COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029157-203
(500-06-000693-149)

DATE: December 19, 2022

CORAM: THE HONOURABLE MANON SAVARD, C.J.Q.
MARTIN VAUCLAIR, J.A.
FRÉDÉRIC BACHAND, J.A.

ANAS NSEIR
APPELLANT – Petitioner
v.

BARRICK GOLD CORPORATION
AARON REGENT
JAMIE SOKALSKY
AMMAR AL-JOUNDI
PETER KINVER
RESPONDENTS – Respondents

JUDGMENT

---

[1] Mr. Nseir appeals against a judgment of the Superior Court, district of Montreal (the Honourable Mr. Justice Thomas M. Davis), dismissing his application for authorization to institute a class action.

[2] For the reasons of Bachand, J.A., with which Savard, C.J.Q. and Vauclair, J.A. agree, **THE COURT:**

[3] **ALLOWS** the appeal in part, with legal costs;

[4] **SETS ASIDE** the judgment of the Superior Court and, rendering the judgment that should have been rendered;

[5] **REPLACES** the conclusions of that judgment with the following:

> [328] **GRANTS** in part the petitioner's re-re-amended consolidated request for authorization to institute an action for damages under sections 225.2 *et seq.* of the *Securities Act*, CQLR, c. V-1.1;
>
> [329] **AUTHORIZES** the petitioner to institute an action for damages under sections 225.2 *et seq.* of the *Securities Act*, CQLR, c. V-1.1, against the respondents Barrick Gold Corporation, Jamie Sokalsky and Ammar Al-Joundi;
>
> [330] **GRANTS** in part the petitioner's re-re-amended consolidated application for authorization to institute a class action;
>
> [331] **AUTHORIZES** the petitioner's action for damages under sections 225.2 *et seq.* of the *Securities Act*, CQLR, c. V-1.1, to proceed as a class action;
>
> [332] **ASCRIBES** to the petitioner the status of representative for the purpose of exercising the aforementioned action on behalf of the following class:
>
> > All natural persons and legal persons who reside in Quebec and acquired securities of Barrick Gold Corporation between July 26, 2012, and October 31, 2013, except the defendants, all officers and directors of Barrick Gold Corporation during the class period, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which the excluded persons have a controlling interest now or during the class period.
> >
> > Toutes les personnes physiques et les personnes morales qui résident au Québec et qui ont acquis des valeurs mobilières de Barrick Gold Corporation entre le 26 juillet 2012 et le 31 octobre 2013, sauf les défendeurs, tout administrateur ou dirigeant de Barrick Gold Corporation durant la période visée par le Recours, ainsi que les membres de leurs familles immédiates, leurs représentants légaux et ayants droit, ou toute entité liée ou contrôlée par une personne exclue ou dans laquelle une personne exclue est un initié;
>
> [333] **IDENTIFIES** the following as the main issues to be dealt with collectively:

A) Were Barrick Gold Corporation's July 26, 2012, representations regarding the environmental compliance of Pascua-Lama's water management system materially misleading?

B) Was that misrepresentation publicly corrected and, if so, when?

C) Is the defendants' due diligence defence meritorious?

D) Are class members entitled to damages and, if so, in what amount?

[334] **IDENTIFIES** the following as the main conclusions sought in relation to the aforementioned questions:

- **GRANT** the class action against the defendants;

- **DECLARE** that Barrick Gold Corporation's July 26, 2012, representations regarding the environmental compliance of Pascua-Lama's water management system were materially misleading;

- **CONDEMN** the defendants to pay for the damages suffered by the class members;

- **ORDER** the defendants to pay each member of the class their respective claims, plus interest at the legal rate as well as the additional indemnity provided for in article 1619 *C.C.Q.*;

- **ORDER** the collective recovery of all sums owed to the class members;

- **THE WHOLE** with costs, including the cost of all experts, expert reports and notices.

[335] **REMANDS** the file to the Chief Justice of the Superior Court for determination of the judicial district in which the class action will proceed and for appointment of the judge charged with hearing and managing the case;

[336] **REFERS** the issues related to the publication of the notice to members, the manner in which the notice is to be given and the time limit for requesting exclusion from the class to the judge of the Superior Court charged with hearing and managing the case;

[337] **THE WHOLE**, with legal costs.

MANON SAVARD, C.J.Q.

MARTIN VAUCLAIR, J.A.

FRÉDÉRIC BACHAND, J.A.

Mtre Jean-Marc Lacourcière
Mtre André Lespérance
TRUDEL JOHNSTON & LESPÉRANCE
For the Appellant

Mtre Kent E. Thomson
Mtre Nicholas Rodrigo
Mtre Faiz Munir Lalani
Mtre Kristine Spence
Mtre Steve G. Frankel
DAVIES WARD PHILLIPS & VINEBERG
For the Respondents

Date of hearing: May 2, 2022

REASONS OF BACHAND, J.A.

Table of contents

Para.

