and Graeme Currie (chair of the board of directors); and

(c) the Underwriters.

[10] The Underwriters are lumped into two groups.

[11] The first group is Clarus Securities Inc. ("Clarus"), who was the lead underwriter of this group, Sprott Capital Partners L.P. ("Sprott"), Stifel Nicolaus Canada Inc. ("Stifel"), Canaccord Genuity Corp., Haywood Securities Inc. ("Haywood"), and PI Financial Corp. ("PI Financial"). They participated in an offering of PGM's securities ($17.3 million) through a short form prospectus dated April 28, 2021 ("April 2021 Prospectus"), in accordance with an underwriting agreement dated April 14, 2021. The offering is referred to as the "May 2021 Offering" in the ANOCC and the Underwriters falling into this group refer to themselves as the "May Offering Underwriters".

[12] The second group consists of the lead underwriter, National Bank Financial Inc. ("National Bank"), and Clarus, Stifel, Haywood, PI Financial, Sprott, and Desjardins Securities Inc. They participated in a subsequent offering ($23 million) through a prospectus dated September 21, 2021 ("September 2021 Prospectus")

per an underwriting agreement dated September 14, 2021. The offering is referred to as the "September 2021 Offering" in the ANOCC. The Underwriters who participated in it refer to themselves as the "September Offering Underwriters".

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[13] The secondary market claim is alleged against ResidualCo (as it is now substituted for PGM) and each of the four Ds&Os.

[14] A claim in negligence is advanced against PGM (now ResidualCo), Messrs. O'Dea and Currie (but not Messrs. Labrenz and Tetzlaff), and certain Underwriters (National Bank, Clarus, PI Financial, and Stifel) in respect of a private placement brokered in February 2022 ("Private Placement"). The claim is premised on an allegation that those defendants breached their "duty of care… to conduct appropriate investigation and diligence [to] ensure that PGM's securities would be issued, distributed and sold to investors only after general disclosure of the material facts and information concerning its operations that would affect the price of its securities."

[15] A claim premised on vicarious liability is also made against PGM (now ResidualCo) and each of the Underwriters.

<u>The Applications</u>

[16] The Ds&Os filed two separate applications. Both were scheduled for hearing before me as the appointed case management judge.

[17] The first, filed April 30, 2024, seeks an order striking the ANOCC per Rule 9-5(1). The Ds&Os' position, concisely stated in the opening paragraphs of their written submissions, is that the ANOCC fails to comply with the basic rules of pleadings:

> **I. OVERVIEW**
>
> 1. The Plaintiff's pleading ought to be struck. It fails to comply with the basic rules of pleadings, which are intended to define and clarify for the parties and this Court what issues of fact and law must be decided for the purposes of both interlocutory steps and an eventual trial. Consequently, the Plaintiff's pleading will frustrate the orderly advancement of this proceeding. It is so prolix and confusing that the material facts supporting the claim

> alleged against Darin Labrenz, Sean Tetzlaff, Mark O'Dea and Graeme Currie (the "**Individual Defendants**") cannot be located, to the extent the nature of the specific claims against them cannot be discerned.
>
> 2. Specifically, the Plaintiff's Amended Claim filed August 25, 2023 (the "**Amended Claim**") fails to set out a concise statement of the material facts giving rise to the Plaintiff's claim; is inordinately lengthy; is not in the mandatory form for a notice of civil claim; is replete with unnecessary and improper materials; makes pleas in the nature of evidence, argument, and narrative; and makes inconsistent allegations.
>
> [Bold in original.]

[18] In their second application, filed July 31, 2024, the Ds&Os seek two orders concerning the secondary market claim.

[19] The first is for an order striking the claim since leave has not been sought and granted, as required by s. 140.8 of the *Sec. Act.*

[20] The second, raised during oral argument as a corollary to the strike order concerning the secondary market claim, is for an order that leave to bring the secondary market claim must be brought by petition and not, as Ms. Larouche intends to do, by a notice of application in this action. The parties specifically asked me, as the case management judge, to determine the procedural issue (which they told me is one of first instance) even if I strike the secondary market claim from the ANOCC, since it impacts future interlocutory proceedings. I agree it makes sense to do so in the interests of efficiency, judicial economy, and economy for the parties, particularly since the issue was fully argued at the hearing. Other relief sought by the Ds&Os in their second notice of application (e.g., concerning the certification hearing) was adjourned.

[21] Through their application responses, the Underwriters also seek to strike the ANOCC (no objection was taken to the fact that they did not file separate notices of application). The primary contention of the May Offering Underwriters is that the ANOCC fails to disclose any cause of action against them. In the same vein as the Ds&Os, they (as an alternative position) and the September Offering Underwriters contend the ANOCC must be struck because it offends the basic rules of pleadings

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on account of its prolixity and impermissible use of irrelevant narrative, argument, legal conclusions, inconsistent allegations, and evidence.

[22] In sum, the relief sought by the Ds&Os and the Underwriters raises three matters for determination: (a) whether the ANOCC should be struck per Rule 9-5(1); (b) the consequences of failing to seek leave to pursue a secondary market claim under s. 140.8 of the *Sec. Act*; and (c) whether an application for leave under s. 140.8 may be brought by a notice of application within an existing proceeding. The first two issues can be addressed together in considering the application of Rule 9-5(1).

The Application to Strike Under Rule 9-5(1)

Rule 9-5(1)

[23] At any stage of a proceeding, a party may apply to strike some or all of another party's pleading per Rule 9-5(1), on one or more of the grounds set out in that Rule, excerpted below:

> **Rule 9-5 – Striking Pleadings**
>
> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[24] A claim may only be struck under Rule 9-5(1)(a) if it is plain and obvious that it discloses no reasonable cause of action, has no reasonable prospect of success, or is certain to fail: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. Under Rule 9-5(1)(b), a pleading may be struck if it does not establish the plaintiff's

cause of action, if it does not advance any claim known in law, if it is obvious the action cannot succeed, if it would serve no useful purpose and would result in a waste of court time and public resources, or if it is so confusing that it is difficult to understand what is pleaded. Similarly, an embarrassing pleading (Rule 9-5(c)) is one that is so irrelevant that to allow it to stand would involve useless expense and prejudice the trial by involving parties in a dispute apart from the issues. An abuse of the court's process (Rule 9-5(1)(d)) allows a court to prevent a claim from proceeding where it would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 at para. 58; *Sahyoun v. Ho*, 2015 BCSC 392 at paras. 57-63, aff'd 2015 BCCA 235; *Johnston v. Rykon Construction Management Ltd*., 2020 BCSC 572 at paras. 20-23. These principles apply to pleadings in proceedings brought per the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]: *Workers' Compensation Board v. Sort*, 2022 BCCA 318 at para. 101.