I. Context 8

A. The Pascua-Lama mining project 8

B. The proceeding commenced by the appellant 25

C. The Superior Court judgment 29

II. Analysis 34

A. Did the motion judge analyze the record within the limits inherent to the screening mechanism established by section 225.4 para. 3 of the *Act*? 37

1. The applicable legal framework 37

2. Application to the case at bar 44

B. Should the appellant be authorized to assert a secondary market claim based on sections 225.2 *et seq.* of the *Act*? 51

1. The applicable legal framework 51

2. Application to the case at bar 60

i) The water management system 60

ii) The glacier protection measures 89

iii) The water quality monitoring system 99

3. Conclusion on the appellant's secondary market claim 107

C. Should the appellant be authorized to assert claims on a class-wide basis? 108

1. The secondary market claim 109

2. The primary market claim 112

3. The claim based on article 1457 *C.C.Q.* 120

III. Conclusion 126

---

[6] This is an appeal from a judgment of the Superior Court, district of Montreal (the Honourable Mr. Justice Thomas M. Davis),[1] dismissing the appellant's application for authorization to institute a class action asserting primary and secondary market claims based on sections 217-218 and 225.8 of the *Securities Act* ("the *Act*"),[2] as well as a claim based on article 1457 *C.C.Q.* With respect to the statutory secondary market claim, the motion judge concluded that the reasonable chance of success test set out in section 225.4 para. 3 of the *Act* was not met. Regarding the claim based on article 1457 *C.C.Q.*, he found that the facts alleged by the appellant did not appear to justify the conclusions sought within the meaning of article 575(2) *C.C.P.* He further held that the appellant had failed to show both that his primary market claim had sufficient apparent merit and that he was a proper representative to bring such a claim on a class-wide basis.

[7] Three main issues arise in this appeal. The first is whether the motion judge analyzed the record in a manner consistent with the limits inherent to the screening mechanism established by section 225.4 para. 3 of the *Act*. The second is whether, on a proper application of the reasonable possibility of success test provided for in that provision, the appellant ought to be authorized to assert a claim based on section 225.8 of the *Act*. The third issue is whether the appellant ought to be authorized to proceed against the respondents on a class-wide basis on either the statutory claims or the claim based on article 1457 *C.C.Q*.

I. Context

A. The Pascua-Lama mining project

[8] The case relates to Pascua-Lama, a multibillion-dollar mining project located in a region of the Andes mountains straddling the border between Chile and Argentina and carried out by the respondent Barrick Gold Corporation ("Barrick"), a mining company headquartered in Toronto.

[9] The Chilean side of the project was approved in February 2006, when local authorities issued a *Resolución de Calificación Ambiental* ("RCA") setting out numerous environmental requirements that Barrick's Chilean subsidy, Compañía Minera Nevada srl ("CMN"), was required to comply with at various stages of the project. Of particular relevance to the present case is the fact that CMN had to refrain from undertaking pre-stripping operations, which involve the removal of waste rock to gain access to

---

1 *Nseir v. Barrick Gold Corporation*, 2020 QCCS 1697 [Jugement under appeal].

2 CQLR c. V-1.1.

mineral ore, prior to having installed and activated a water management system aimed at mitigating adverse impacts on the quality of water in surrounding areas. The RCA also required CMN to activate a water quality monitoring plan and activate emergency plans if predetermined levels of acidifications were reached. Moreover, CMN was mandated to implement measures aimed at protecting nearby glaciers by limiting the amount of dust generated by the mine, including monitoring various impact indicators, such as dust accumulation and melting rates, as well as keeping the mine's access roads wet all at times.

[10] In May 2009, Barrick's board of directors authorized management to go ahead with the project. Work on the site began in October 2009.

[11] Pre-stripping started in May 2012. On July 26, 2012, Barrick issued a public statement emphasizing that critical milestones had been achieved as a result of the completion of the water management system and the commencement of pre-stripping operations.

[12] Concerns about the project's compliance with relevant environmental requirements began to emerge at the end of September 2012, when local community groups commenced lawsuits alleging that pre-stripping had started prior to the completion of the water management system and that CMN had failed to abide by its obligations in relation to the protection of nearby glaciers. While an application for interim remedies was dismissed, the case was allowed to proceed. Barrick addressed the commencement of these legal proceedings in a statement dated November 1, 2012.

[13] At the end of October 2012, pre-stripping operations were suspended after it was discovered that dust generated by those operations possibly posed a health risk to workers. That development was publicly disclosed by Barrick in a statement issued on November 11, 2012.

[14] The project encountered further problems when two mudslides, which occurred in December 2012 and January 2013, damaged certain components of the water management system. Those incidents led to the discovery of a significant design flaw preventing the water management system from adequately handling the water flows.

[15] In the meantime, the Chilean Superintendency of the Environment ("SMA"), a newly-created regulator, took over responsibility for monitoring Pascua-Lama and enforcing applicable environmental requirements. Relatedly, a new system providing for self-reporting of environmental violations became operational.

[16] CMN made use of that system on January 18, 2013, when, further to the mudslides, it filed a report acknowledging — among other issues — that certain components of the water management system had not been built in compliance with the RCA. However, SMA subsequently dismissed the report as unsatisfactory, ordered

interim measures and launched an investigation into the project's overall compliance with the requirements set out in the RCA.