[25] Unless a pleading refers to a document (which may be viewed on the application because it forms part of the pleading itself), no evidence is admissible to determine an application brought under subrule 1(a). The facts alleged in the pleading are assumed will be proven true. The application will be considered on the basis of the pleading as it stands or as it may be amended: *Imperial Tobacco* at para. 22; *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 67; *Johnston* at paras. 17, 20; *Owimar v. Stewart*, 2019 BCSC 1198 at para. 17.

[26] When a pleading falls into any of the categories of problems enumerated in subrules (a)-(d), Rule 9-5(1) creates discretion for a court to order either that the pleading be struck out, or amended. The authorities on this point have cautioned that an order to strike is a "draconian remedy": *Sandhu v. Sidhu*, 2023 BCSC 1860 at paras. 23-24.

[27] To determine whether the primary and secondary market claims asserted in the ANOCC run afoul of Rule 9-5(1), it is necessary to review the elements of these

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claims under the *Sec. Act.* In doing so, it will be clear that the secondary market claim is a nullity and must be struck.

Primary Market Claims

[28] A primary market claim is founded on establishing a misrepresentation contained in a prospectus released by or on behalf of a reporting issuer or security holder. If it is, then s. 131 of the *Sec. Act* deems reliance on the misrepresentation and provides for a right of action for damages:

> **Part 16 — Civil Liability**
>
> **Liability for misrepresentation in prospectus**
>
> **131** (1) If a prospectus contains a misrepresentation, a person who purchases a security offered by the prospectus during the period of distribution
>
> (a) is deemed to have relied on the misrepresentation if it was a misrepresentation at the time of purchase, and
>
> (b) has a right of action for damages against
>
> (i) the issuer or a selling security holder on whose behalf the distribution is made,
>
> (ii) every underwriter that is in a contractual relationship with the issuer or selling security holder on whose behalf the distribution is made,
>
> (iii) every director of the issuer at the time the prospectus was filed,
>
> (iv) every person whose consent to disclosure of information in the prospectus has been filed, and
>
> (v) every person who signed the prospectus.
>
> (2) A person referred to in subsection (1) (b) (iv) is liable only with respect to a misrepresentation contained in a report, opinion or statement made by the person.
>
> …
>
> (4) A person is not liable under subsection (1) if the person proves that the purchaser had knowledge of the misrepresentation.
>
> [Emphasis added]

[29] A misrepresentation is defined in s. 1 of the *Sec. Act* to mean an untrue statement of a material fact, or an omission to state one that is required to be stated

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or necessary to prevent a statement that is made from being false or misleading in the circumstances in which it is made.

[30] A material fact is defined (s. 1) as a fact that would reasonably be expected to have a significant effect on the market price or value of the security.

Secondary Market Claims

Nature of the Claim

[31] Secondary market claims (per s. 140.3 of the *Sec. Act*) are also grounded on a misrepresentation. The ambit of liability is broad as it extends beyond a prospectus to a wide category of documents and public statements.

[32] A secondary market claim is authorized by s. 140.3(1) of the *Sec. Act* when a "responsible issuer" or person with actual, implied, or apparent authority to act on behalf of the issuer releases "a document" (not limited to a prospectus) that contains a misrepresentation. A person who acquires or disposes of the issuer's security between the time when the document was released and the time when the misrepresentation was publicly corrected has a right of action for damages. Reliance is deemed.

[33] "Document" is defined in s. 140.1 to mean any written communication, including those in electronic form (whether or not required by the *Sec. Act*) that is filed with the British Columbia Securities Commission ("Commission") or other government agency, as well as any other communication whose content would reasonably be expected to affect the market price or value of the security.

[34] The right of action lies against, *inter alia*: (a) the responsible issuer and each of its directors at the time the document was released; (b) each officer who authorized, permitted, or acquiesced in the release of the document; (c) any of the issuer's officers who authorized, permitted, or acquiesced in the release of the document; and (d) each influential person (and each of its directors and officers) who knowingly influenced the issuer or any person acting on the issuer's behalf: *Sec. Act*, ss. 140.3(1)(a)-(d).

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[35] In addition to misrepresentations in documents, s. 140.3(2) creates, *inter alia*, a right of action for misrepresentations in public oral statements related to the business or affairs of the issuer, if those statements were made by a person with actual, implied, or apparent authority to speak on the issuer's behalf. Similarly, s. 140.3(3) creates a right of action for misrepresentations in public oral statements made by an "influential person" (defined in s. 140.1 as a control person, promoter, or insider of the issuer) or someone with actual, implied, or apparent authority to speak on the influential person's behalf. Finally, s. 140.3(4) creates a cause of action when an issuer fails to make a timely disclosure.

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[36] Of particular importance to one of the objections raised by the Ds&Os and Underwriters to the ANOCC, multiple misrepresentations having a common subject matter or content may, in an action and in the discretion of the court, be treated as a single misrepresentation: *Sec. Act*, s. 140.3(6).

[37] The *Sec. Act* refers to both documents and "core documents". A core document is defined in s. 140.1 to mean specific documents, such as a prospectus, take over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of any such circular, a rights offering circular, management's discussion or analysis, an annual information form or information circular, and annual financial statements.

[38] The *Sec. Act* provides a separate defence for a misrepresentation in a document that is not a core document. For example, for a non-core document, a claimant must prove actual knowledge, or that the person who made the misrepresentation deliberately avoided acquiring knowledge of the misrepresentation, or through action or failure to act was guilty of gross misconduct in connection with the release of the document or oral statement: *Sec. Act*, ss. 140.4(1)-(4).

[39] Two of the enumerated defences to liability, regardless of the nature of the document, is where the claimant knew of the misrepresentation before the document was released (*Sec. Act*, s. 140.4(5)) and where the person making the

misrepresentation had no reasonable grounds to believe the document contained the misrepresentation (*Sec. Act*, s. 140.4(6)).

Leave Requirement

[40] Leave is required to commence an action asserting a secondary market claim: see s. 140.8, excerpted below. Notice to each proposed defendant must be given. Leave is granted only where the court is satisfied that the action is being brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff:

> **Leave to proceed**
>
> **140.8** (1) No action may be commenced under section 140.3 without leave of the court granted upon motion with notice to each defendant.
>
> (2) The court may grant leave only where it is satisfied that
>
> > (a) the action is being brought in good faith, and
> >
> > (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> [Bold in original]

[41] Affidavits setting forth the material facts upon which each party intends to rely may be filed. An affiant may be cross-examined in accordance with the *Rules*. A copy of the application for leave and affidavits must be sent to the Commission: *Sec. Act*, ss. 140.8(3)-(5).

[42] The case authorities are clear that leave is required before an action for a secondary market claim may be commenced: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 186 at paras. 8-13 [*Tietz SC 186*], 2021 BCSC 810 at paras. 6-8 [*Tietz SC 810*], 2021 BCSC 2275 at para. 47 [*Tietz SC 2275*], rev'd in part, *sub. nom. Tietz v. Affinor Growers Inc.*, 2022 BCCA 307 at para. 1 [*Tietz CA*].

[43] In *Tietz SC 186*, Justice Wilkinson explained that the requirement for leave under the *Sec. Act*, which is similar to securities legislation in Québec and Ontario, is "a robust screening mechanism which requires the plaintiff to show that there is a reasonable or realistic chance that the claim will succeed." She found the reasons of the Supreme Court of Canada in *Theratechnologies Inc. v. 121851 Canada Inc.*,

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2015 SCC 18 at para. 39, discussing the leave requirement in Ontario's securities legislation, informed the leave requirement in the *Sec. Act*. Her comments below are instructive for the Ds&Os' application to strike the secondary market claim portions of the ANOCC:

> [12] Leave of the court is not a formal or nominal requirement. It is a robust deterrent screening mechanism which requires a plaintiff to show that there is a reasonable or realistic chance that the claim will succeed. The leading authority setting out the test for leave is *Theratechnologies inc. v. 121851 Canada inc*., 2015 SCC 18. *Theratechnologies* considered the test for leave in the context of the Quebec securities legislation. This test has since been applied in the context of the Ontario securities legislation: *Canadian Imperial Bank of Commerce v. Green,* 2015 SCC 60 at paras. 122, 212. At para. 39 in *Theratechnologies,* Justice Abella, writing for a unanimous Court, explained:
>
>> [39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success - and the time and expense they impose - are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.
>
> [13] Because of the similarities between the wording in the Quebec and Ontario legislative provisions and their legislative histories and those of British Columbia, I am persuaded that the test for leave set out in *Theratechnologies* is equally applicable to the leave provisions under the *Act* in British Columbia.
>
> [Emphasis added]

See also *Tietz 2275* at paras. 19-20. 49-56.

[44] Failure to obtain leave is fatal.

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[45] A secondary market claim pleaded as a contingent claim requiring leave in a counterclaim in an existing action was struck in *Mercer Gold Corporation (Nevada) v. Mercer Gold Corp. (B.C.)*, 2012 BCSC 322. Justice Greyell struck the secondary market claim from the amended counterclaim, as opposed to staying it, pending the outcome of a leave application: *Mercer* at paras. 23, 26-27.

[46] As Justice Fitzpatrick points out in *Hougen Co. Ltd. v. Su*, 2024 BCSC 74 at paras. 37-40, where legislation requires leave to commence a claim (in that case, under the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]), a claimant has no capacity to bring it. Relying in part on *Owners, Strata Plan LMS 888 v. Coquitlam (City)*, 2003 BCSC 941, where Justice Cohen struck a pleading as a nullity because the strata corporation had not complied with the statutory prerequisites to bring the action (at para. 45), Fitzpatrick J. struck the pleading (at para. 86) as a nullity.

[47] Thus, those portions of the ANOCC referring to the secondary market claim must be struck, even though the pleading specifically acknowledges that leave is required.

[48] That leaves for determination under the Ds&Os' Rule 9-5(1) application whether the ANOCC otherwise complies with the *Rules*, and if not, whether Ms. Larouche should be permitted to deliver a revised draft ANOCC for review or whether the ANOCC should be struck with leave to apply to amend. This analysis requires a discussion of the *Rules* and case authorities concerning the appropriate form, content, and structure of pleadings.

Form, Content, and Structure of Pleadings

[49] The length of the ANOCC (71 pages consisting of 53 pages of substantive pleading, two schedules, and an appendix), disparaged by the Ds&Os in oral submissions, is not, on its own, evidence of prolixity. The issue is whether it offends the requirements for pleadings prescribed in the *Rules* and the case authorities.

[50] Rule 3-1(2) sets out the form, structure, and content requirements for notices of civil claim. The Rule requires a notice of civil claim to set out a concise statement

of the material facts giving rise to the claim, the relief sought, and the legal basis for the relief sought. This structure is reflected in Form 1 of Appendix A of the *Rules*, which sets out the prescribed form of a notice of civil claim.

[51] Rules 3-1(2)(a)-(c) and (g) require a notice of civil claim to also comply with Rule 3-7, which contains additional requirements for the content of any pleading. Relevant to the instant applications are these:

(a) a pleading must not contain evidence by which the facts alleged in it are to be proven: Rule 3-7(1);

(b) the effect of a document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the document or conversation must not be stated unless those words are themselves material: Rule 3-7(2);

(c) a party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading: Rule 3-7(6);

(d) alternative allegations may be pleaded: Rule 3-7(7);

(e) conclusions of law must not be pleaded unless the material facts supporting them are pleaded: Rule 3-7(9);

(f) matters arising since the start of a proceeding may be pleaded: Rule 3-7(5);

(g) if general damages are claimed, the amount claimed must not be stated in any pleading: Rule 3-7(14);

(h) where misrepresentation or fraud are alleged, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading: Rule 3-7(18);

(i) if particulars required of debt, expenses, or damages are lengthy, the party pleading may refer to this fact and instead of pleading particulars, must serve

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them in a separate document either before or with the pleading: Rule 3-7(19); and

(j) particulars need only be pleaded to the extent that they are known at the date of the pleading; further particulars may be served after they become known: Rule 3-7(20).

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[52] Pleadings are foundational to the fundamental principle of procedural justice that a litigant should have notice of the case against it. The case authorities emphasize the importance of precision and conciseness: see, e.g., *Mercantile* at paras. 22-23; *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2020 BCSC 1037 at para. 15(e); *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.) at paras. 5-11; *Johnston* at paras. 7-11.

[53] In *Johnston*, Justice Adair made these apposite remarks:

> [11] The requirement that the statement of material facts and the summary of the legal basis be "concise" emphasizes the importance of stating clearly everything that is necessary, but not more. Going beyond a concise statement or summary creates the risk that what is essential will get lost in the superfluous. It is not conducive to defining and limiting the issues in the case. It is incompatible with the goal of efficient resolution of issues on their merits: see Rule 1-3. The court or the adverse party should not have to hunt through many paragraphs to find the concise statement of the essential elements of a claim.
>
> [Emphasis added]

[54] Material facts are the elements essential to formulate a claim or cause of action: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54; *Young v. Borzoni et al.*, 2007 BCCA 16 at para. 20; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 9; *Jones v. Donaghey*, 2011 BCCA 6 at para. 18; *Muldoe v. Derzak*, 2021 BCCA 199 at para. 31. Material facts in this class action proceeding are not defined only by the ambit of materiality ascribed by the *Sec. Act.* In the context of pleadings, material facts tell the defendant "who, when, where, how and what gave rise to liability": *E.B. v. British Columbia (Child, Family*

and Community Services), 2021 BCCA 47 at para. 65; see also, *Kindylides v. Does*, 2020 BCCA 330 at para. 34.