[17] On February 14, 2013, Barrick issued a public statement disclosing that the water management system had been damaged and that, depending on the outcome of SMA's investigation and the pending lawsuits, further restrictions could be placed on the project due to the need to repair and improve that system.

[18] On March 27, 2013, SMA issued a resolution alleging that the project failed to comply with the RCA in a number of respects. This was publicly disclosed by Barrick in a statement issued the following day.

[19] On April 9, 2013, a Chilean court issued an interlocutory injunction in the context of the proceedings that had been commenced in September 2012. The effect of that injunction was to suspend all operations at Pascua-Lama. On April 10, 2013, Barrick issued a statement reporting on this development and, shortly thereafter, the price of its shares fell by approximately 30%.

[20] A few weeks later, CMN acknowledged all charges that SMA had brought in late March 2013. At the end of May 2013, SMA imposed a fine initially set at approximately US$16 million and later reduced to approximately US$12 million. SMA also suspended all construction work and ordered CMN to address shortcomings in the water management system prior to resuming its activities. In June 2013, a local Indigenous group challenged these orders on the ground that the sanctions ordered by SMA were too lenient.

[21] On June 28, 2013, Barrick issued a press release announcing that it had submitted a plan, subject to review by Chilean authorities, to repair and redesign the water management system in order to ensure its compliance with RCA requirements. Barrick added that it aimed to achieve this objective by the end of 2014 and to thereafter resume construction work, including pre-stripping operations.

[22] Three weeks later, on July 15, 2013, a Chilean appellate court confirmed the interlocutory judgment that had been issued in April 2013, found that CMN had failed to comply with the RCA in a number of respects — including in relation to requirements regarding the quality of water in areas surrounding Pascua-Lama — and ordered it to address shortcomings in the water management system prior to resuming construction work. This ruling was upheld by the Supreme Court of Chile in September 2013.

[23] Barrick's board decided to indefinitely suspend all activities at a meeting held on October 30, 2013. That decision was made public on the following day. Barrick's share price fell by approximately 15% shortly thereafter.

[24] On March 3, 2014, a Chilean environmental court upheld the challenge to sanctions imposed by SMA that had been launched by the Indigenous group in June

2013. Among other findings, the court held that CMN had repeatedly violated RCA requirements relating to the monitoring of water quality in areas surrounding Pascua-Lama.

B. The proceeding commenced by the appellant

[25] The appellant filed his application for authorization to institute a class action in April 2014. He wishes to act on behalf of all Quebec residents who acquired Barrick securities between May 7, 2009, and November 1, 2013.

[26] On the merits, the appellant essentially claims that Barrick falsely represented to investors that the Pascua-Lama project was being carried out in compliance with relevant environmental requirements. He further alleges that those misrepresentations were reflected in Barrick's share price until the market absorbed the news of previously undisclosed environmental violations. As those revelations led to significant decreases in the price of Barrick shares, the appellant seeks damages — whose amount has yet to be specified — in relation to the prejudice suffered by similarly-situated investors. As indicated earlier, the appellant wishes to assert a secondary market claim based on sections 225.2 *et seq.* of the *Act*, a primary market claim based on sections 217 *et seq.* of the *Act*, as well as a claim based on the general rules of civil liability.

[27] The suspension of the Pascua-Lama project also led to a class action proceeding before the Ontario Superior Court of Justice. The ambit of that proceeding is in some respects broader, as it is not limited to alleged misrepresentations regarding environmental compliance. However, the portion of the proceeding relating to misrepresentations regarding environmental issues is similar to the proceeding commenced by the appellant in that it focuses on the allegation that CMN commenced pre-stripping operations in violation of RCA requirements and failed to disclose that such non-compliance had jeopardized the entire project. In a judgment released in October 2019,[3] Belobaba J. granted in part the plaintiff's application for authorization to commence a securities class action pursuant to sections 138.1 *et seq.* of the Ontario *Securities Act*,[4] which are similar to sections 225.2 *et seq.* of Quebec's *Securities Act*.[5] Specifically, he allowed the appellant's claim to proceed, but only in relation to the alleged misrepresentation arising out of Barrick's July 26, 2012, statement. That aspect of his

---

3 *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160.

4 R.S.O. 1990, c. S.5.

5 See e.g.: *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, para. 32; *Amaya inc. v. Derome*, 2018 QCCA 12 (leave to appeal to the Supreme Court of Canada denied: 2018 CanLII 73617), para. 97; Stéphane Rousseau, Dominique Payette & Christopher Trouvé, "Just What the Doctor Ordered?: A Look at the Side Effects of *Theratechnologies* on Secondary Market Liability in Canada", (2019) 97 *Can. Bar Rev.* 404, p. 412; Stéphane Rousseau, "Étude du recours statutaire en responsabilité civile pour le marché secondaire des valeurs mobilières au Québec", (2009) 43 *R.J.T.* 709, p. 717.

judgment was not at issue in an appeal subsequently brought before the Ontario Court of Appeal.[6]

[28] Turning back to the proceeding commenced by the appellant, it is worth noting that he filed documentary evidence totalling approximately 8,000 pages and that the respondents filed twelve sworn statements and attached documents totalling well over 25,000 pages. The record also contains transcriptions of out-of-court examinations that add another 800 pages or so. In short, at the authorization stage of the proceeding, the record is already massive.