[55] Evidence relevant for trial and material facts required for a pleading are also two different things. When several causes of action are alleged against multiple parties, a notice of civil claim or third-party notice must clearly identify what facts relate to what cause of action and to which party. Material facts should be clearly pleaded and not left to be deduced from the form in which the pleading is framed: *Johnston* at paras. 13-15; *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd.,* 2016 BCSC 2089 at para. 22; *Mercantile* at para. 49.

[56] Where appropriate, narrative is permissible in a pleading, even though they include information that is not strictly necessary or proper. As Justice Voith said in *Mercantile* at para. 43, "Drafting a pleading is not a mathematical exercise. It involves the exercise of judgment and it requires some degree of flexibility." In this respect, Rule 22-3(1) confirms that the forms in Appendix A or A.1 of the *Rules* may be varied "as the circumstances of the proceeding require." Nonetheless, as Voith J.A. cautioned at para. 44 of *Mercantile*, "a reasonably disciplined exercise" in drafting is required, which is governed "in many instances in mandatory terms, by the *Rules* and the relevant authorities."

[57] Justice Voith's salutary instructions concerning the purpose and objectives of pleadings, excerpted below, cannot be overemphasized:

> [20] I have addressed these various Rules and their accompanying forms at some length because they establish how comprehensive and prescriptive the requirements for specific categories of pleadings are. These formal and content-based requirements are neither anachronistic nor technical. Instead, they are necessary and serve to further the purposes of the *Rules*. Those purposes and their importance have been expressed on numerous occasions by both this Court and by trial judges.
>
> [21] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.
>
> [22] Pleadings also give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540 at paras. 22–23. They enable the parties and the court "to ascertain with precision the matters on

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> which parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182 at para. 55, citing D.B. Casson & I.H. Dennis, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75–76.
>
> [23] For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 15–22; *Shoolestani v. Ichikawa*, 2018 BCCA 155 at para. 30; *Weaver v. Corcoran*, 2017 BCCA 160 at para. 63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: Frederick M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) (loose-leaf updated 2021) at 3–6; *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at paras. 17–18, aff'd 2016 BCCA 52.
>
> [Emphasis added]

[58] In his reasons in *Mercantile*, Voith J.A. also recognized (at para. 49) that there may be times when, "as a practical matter, some limited evidence may be necessary to make a pleading more comprehensible" but also cautioned that "what evidence may be relevant at trial and what material facts are relevant for the pleading are two different things." Evidence and arguments unrelated to material facts "have no place in" a pleading: *Mercantile* at para. 52.

Analysis

Part 1 of the ANOCC

[59] As mentioned above, Form 1 of Appendix A of the *Rules* sets out the prescribed form of a notice of civil claim that mirrors Rule 3-1(2). In *Mercantile*, Voith J.A. said, at para. 16, that Rule 22-3(1) requires that pleadings "adhere, 'with variations as the circumstances of the proceeding require', to the structure prescribed by a specific rule and its corresponding form."

[60] Here, the heading used in the ANOCC for Part 1 does not comply with Appendix A. The heading describes Part 1 as "NATURE OF THE ACTION". Appendix A does not prescribe a section that sets out the nature of the action. It

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requires a statement of facts (in Part 1), the relief sought (in Part 2), and the legal basis for the claim and relief sought (in Part 3).

[61] A departure from Form A to include an overview of the nature of a complex action in order to facilitate conciseness would not, of itself, be automatic grounds to strike it from the pleading. The difficulty with the ANOCC is that Part 1 mirrors and, in some instances, duplicates facts set out in the statement of facts section that follows in Part 2.

[62] Part 1 also contains a description of the causes of action alleged against the defendants which are described in more detail in the legal basis section, found in Part 4 of the ANOCC. This repetition creates confusion, as it can leave the reader questioning whether a previous allegation is merely being repeated, or whether a new allegation is being asserted.

[63] Compounding the confusion in Part 1 is that nothing is tied to liability for a misrepresentation in a prospectus, core document, document, or public statement provided for in the *Sec. Act.* Without an understanding of the provisions of the *Sec. Act*, the pleading appears to contain inconsistent allegations.

[64] By way of example, para. 2 of Part 1 alleges that PGM's "disclosure documents" (which are undefined) issued during the relevant timeframe (March 31, 2021 – October 31, 2021, defined in the ANOCC as the "class period") contained "a misrepresentation". The reader is left with the impression that the claim concerns a singular misrepresentation. Yet, in the preceding paragraph of the ANOCC, the allegation is framed in the plural, stating the class proceeding "arises out of the Defendants' false and misleading statements and representations in the disclosure documents [also not defined] of [PGM] issued between March 31, 2021 and October 31, 2022, inclusive…"

[65] Without more, these two paragraphs of Part 1 appear inconsistent and, upon reading the rest of the pleading, inconsistent with allegations elsewhere referring to

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false and misleading representations framed in the plural, thus offending the prohibition against inconsistent pleadings.

[66] Another difficulty with Part 1 is that it includes legal conclusions (seemingly based on admissions from some of the defendants) not tied to material facts. As pointed out above, legal conclusions may be pleaded only where the material facts supporting them are set out, which in this case, does not occur, and then only to a limited degree, until other parts of the ANOCC.

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Remainder of the ANOCC

[67] The remainder of the ANOCC also presents as a confusing mosaic of allegations of multiple misleading and false representations (including forward-looking statements), containing:

(a) legal conclusions based on admissions not always tied to material facts;

(b) lengthy narrative that at times includes information of questionable relevance (e.g., PGM's prior *CCAA* proceeding);

(c) what appears on its face to be improper pleading of evidence;

(d) at times referring to "the defendants" as a group without consistently specifying their alleged liability (e.g., tied to a specific prospectus) under s. 131 of the *Sec. Act*;

(e) the inappropriate use of schedules that include lengthy documents, including an unofficial transcript of an interview with one of the Ds&Os;

(f) a negligence claim that does not differentiate between the duty of care owed by PGM, by the specific Ds&Os, and by the Underwriters against whom this cause of action is asserted; and

(g) a vicarious liability claim not supported by material facts.