C. The Superior Court judgment

[29] In the judgment under appeal, which followed a six-day hearing, the Superior Court refused the authorizations sought by the appellant under both section 225.4 para. 3 of the *Act* and article 575(2) *C.C.P.*

[30] A key aspect of that judgment is the motion judge's finding to the effect that Pascua-Lama failed not because of significant environmental non-compliances, but rather because of the design flaw in the water management system that was discovered in the winter of 2013. To the judge, the evidence in the record showed that the instances of environmental non-compliance noted by Chilean authorities could have been resolved easily and at low cost, and that the water management system's design flaw had been the true cause of the significant decreases in Barrick's share price as well as the board's decision to suspend the project indefinitely.

[31] Addressing more specifically the appellant's statutory claims, the judge ruled in the respondents' favour on practically every issue in dispute. He concluded that the appellant had failed to show a reasonable chance of demonstrating (*i*) that Barrick had made misrepresentations regarding Pascua-Lama's compliance with relevant environmental requirements, (*ii*) that the alleged misrepresentations were material within the meaning of section 5 of the *Act*, (*iii*) that those alleged misrepresentations had been publicly corrected as contemplated by section 225.8 of the *Act*, and (*iv*) that the respondents could not benefit from the due diligence defence provided for in sections 225.17 and 225.18 of the *Act*. The judge also ruled that the appellant had no arguable case in relation to his primary market claim.

[32] With respect to the claims based on the general rules of civil liability, the judge ruled that the appellant had failed to show an arguable case that Barrick had made significant misrepresentations regarding environmental compliance or that he had relied on representations made by Barrick when he decided to purchase shares thereof.

---

[6] *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 (leave to appeal to the Supreme Court of Canada denied: 2021 CanLII 66411), para. 16.

[33] Lastly, the judge held that the appellant had failed to show any basis upon which the personal respondents could be held liable for the prejudice suffered by the appellant as a result of the decreases in the price of Barrick shares that occurred in 2013.

II. Analysis

[34] As the Court explained in *Amaya*, where an action for damages in relation to secondary-market securities liability is brought as a class action, it is generally preferable to first address the authorization question that arises under section 225.4 para. 3 of the *Act* and to subsequently consider whether the class action ought to be authorized pursuant to article 575 *C.C.P.*[7]

[35] I thus begin by considering whether the motion judge committed a reviewable error when he refused to allow the appellant to proceed with the claims based on sections 225.2 *et seq.* of the *Act*. This question has two parts, the first being whether — as the appellant claims — the motion judge overstepped the limits inherent to the screening mechanism established by section 225.4 para. 3 of the *Act* by essentially treating the authorization stage as a mini-trial. If that is the case, I will need to consider *de novo* whether the appellant ought to be authorized to assert causes of action based on sections 225.2 *et seq.* of the *Act*.

[36] After having addressed the arguments relating to the authorization process applicable to secondary market claims, I will need to consider whether the motion judge committed a reviewable error when he refused to allow the appellant to proceed on a class-wide basis in relation to his primary and secondary market claims as well as his claim based on article 1457 *C.C.Q.*

A. Did the motion judge analyze the record within the limits inherent to the screening mechanism established by section 225.4 para. 3 of the *Act*?

1. The applicable legal framework

[37] Section 225.4 of the *Act* provides that an action based on sections 225.2 *et seq.* will be authorized if the court finds that it is in good faith and that there is "a reasonable possibility/*une possibilité raisonnable*" that it will be resolved in the applicant's favour. Good faith is not in dispute here. The debate rather focuses on the reasonable possibility of success threshold. Whether the motion judge misunderstood that threshold and ended up applying the wrong test raises a question of law. Consequently, the applicable standard of appellate review is correctness.[8]

---

[7] *Amaya inc. v. Derome*, 2018 QCCA 120 (leave to appeal to the Supreme Court of Canada denied, August 9, 2018, n° 38038), para. 54.

[8] *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, paras. 36-38.

[38] The reasonable possibility of success threshold, a "relatively low merits-based threshold",[9] has been extensively analyzed in recent cases. A number of key propositions are now well established.

[39] One concerns that threshold's purpose. Along with the requirement that the action be in good faith, it is "a means of protecting public issuers and their shareholders from frivolous or bad faith actions, sometimes called 'strike suits', brought by opportunistic or disgruntled investors who unfairly seek to take advantage of the favourable statutory recourse".[10]

[40] The reasonable possibility of success threshold sets a different and higher standard than the one applicable to proposed class actions, which requires that "the facts alleged appear to justify the conclusions sought/*les faits allégués paraissent justifier les conclusions recherchées*" (article 575(2) *C.C.P.*).[11] That being said, under section 225.4 of the *Act*, the applicant's burden is limited to "offer[ing] both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim".[12]

[41] Both parties can adduce evidence at the authorization stage, but from the court's perspective, "[a] full analysis of the evidence is unnecessary".[13] And while the court must consider and engage in some weighing of the evidence adduced by all parties,[14] its role is "not to do the best it could on the available record, treating the motion as if it were a mini-trial",[15] but rather to "conduct a preliminary examination of the impugned action or inaction to assess whether it could be said to have a reasonable possibility of success".[16] At all times, the court must remain mindful that "the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial".[17] As the Supreme Court noted in *Theratechnologies,* "[w]hat *is* required is sufficient evidence to persuade the court

---

9 *Id.*, para. 45.

10 *Amaya inc. v. Derome*, 2018 QCCA 120 (leave to appeal to the Supreme Court of Canada denied: 2018 CanLII 73617), para. 8, referring to *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, para. 39. See also *Amaya*, paras. 49, 84, 89 and 96.

11 *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, paras. 35-36.

12 *Id.*, para. 39 [emphasis added].

13 *Ibid.*

14 See e.g. *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 (leave to appeal to the Supreme Court of Canada denied: 2021 CanLII 66411), para. 44, quoting from *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, para. 48: "[t]his, as Hourigan J.A. wrote for this court in *SouthGobi*, 'must include some weighing of the evidence that both parties are required to proffer under ss. 138.8(2) and (3) [i.e. affidavit evidence setting forth the material facts on which the parties intend to rely] and scrutiny of the entire body of evidence, not just the evidence of the plaintiff viewed in isolation'".

15 *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, para. 50. See also *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, para. 39.

16 *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, para. 36.

17 *Id.*, para. 39.

that there is a reasonable possibility that the action will be resolved in the claimant's favour".[18]

[42] The proper analytical approach can be seen as a two-step process. The motion judge must first consider whether the applicant has offered a plausible analysis of the applicable legislative provisions as well as evidence tending to support their claim. If that is the case, the judge must then consider whether the applicant has shown that the analysis and evidence offered by the respondent falls short of "demolish[ing] or fully rebut[ing]" the applicant's submissions, to quote from Belobaba J.'s judgment in the Ontario case.[19]

[43] The court must also bear in mind that parties reach the authorization stage relatively early in the proceeding and, crucially, well before any pre-trial discovery and disclosure has been undertaken. This means that there is a real risk that the evidentiary record before the Court will not only be incomplete, but also tilted in favour of the defendant, who will — more often than not — have much better access to potentially relevant evidence. As the Court emphasized in *Amaya*:[20]

> In deciding whether the shareholder has shown a reasonable possibility that his or her action will succeed, a judge should consider, in weighing the evidence for this limited purpose, that the shareholder did not have the benefit of evidence that would come from discovery. As van Rensberg, J. of the Ontario Superior Court of Justice observed in *Silver v. Imax Corporation*, [2009 CanLII 72342 (ON SC), para. 326] "[i]n undertaking this evaluation the court must keep in mind that there are limitations on the ability of the parties to fully address the merits because of the motion procedure". Perrell, J. wrote similarly in *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, [2013 ONSC 6864, para. 41,] that "[t]he court's weighing of the evidence for the leave test must be tempered by the recognition that there has been no discovery and that the analysis is conducted on a paper record with all its attendant limitations".

---

18 *Ibid*.

19 *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, para. 120. See also para. 117, where Belobaba J. considered whether Barrick's submissions had "eliminated all reasonable possibility" that the applicant would prevail on the issue under discussion.

20 *Amaya inc. v. Derome*, 2018 QCCA 120 (leave to appeal to the Supreme Court of Canada denied: 2018 CanLII 73617), para. 108. See also *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, para. 48: "To be clear, the motion judge's duty to scrutinize the entire record is not restricted to a review of the evidence filed on the motion. The motion judge is also obligated to consider what evidence is not before her. She must be cognizant of the fact that, at the leave stage, full production has not been made and the defendant may have relevant documentation that has not been produced or relevant evidence that has not been tendered. Consideration of these evidential limitations of the leave stage is important because they can work to the prejudice of plaintiffs who have potentially meritorious claims".

2. Application to the case at bar

[44] I now turn to the judgment under appeal and consider whether, as argued by the appellant, the motion judge failed to properly focus his analysis on determining whether there was a reasonable possibility that the action will be resolved in his favour.

[45] I am of the view that the appellant's argument is well founded. Although the judge correctly summarized the law governing the authorization stage at the beginning of his analysis of the issues in dispute, he subsequently made errors similar to those made in *Rahimi*, a case in which the Ontario Court of Appeal found that the motion judge had erred by treating the authorization stage as a mini-trial and compounded that error by failing to properly consider elements of the record that conflicted with the evidence invoked by the defendant.[21]

[46] One example is the judge's analysis of the central issue of whether Barrick's July 26, 2012, statement regarding the completion of the water management system constituted a misrepresentation within the meaning of section 5 of the *Act*. The answer to that question turns mainly on whether, at the time that statement was made, the water management system's condition was such that the relevant RCA requirements were met — a highly disputed and complex issue of mixed fact and law. What the judge should have done at this juncture is to first consider whether the appellant had offered evidence tending to support his position and, if that was the case, to next consider whether the evidence invoked by the respondents was so compelling that there was no reasonable possibility that the appellant would succeed on this issue. Instead, the judge limited his analysis to briefly considering certain provisions of the RCA as well as aspects of the record emphasized by the respondents.[22] He then made findings using language strongly suggesting that he was focussed more on considering the comparative weight of the evidence than determining whether the appellant's arguments had a reasonable possibility of success:[23]