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[68] It was only during the course of fulsome oral submissions on behalf of Ms. Larouche, explaining the basis of the claim in relation to specific provisions of the *Sec. Act* and what facts are material and why, that the seeming inconsistencies, the connection between legal conclusions and admissions, and the legal basis of the claim against the defendants became clear.

[69] Ms. Larouche is not limiting herself to a claim involving a singular misrepresentation in a prospectus. Her claim is predicated on numerous statements made by or on behalf of PGM in the class period (including false and misleading statements) concerning PGM's liquidity crisis and its "operational deficiencies", and the failure to rectify them in correctional disclosures, to establish that a misrepresentation (including those having a common subject matter or content per s. 140.3(6)) is contained in both the April 2021 Prospectus and September 2021 Prospectus (and thereby engage the deemed reliance and the right of action provisions in s. 131).

[70] Thus, for the April 2021 Prospectus, the claim is against PGM (now ResidualCo), the Ds&Os, and the May Offering Underwriters under s. 131 of the *Sec. Act*. For the September 2021 Prospectus, the claim, also predicated on s. 131, is against ResidualCo, the Ds&Os, and the September Offering Underwriters.

[71] The difficulty is that while allegedly misleading representations concerning PGM's alleged "severe cash and liquidity constraints" can, in a general sense, be gleaned from the ANOCC, the material facts concerning PGM's alleged operational deficiencies cannot, leaving the reader to wonder what constitutes all of the material facts supporting this aspect of the claim. I was told in oral submissions that at this juncture, Ms. Larouche is unable to identify the precise nature of every operational deficiency until examinations for discovery are completed. Ms. Larouche correctly pointed out that material facts may be pleaded as they become known: see Rule 3-7(20). At present, what I can glean from reading the ANOCC is that PGM's operational deficiencies that should have been disclosed prior to or during the class period are that PGM lacked a proper "definition drilling program", commenced drilling

at the wrong end of the mineral deposit, and failed to follow the recommendations set out in a technical report. According to the ANOCC, these deficiencies resulted in a persistent shortage of access to high-grade ore, adversely impacted production, and caused increased costs, all resulting in a liquidity crisis; all of which allegedly should have been disclosed.

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[72] The ANOCC also does not clearly identify all material facts supporting the claim against the May Offering Underwriters, since the ANOCC fails to make clear what facts those defendants knew or ought to have known when the April 2021 Prospectus was issued, or what they failed to disclose through a correctional disclosure. The May Offering Underwriters interpret the ANOCC to allege that the operational deficiencies were not discovered by PGM until September 2021, months after the April 2021 Prospectus was issued. On this point, the May Offering Underwriters drew my attention to a decision of the Ontario Superior Court issued in the context of an application for leave to commence a secondary market claim under Ontario securities legislation: *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515 at para. 55. To draw from those reasons, a corporate defendant and its executives can be liable for a misrepresentation by omission if they were not aware of material facts they negligently failed to disclose, but a failure to disclose facts that are unknowable because they do not exist or are undiscoverable cannot form the basis of a viable claim.

[73] For the Private Placement, the claim is based in negligence against PGM, two of the Ds&Os, and certain Underwriters for their alleged breach of their alleged duty of care owed to those class members who invested in PGM through the purchase of its shares consequent on the Private Placement. The nature of the duty of care, which I was told in submissions is similar to the duty alleged in *Catucci c. Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870 (see paras. 298-305), that withstood challenge, is specifically pleaded in the Legal Basis of the ANOCC:

> 15. The Defendants' duty of care owed to the Class Members who participated in the February 2022 Private Placement required them to conduct appropriate investigation and diligence and ensure that [PGM's] securities would be issued, distributed and sold to investors only after general

disclosure of the material facts and information concerning its operations that would affect the price of its securities.

[74] Presumably, the same duty of care is alleged to be owed by each of the defendants against whom the negligence claim is made. Whether a claim framed in that way, based on an identical duty of care, could withstand a Rule 9-5(1)(a) application (i.e., no reasonable prospect of success) was not argued on this application.

[75] The material facts grounding a separate vicarious liability claim advanced against PGM for the acts and omissions of all of the Ds&Os and of PGM's "other directors, officers, employees and agents" are unclear from reading the ANOCC and were not adequately explained in oral submissions. The same is true of the vicarious liability claim advanced against each of the Underwriters for "the acts and omissions of its respective directors, officers, employees, and agents."

Disposition

[76] The explanation provided on behalf of Ms. Larouche in oral submissions does not supplant the requirements set out in the *Rules* and the case authorities for a proper pleading. Respectfully, it is no answer to say, as Ms. Larouche does, that the pleading is thoroughly comprehensible to defence counsel because they are highly experienced in the defence of claims brought under the *Sec. Act*. It is the defendants who must know the case they have to meet from a concise pleading of those facts alleged to be material, the legal conclusions based on those material facts, and the legal basis of the claim.

[77] It is also inappropriate to include wholesale reproductions of documents and the entirety of an unofficial transcript of a journalist's interview with a D&O on the basis that, as Ms. Larouche contends, "every word is material". This confuses material facts from facts relevant to assist in proving liability at trial.

[78] The question is whether I should strike the ANOCC with leave to Ms. Larouche to apply to file a further amended pleading or adjourn the application

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to allow her to draft and tender to the defendants and the court for review a new proposed pleading. The defendants advocate for the former and Ms. Larouche, who concedes that some aspects of her pleading need to be revised, seeks the latter.

[79] Despite the problems I have identified with the ANOCC, this is not a case, unlike others where the pleading was struck, where the essential nature of the claim is undecipherable or obscured in the pleading, is comprised of speculative and fanciful allegations or assumptions, is so replete with irrelevant allegations, or confusing to the point of being vexatious, embarrassing, or an abuse of process: see, e.g., *Johnston* at paras. 21-22; *Owimar* at paras. 19-24. For example, this case is not akin to *Johnston,* where a breach of contract claim was pleaded without pleading the key terms of the contract grounding allegations of contractual duties owed by certain defendants to the plaintiff in the statement of facts, and where parties not alleged to be parties to the contract were alleged to owe duties under it: *Johnston* at para. 32-33.