> [255] Therefore, even acknowledging that the entire [water management system] was not complete when the statement was made, the evidence shows that the elements required for the construction phase and more particularly for pre-stripping to commence were complete. The statement in relation to the most material element for the investor buying the stock at that time, pre-stripping, cannot be said to be a misrepresentation.
>
> [Emphasis added]

---

21 *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, paras. 51 *et seq.*

22 Judgment under appeal, paras. 251-255.

23 See also para. 250 of the judgment under appeal, where the judge makes similar findings regarding Barrick's belief that it could begin pre-stripping operations: "[t]he evidence demonstrates that Barrick's management, based on timely information that it had received from the site, fully and justifiably believed that it was authorized to begin pre-stripping" [emphasis added].

[47] Another example is the judge's analysis of whether Barrick made misrepresentations regarding the project's compliance with RCA requirements aimed at protecting nearby glaciers by limiting the amount of dust generated by the mine. His brief analysis led him to state in a rather conclusory manner that the evidence showed the impugned statements to be true.[24] There is no indication in his judgment that he considered whether the evidence invoked by the appellant on this issue — which includes findings made by the Chilean appellate court in July 2013 — tended to support his claim, nor is there any explanation as to why the evidence relied upon by the respondents was so compelling that there was no reasonable possibility that the appellant would succeed.

[48] Yet another example concerns RCA requirements relating to water quality monitoring in areas surrounding Pascua-Lama. The judge found that any failure by CMN to meet those requirements was primarily due to the fact that the water quality had naturally degraded during the relevant period.[25] Here as well, he made a determinative finding without mentioning key evidence invoked by the appellant, which includes the March 2014 Chilean environmental court decision rejecting CMN's argument concerning natural degradation. Moreover, the relevant parts of his judgment do not explain why the evidence relied upon by the respondents was so compelling that there was no reasonable possibility that the appellant would succeed on this particular issue.

[49] One last example is worth mentioning and it concerns the judge's analysis of the respondents' assertion of the due diligence defence set out in section 225.17 of the *Act*, another key and highly disputed aspect of this case. Here as well, his judgment contains little indication that he considered whether the appellant had offered evidence tending to support his position. Rather, his analysis is limited to quoting from an excerpt of the respondents' written submissions regarding Barrick's internal accuracy-checking procedures and stating, again in a rather conclusory manner, that it accurately characterizes the relevant aspects of the evidentiary record.[26]

[50] These examples, which touch on central aspects of the case, suffice to conclude that the motion judge's analysis of the record is not consistent with the limits inherent to the authorization process set out in section 225.4 para. 3 of the *Act*. Because he erred in law, the Court must consider *de novo* whether the appellant ought to be authorized to assert causes of action based on sections 225.2 *et seq.* of the *Act*.

---

[24] Judgment under appeal, para. 233.
[25] Judgment under appeal, para. 238.
[26] Judgment under appeal, paras. 230 *et seq*.

B. Should the appellant be authorized to assert a secondary market claim based on sections 225.2 *et seq.* of the *Act*?

1. The applicable legal framework

[51] The appellant's statutory claims are based on section 225.8 of the *Act*, the relevant parts of which read as follows:

> **225.8.** A person that acquires or disposes of an issuer's security during the period between the time when the issuer […] released a document containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against
>
> (1) the issuer, each director of the issuer at the time the document was released, and each officer of the issuer who authorized, permitted or acquiesced in the release of the document;
>
> […]
>
> **225.8.** La personne qui a acquis ou cédé un titre alors que l'émetteur […] a publié un document contenant une information fausse ou trompeuse et avant que celle-ci n'ait fait l'objet d'une rectification rendue publique peut intenter l'action contre l'une ou plusieurs des personnes suivantes:
>
> 1° l'émetteur et ses administrateurs en poste au moment de la publication du document, de même que ses dirigeants qui ont autorisé ou permis la publication du document ou qui y ont acquiescé;
>
> […]

[52] As can be seen from this provision, to be successful on a claim based on section 225.8, the plaintiff must — at a minimum — prove that the issuer released a document containing a misrepresentation, that this misrepresentation was subsequently publicly corrected, and that the issuer's security was acquired between the release of the document and the public correction.

[53] Section 5 of the *Act* defines a misrepresentation as "any misleading information on a material fact as well as any pure and simple omission of a material fact/*toute information de nature à induire en erreur sur un fait important, de même que l'omission pure et simple d'un fait important*". As is the case in Ontario,[27] this definition does not contain any knowledge requirement, such that the concept of misrepresentation includes a fact of which the issuer was unaware at the time the impugned statement was made. It should be added that knowledge does become relevant if the claim is not based on a document that constitutes a "core document/*document essentiel*" within the meaning of that term in

---

[27] *Drywall Acoustic Lathing and Insulation, Local 675 v. SNC-Lavalin Group Inc.*, 2015 ONCA 718, paras. 65-66.

section 225.3 of the *Act*.[28] However, this distinction is not significant in the present case, as it is undisputed that each aspect of the appellant's claim is based on a least some core documents.

[54] Section 5 also defines the concept of material fact: it is "a fact that may reasonably be expected to have a significant effect on the market price or value of securities issued or securities proposed to be issued/*tout fait dont il est raisonnable de s'attendre qu'il aura un effet appréciable sur le cours ou la valeur d'un titre émis ou d'un titre dont l'émission est projetée*". Whether a given fact is material is to be assessed at the time the allegedly misleading statement was made.[29] Moreover, the analysis of materiality offered by the Supreme Court in *Sharbern* is relevant in the context of a secondary market claim brought under section 225.8 of the *Act*: [30]

> [61] In sum, the important aspects of the test for materiality are as follows:
>
> i. Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;
>
> ii. An omitted fact is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely might have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;
>
> iii. The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;
>
> iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and
>
> v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the

---

[28] Pursuant to section 225.13 of the *Act*, where the claim is not based on a core document, the plaintiff is generally required to prove that the defendant "knew, at the time that the document was released or the public oral statement was made, that the document or public oral statement contained a misrepresentation or deliberately avoided acquiring such knowledge at or before that time/*se trouvait dans une des situations suivantes […] lors de la publication du document ou lors de la déclaration publique, il savait ou avait délibérément évité d'être informé que le document ou la déclaration publique contenait une information fausse ou trompeuse*".

[29] Stéphane Rousseau, "Régimes de responsabilité civile : divulgation sur les marchés primaire et secondaire", in Stéphane Rousseau (ed.), *JurisClasseur Québec*, coll. "Droit des affaires", vol. "Valeurs mobilières", fasc. 13, Montreal, LexisNexis, 2010 (loose-leaf, updated February 2022).

[30] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23.

> disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

[55] The concept of public correction mentioned in section 225.8 is not defined in the *Act*. I agree with the Ontario Court of Appeal that it is a public statement emanating from the issuer or a third party which "was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement".[31] Moreover, "the public correction need not be a 'mirror-image' of the alleged misrepresentation or a 'direct admission that a previous statement is untrue'",[32] as "[t]here need only be 'some linkage or connection between the pleaded public correction and the alleged misrepresentation'".[33] I also agree with the Ontario Court of Appeal that, "[w]hile public correction is a necessary part of the statutory scheme, its role, at least at the leave stage, is a modest one",[34] because "the clearing of the misrepresentation threshold, combined with the fact that the plaintiff brought an action, suggests that there was a public correction".[35]

[56] As for the due diligence defence asserted by the respondents, it is codified in the following provisions of the *Act*:

225.17. […]	**225.17.** […]
An action may also be defeated by proving that the defendant conducted or caused to be conducted a reasonable investigation and had no reasonable grounds to believe that the document or public oral statement would contain a	Il peut également y faire échec en établissant qu'il a effectué ou fait effectuer une enquête raisonnable et que, selon le cas, il n'avait pas de motifs raisonnables de croire que le document ou la déclaration publique contiendrait une information fausse ou trompeuse

[31] *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 (leave to appeal to the Supreme Court of Canada denied: 2021 CanLII 66411), para. 76; *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838, para. 47.

[32] *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838, para. 54, quoting from *Swisscanto v. BlackBerry*, 2015 ONSC 6434, para. 62, itself citing *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083, paras. 64-71.

[33] *Id.*, para. 54, quoting from *Swisscanto v. BlackBerry*, 2015 ONSC 6434, para. 65.

[34] *Id.*, para. 51.

[35] *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 (leave to appeal to the Supreme Court of Canada denied: 2021 CanLII 66411), para. 71; *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838, para. 51.

misrepresentation or that the failure to make timely disclosure would occur.	ou qu'il y aurait manquement à une obligation d'information occasionnelle.
225.18. In determining whether an investigation was reasonable under the second paragraph of section 225.17, the court must consider all relevant circumstances, including those listed in paragraphs 1 to 11 of section 225.15.	**225.18.** Pour apprécier le caractère raisonnable de l'enquête prévue au deuxième alinéa de l'article 225.17, le tribunal tient compte de toutes les circonstances pertinentes, notamment celles énumérées aux paragraphes 1° à 11° de l'article 225.15.

[57] Also noteworthy is section 225.16 of the *Act*, which provides that "[t]he court seized of the action may decide that multiple misrepresentations having common subject matter or content may be treated as a single misrepresentation/*[l]e tribunal saisi de l'action peut décider que plusieurs informations fausses ou trompeuses portant sur le même sujet ou ayant la même teneur seront traitées comme un cas unique d'information fausse ou trompeuse*". In his factum, the appellant suggested that each of the 60 or so misrepresentations alleged in his application ought to be considered as a single overarching misrepresentation regarding Pascua-Lama's alleged non-compliance with the RCA that began in May 7, 2009, and extended until August 1, 2013. Although I agree that section 225.16 has a role to play in this case, the appellant's suggestion stretches the concept of subject matter too far. In my view, the preferable approach consists in starting from the premise that the misrepresentations relate to three distinct subject matters — the water management system, the glacier protection measures and the water quality monitoring system — and group them accordingly pursuant to section 225.16.