[80] It cannot be said at this juncture that the s. 131 and negligence claims have no reasonable prospect of success so as to engage what some of the case authorities describe as the "draconian remedy" provided for in Rule 9-5(1). In *Johnston*, at para. 18, Adair J. characterized the power to strike a claim that has no reasonable prospect of success as a "valuable tool [that] must be used with care." Citing *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.), Adair J. said at para. 20, "A motion to strike will be considered on the basis of the pleading as it stands <u>or as the pleading may be amended</u>." [Emphasis added]

[81] Although framed in the context of Rule 22-7 (non-compliance with the *Rules*), I am mindful of Justice Matthews' instructive and, in my view, apposite caution, in one of the cases contained in the parties' book of authorities, *Sandhu v. Sidhu*, 2023 BCSC 1860. In respect of an application to dismiss a claim for failing to comply with the *Rules*, Matthews J. said that dismissing the claim, which would be the effect in this case if the ANOCC is struck, for failing to comply with the *Rules* is a draconian remedy to be used sparingly and in egregious cases:

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> [23] The appellate authorities make it clear that an order dismissing a claim or striking out a response is a draconian remedy to be used sparingly: *Barrie* v. *British Columbia (Forests, Lands and Natural Recourse Operations)*, 2021 BCCA 322 at para. 103; *House of Sga'nisim* v. *Canada (Attorney General),* 2007 BCCA 483 at para. 28; *Besic* v. *Kerenyi,* 2012 BCCA 187 at paras. 16–17 and 20–22; *Homer Estate* v. *Eurocopter S.A.,* 2003 BCCA 229 at para. 4; and *Dhillon* v. *Pannu,* 2008 BCCA 514.
>
> [24] The reason to resist dismissal where there is non-compliance with the Supreme Court Civil Rules and/or a court order is because the goal of the justice system is to try matters on their merits. However, an order of dismissal for failure to comply with the Supreme Court Civil Rules is appropriate in egregious cases such as multiple flagrant and unexcused breaches of the rules and/or orders of the court, because a merits-based determination may not be possible if the rules and court processes are continuously frustrated.
>
> [Emphasis added]

[82] In the case at bar, the ANOCC clearly states the overarching nature of the primary market claim: the April 2021 Prospectus and September 2021 Prospectus each contain a misrepresentation concerning the financial and operational ability of PGM to carry out its mining program and each misrepresentation was not remedied by correctional disclosures. Under s. 131 of the *Sec. Act*, a cause of action lies against each of the defendants involved with each prospectus (directly as Ds&Os or the Underwriters through their contracts with PGM); reliance is deemed. The scope of the duty of care is also alleged in the negligence claim. It is not plain and obvious, at least not at this stage, that the negligence claim has no reasonable prospect of success and will fail: *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252 at para. 209. Similarly, I am not satisfied that at this juncture, the ANOCC should be struck per Rules 9-5(1)(b), (c), or (d). In these circumstances, to strike the ANOCC before allowing Ms. Larouche the opportunity to draft a pleading that conforms with the *Rules* may engage a limitation period (see, e.g., *Sec. Act*, s. 140.94(1)) that was otherwise suspended when the class proceeding was commenced: see *CPA* ss. 38.1-39; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras. 18, 171-172, 210.

[83] The exception is the vicarious liability claim. Given the absence of any material facts to understand the essential nature of the broad ambit of this claim,

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which is grounded in part on unidentified acts of unidentified "officers, employees, and agents," it should be struck, with liberty to apply to amend.

[84] Apart from the secondary market and vicarious liability claims, I have determined that the application should be adjourned to permit Ms. Larouche to prepare and deliver to the defendants a draft further amended notice of civil claim concerning the primary market and negligence claims that specifically conforms with the *Rules*. It should follow the form in Appendix A (i.e., it should not include Part 1: Nature of the Action), avoid the appearance of inconsistencies, identify the specific material facts supporting each claim, avoid the use of schedules to attach documents untethered to material facts, properly identify the material facts upon which legal conclusions are based, and state with precision the duty of care owed by which defendant.

[85] In order to move this case forward as promptly as possible, that draft should be delivered to the defendants as close to one month's time as possible, which, taking into account the holiday in November, shall be no later than November 15, 2024. Following their review of the document, the defendants should then advise me as soon as possible, through Vancouver Scheduling, whether they wish to reset this application or will consent to the draft further amended pleading being filed.

<u>**Leave to Bring a Secondary Market Claim**</u>

Analysis

[86] As mentioned above, according to counsel, the question of whether the leave application may be brought by a notice of application in an existing action or must be sought by petition has not been decided in any case authority they could find.

[87] The Ds&Os contend that the answer is found on a plain reading of Rule 2-1(2)(b), which states that "a person <u>must</u> file a petition" where "the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court …". [Emphasis added]

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[88] In this respect, the Ds&Os brought to my attention certain case authorities, decided in other statutory contexts, referring to the hearing of such a petition as an "application": see, e.g., *Cepuran v. Carlton*, 2022 BCCA 76 at para. 157 [*Patients Property Act*, R.S.B.C. 1996, c. 349, ss. 3, 5]; *Gates v. Sahota*, 2018 BCCA 375 at paras. 42-43, leave to appeal ref'd [2018] S.C.C.A. No. 505 [*Residential Tenancy Act*, S.B.C. 2002, c. 78, s. 58]; *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at para. 41 [*Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330, ss. 15, 17]; *Chancellor v. Maynes*, 2021 BCSC 391 at para. 58 [*BCA*, ss. 324-325]; *Starr Insurance v. Granfar*, 2024 BCSC 1051 at para. 19 [*Insurance Act*, R.S.B.C. 2012, c. 1, s. 12(8)].

[89] Additional interpretive guidance supporting the Ds&Os' position concerning legislative intent is also taken from Rules 16-1(8) and 16-1(13), which refer to the hearing of a petition as an "application":

> **Part 16 — Petition Proceedings**
>
> **Rule 16-1 — Petitions**
>
> **<u>Setting application for hearing</u>**
>
> (8) <u>A petitioner wishing to set a petition down for hearing</u> must,
>
> (a) in the case of a petition to which no response to petition has been served under subrule (4) (c), file a notice of hearing in Form 68 at any time before the hearing of the petition, or
>
> (b) in the case of a petition to which a response to petition has been filed and served under subrule (4) (c), file a notice of hearing in Form 68, and serve a copy of the filed notice of hearing on each petition respondent, at least 7 days before the date set for the hearing of the petition.
>
> …
>
> **If <u>petition respondent's application</u> is to be heard at the hearing**
>
> (13) If a petition respondent intends to set an <u>application</u> for hearing at the same time as the hearing of the petition, the parties must, so far as is possible, prepare and file a joint petition record and agree to a date for the hearing of both applications.
>
> [Bold in original; underlying emphasis added]

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[90] The Ds&Os correctly point out that it is appropriate for leave applications to be heard in the context of a petition even where the evidence is in conflict raising a *bona fide* triable issue. It is no longer the case that a matter will be referred to the trial list, resulting in a delayed hearing, which in turn could impede the timeliness of an existing action.

[91] The law concerning the procedure to follow where conflicts on the evidence create *bona fide* triable issues in petition proceedings has evolved since *Saputo*. In that case, the Court of Appeal held that a petition must be referred to the trial list where a *bona fide* triable issue is raised. In a subsequent decision of the Court of Appeal in *Cepuran*, Justice Griffin, writing for a five-member panel, said that hybrid procedures are available in petition hearings, including discovery of documents and witnesses:

> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29–30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.
>
> [159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
>
> [160] <u>To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.</u>
>
> [Emphasis added]

[92] As a result of *Cepuran*, orders may be made compelling cross-examination on affidavit and discovery of witnesses and documents without having to refer the matter to the trial list.

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[93] Ms. Larouche, on the other hand, says it is perfectly proper to bring the leave application through a notice of application filed in this action. She submits the interplay between the legislature's use of the word "motion" in s. 140.8(1) of the *Sec. Act* and Rule 1-2(4) supports her position.

[94] The statutory reference to "motion" in s. 140.8 is excerpted below:

> **140.8** (1) No action may be commenced under section 140.3 without leave of the court granted upon motion with notice to each defendant.
>
> [Bold in original; underlining emphasis added]

[95] Ms. Larouche contends that since motions are interlocutory applications brought by notices of application in existing actions (and governed by Part 8 of the *Rules*), and since s. 140.8 was enacted long before *Cepuran* was decided, the legislature intended that the leave applications could be brought by a notice of application in an existing action.

[96] Further, Ms. Larouche says Rule 1-2(4), also excerpted below, is clear that Part 8 of the *Rules*, dealing with notices of application, applies where the application does not seek a final order:

> **Petitions and applications**
>
> (4) If an enactment, other than these Supreme Court Civil Rules or the Supreme Court Family Rules, authorizes an application to the court or to a judge, the application must be
>
> > (a) by petition under Rule 16-1 or requisition under Rule 17-1, or
> >
> > (b) if the application is for an order other than a final order, by application under Part 8,
>
> whether or not the enactment provides for the mode of application.
>
> [Emphasis added]

[97] She asserts that since the Court of Appeal determined in *Tietz CA* that an order granted on a s. 140.8 leave application is not a final order, Part 8 clearly applies such that she is able to file in this action her extant draft notice of application seeking leave.

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[98] In *Tietz CA*, Justice Willcock concluded that an order granting leave is not a final order, and disagreed with the chambers judge that hearsay evidence is inadmissible: *Tietz CA* at paras. 86-91. In his reasons, Willcock J.A. said:

> [89] Further, I am of the view that hearsay evidence is not presumptively inadmissible on an application for leave to bring secondary market claims. The leave provision appears in Division 4 of Part 16.1 of the *Securities Act,* which addresses "Procedural Matters". The granting of leave does not determine the merits of the proposed secondary market claim. While the dismissal of an application for leave has final effect, the order sought is not final, and hearsay evidence may be submitted in support of the order sought.
>
> [90] This Court concluded, in *Primex Investments Ltd. v. Northwest Sports Entertainment Ltd.* (1995), 23 B.C.L.R. (3d) 251, 1995 CanLII 2383 (C.A.), that an order granting leave to bring a derivative action is not a final order. Under s. 225 of the *Company Act*, R.S.B.C. 1979, c. 59 (now s. 232 of the *BCA*), leave may be granted to commence a derivative action and permit *bona fide* and *prima facie* meritorious claims to proceed against corporations—a very similar order to the one sought here.
>
> [Emphasis in original]

[99] Even though dismissal of a leave application results in a final order, the reasons in *Tietz CA* point out that it is the nature of the order sought, as opposed to the result, that is important.

[100] Does this mean, as Ms. Larouche argues, that the effect of *Tietz CA* is that Rule 1-2(4)(b) is engaged so that Part 8 governs?

[101] A brief review of the proceedings in *Tietz* is necessary to put the Court of Appeal's determination in its proper context.

[102] Unlike this case, in *Tietz*, the putative class plaintiff sought leave to proceed with a secondary market claim through a petition. The plaintiff also included its proposed secondary market claim in a draft amended pleading: see *Tietz SC 186* at para.1; *Tietz SC 2275* at paras. 1-2. However, for convenience, when arguing the leave application, counsel referred to the allegations grounding the secondary market claim contained within the proposed amended notice of civil claim: *Tietz SC 186* at para. 1.

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[103] The leave issue was not determined in *Tietz SC 186* but in a subsequent hearing that resulted in Wilkinson J.'s reasons in *Tietz SC 2275*. It is in those reasons that Wilkinson J. discussed the procedural issue in the context of the petitioners' request to grant leave on a *nunc pro tunc* basis, which is a discretionary remedy that includes considerations of notice and prejudice:

> **Leave sought *nunc pro tunc***
>
> [366] Each of the petitioners seek leave, if granted, to be *nunc pro tunc* to July 11, 2019, the date of the filing of the NOCC. *They submit that the NOCC, which included the statutory claims, was done so based on a misapprehension of the procedure required under R. 15 of the Supreme Court Civil Rules, that applications be brought by way of petition. They had assumed an application could be brought within the NOCC process, a procedure apparently followed in other jurisdictions which regularly determine these types of statutory claims.*
>
> [367] *I find that the respondents have been put on adequate notice of this irregularity, in fact it was one of the initial respondents which brought this irregularity to the petitioners' attention*. I do not find that the failure to bring the leave application prior to including the statutory claims within the Proposed Class Action was an irregularity that has prejudiced the respondents. This matter is case managed and the Court along with the respondents were alerted to the irregularity and the petitioners' intention to seek correction.
>
> [368] Where I have granted leave to bring statutory claims, I grant that leave *nunc pro tunc* to July 11, 2019.
>
> [Bold and underlining in original; italics emphasis added]

[104] Justice Wilkinson did not remark on whether a leave application could have been brought by notice of application. I take it from the tenor of her remarks that she did not question the correctness of the petitioners' acknowledgement that leave must be sought by petition.

[105] Nor did the Court of Appeal in *Tietz CA* deal with the point in its reasons; possibly because, as I was told by counsel, it was not raised as an issue on appeal.

[106] At the conclusion of the hearing, counsel agreed to search for authorities or materials that may bear on the question (e.g., Law Reform Commission papers), and have advised the only item of interest they located was the *Canadian Securities Administrators Notice 53-3-2* ("*CSA Notice*"). The *CSA Notice* discusses proposed amendments to provincial securities legislation, which closely mirror the

amendments eventually adopted in Ontario and, later, British Columbia. Counsel drew my attention to page 12 of the *CSA Notice,* which recommends a "screening mechanism" to deter and prevent unmeritorious secondary market claims. Although the proposed screening mechanism is similar to s. 140.8 of the *Sec. Act.*, the *CSA Notice* does not address the procedural issue raised on this application.

[107] Certain excerpts from the debates in the legislature of this province have since come to my attention that bear somewhat on the issue. Counsel were notified of those debates and given opportunity to provide submissions.

[108] To the extent the extra step of seeking leave through a petition proceeding, as opposed to an existing action asserting a companion primary market claim, may seem in contrast to the stated object of the *Rules* ("to secure the just, speedy and inexpensive determination of every proceeding on its merits": Rule 1-3(1)), excerpts from debates of the legislative assembly found in *Hansard* (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38th Parl., 3rd Sess., Vol. 23, No. 2 (23 October 2007) at 8746-7), show that the legislature intended a gatekeeping function not wholly dependant on the processes in the *Rules* in order to prevent meritless actions from being commenced:

> **L. Krog:** If we can just go back to 140.8 on page 19. My reading of this is that you can't start such an action unless you have leave of the court. In other words, I can't just go into my lawyer's office…. Assuming I do have deep pockets and can afford to commence this litigation, I have to go to court and ask for leave in order to commence the action. I read it to refer to what is essentially the whole remedial section of this bill, which is liability for secondary market disclosure.
>
> I just wonder if the Attorney General can confirm that that's the case. In other words, it's not like an ordinary lawsuit. I have to get leave first, and if I get leave, then I can proceed.
>
> **Hon. W. Oppal:** Yes, leave would be needed. This really prevents an action from being commenced
>
> [Page 8747]
>
> without leave of the court and is intended to prevent actions without merit from being brought in. It protects the defendants. It's the old "Frivolous and vexatious" section that's there now in the Supreme Court rules.
>
> **L. Krog:** When courts have legislation in front of them, they take direction from that legislation. They follow; they interpret. The provisions

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> relating to frivolous and vexatious actions…. The last time I checked they were still in the Supreme Court rules. That remedy is still available for anyone commencing an action in British Columbia.
>
> It strikes me that when this Legislature includes a specific provision related to this newly created statutory right, you in fact are expanding, if you will, the blockades to someone commencing an action. In other words, you're putting one more procedural roadblock in front of what the Attorney General is telling us today is a new remedy which is good for business and good for investment. I mean, this is an extra roadblock to bringing an action that I would submit is already covered by the Supreme Court rules.
>
> I just want to hear the Attorney General tell me if I'm wrong or right, and I'm always delighted to hear whether I'm wrong or right.
>
> **Hon. W. Oppal:** This section is really there to create a balance. In fairness to those people who may be defendants, it prohibits an action from being commenced without leave of the court, if the defendant is frivolous, particularly in this era of contingency fee agreements. It's protection against frivolous lawsuits.
>
> I recognize that the rules in the Supreme Court allow for a similar remedy, but the fact is that we are harmonizing our legislation with other provinces, and other provinces have this same provision.
>
> [Emphasis added]

[109] Ms. Larouche submits this exchange between Mr. Krog and Attorney General Oppal illustrates that the legislature's intent was to harmonize this province's securities legislation with that of Ontario, and that our courts should therefore adopt the procedures used by Ontario where leave applications are heard by motions.

[110] However, as the parties pointed out in their oral submissions, the rules of civil procedure differ between the two provinces (e.g., in Ontario, leave to commence an action is sought by way of a motion as opposed to a petition). The legislature's desire to harmonize securities legislation cannot – without more – be taken as a desire to import Ontario's procedural approach into this province.

[111] In light of these differences in the rules of civil procedure, the legislature's intent to harmonize the substance of BC's securities legislation does not mean there was a corresponding intention to harmonize procedure.

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[112] Considering the issue as one of first instance, I must turn back to the specific words used in the legislation. Section 140.8 states that <u>no action may be commenced</u> without leave.

[113] Since no action for a secondary market claim may be commenced without leave, an attempt to do so in an extant notice of civil claim or amendment to it results in a nullity because the party asserting it has <u>no capacity</u> to bring the claim: see *Hougen* at paras. 37-40. It is wholly different from a situation where a party who has capacity to advance a cause of action, seeks leave to add to it by amendment to a notice of civil claim in an existing action.

[114] Thus, since <u>no action</u> may be commenced, Part 8 of the *Rules* governing extant actions is inapplicable, even though the order sought is not, per *Tietz CA*, a final order.

[115] Consequently, seeking leave to commence an action advancing a secondary market claim through a petition is the appropriate procedure in this province.

[116] If leave is granted, then the secondary market claim might, where appropriate, be included by amendment to an existing notice of civil claim or, if brought in a companion action to an existing claim, joined to be heard alongside it, per Rule 22-5 (which permits joinder of proceedings in appropriate circumstances).

[117] One of the concerns I identified to counsel during the hearing was that determining the merits of the leave application at a hearing of the petition, where the facts underlying the secondary market claim appear so intertwined with the s. 131 and negligence claims, might result in findings that could impede the prosecution or defence of those claims in the existing action or engage concerns over the possibility of inconsistent findings of fact. As mentioned above, Rule 22-5 permits joinder of proceedings in appropriate circumstances. At the hearing, I questioned whether a petition (mirroring her extant draft notice of application) filed by Ms. Larouche seeking leave should be joined with this action. I accept the Ds&Os' submission that absent consent, the propriety of joinder should be determined at a subsequent

application where the question can be argued based upon the petition, response, and application materials.

Disposition

[118] The s. 140.8 leave application must be brought by way of petition. If the circumstances warrant, the petition may be joined with the main action per Rule 22-5. I agree with the Ds&Os that the question of joinder is not something that can or should be determined at this juncture. Absent consent to joinder, that issue should be the subject of a subsequent application once the petition and supporting materials are in hand.

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Summary

[119] Except for “Part 1: Nature of the Action,” the secondary market claim, and that part of the ANOCC advancing the vicarious liability claim, I have determined that it is not appropriate at this juncture to strike the remainder of the ANOCC. Instead, the Ds&Os’ application to strike is adjourned pending delivery of a draft further amended document to the defendants by November 15, 2024.

[120] Part 1 of the ANOCC and the vicarious liability claim in it are struck.

[121] If Ms. Larouche intends to pursue a vicarious liability claim, she must apply for leave to amend.

[122] The portions of the ANOCC that refer to a secondary market claim are also struck as a nullity for failing to obtain leave under s. 140.8 of the *Sec. Act*.

[123] Ms. Larouche’s intended application for leave to commence the secondary market claim must be brought by petition. If Ms. Larouche intends to seek joinder per Rule 22-5, absent consent, she should do so by notice of application after the petition, response, and application materials are filed and served.

“Walker J.”