[58] It follows from the preceding analysis that, in order to clear the hurdle set by section 225.4 para. 3 of the *Act*, the appellant must show, with respect to each subject matter, a reasonable possibility of success in relation to the following assertions:

- Barrick made written representations regarding compliance with the RCA that were misleading in material respects;
- those misrepresentations were subsequently publicly corrected;
- the appellant acquired shares between the date on which those misrepresentations were made and the public correction;
- Barrick did not conduct a reasonable investigation or had reasonable grounds to believe that those representations were misleading in material respects.

[59] As the respondents do not contest that the appellant acquired Barrick shares during the potentially relevant periods, the debate before us focusses on the first, second, and fourth elements: material misrepresentation, public correction and due diligence.

2. Application to the case at bar

i) The water management system

[60] ***Material misrepresentation.*** The appellant's argument in relation to the water management system begins with the proposition that CMN commenced pre-stripping in May 2012 in violation of relevant RCA requirements. He further alleges that Barrick failed to disclose this breach when it stated, on July 26, 2012, that the project had "achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities".[36] Lastly, the appellant alleges that this breach was of great significance in that it jeopardized CMN's right to carry out work — pre-stripping operations — that was crucial to the project.

[61] It is clear that the July 26, 2012, statement — a core document within the meaning of section 225.3 of the *Act* — amounts to a representation by Barrick that CMN began pre-stripping operations in compliance with all applicable requirements, including those set out in the RCA. The real issue is whether that representation was materially misleading or, to put the question more accurately, whether there is a reasonable possibility that the appellant will demonstrate that it was materially misleading.

[62] The appellant points to several aspects of the evidentiary record which, in his submission, support a finding that Barrick's July 26, 2012, statement was misleading. He places particular emphasis on the following:

- excerpts from the RCA requiring that the water management system be completed before pre-stripping could begin;[37]
- CMN's January 2013 self-report in which it admitted that portions of the water management system had not been constructed as required by the RCA;[38]

---

[36] Exhibit P-4, J.S., p. 5667.

[37] Specifically: "[t]he construction of works and facilities for management and treatment of acid drainage from the Nevada Norte waste dump will be carried out in such a manner that they are operational before starting the pit pre-stripping, which will involve disposal in the dump" (Exhibit P-6B, J.S., p. 6691.112).

[38] Exhibit P-7.1, J.S., pp. 6699.1 *et seq.* See in particular pp. 6699.3-6699.6.

- CMN's April 2013 written acknowledgment[39] of charges brought by the SMA in March 2013, which charges alleged that the water management system lacked certain components required by the RCA;[40]

- Barrick's June 2013 press release in which it stated that it had "submitted a plan, subject to review by Chilean regulatory authorities, to construct the project's water management system in compliance with permit conditions for completion by the end of 2014, after which Barrick expects to complete remaining construction works in Chile, including pre-stripping";[41]

- the July 2013 appellate decision, later confirmed by the Supreme Court of Chile, ordering CMN to complete the management system in compliance with relevant RCA requirements before resuming pre-stripping construction work;[42]

- a statement to Barrick employees, which was issued shortly after that appellate decision and in which CEO Jamie Sokalsky wrote: "[w]hile we remain confident in the future of Pascua-Lama, we need to acknowledge that, as a company, we did not live up to our compliance obligations at the project, and we've seen just how costly this can be".[43]

[63] I have little hesitation in concluding that these elements tend to support the appellant's assertions about the misleading nature of Barrick's July 26, 2012, statement.

[64] I also have no difficulty in concluding that the appellant has offered evidence tending to support his position with respect to the materiality requirement.

[65] First, it is clear from the record that pre-stripping was an essential aspect of the project in that CMN could not gain access to mineral ore before first removing waste rock. Unsurprisingly, Barrick itself stated in its July 26, 2012, statement that the commencement of pre-stripping operations was "a critical milestone" of the Pascua-Lama project. As Belobaba J. stated in his judgment in the Ontario case, "[t]he announcement of July 26, 2012, that a 'critical milestone' had been achieved was, to put it bluntly, a big deal".[44]

[66] Second, it is equally clear from the record that pre-stripping could only begin once relevant RCA requirements had been met.

---

39 Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 24a, J.S., p. 17757.
40 Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 23.1, J.S., p. 17633.
41 Exhibit P-4, J.S., p. 6408.
42 Exhibit P-17B, J.S., p. 7580.
43 Sworn statement of Ivan Mullany dated September 17, 2018, Exhibit 122, J.S., p. 24747.
44 *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, para. 105.

[67] Third, the record clearly contains "some credible evidence" tending to demonstrate that the water management system's shortcomings were by no means minor, thus giving rise to a real possibility that they could significantly hinder the project's progress. For example, as CMN itself acknowledged in early 2013, the so-called "non-contact" portion of the water management system was built in a manner that overlooked a key requirement of the RCA to the effect that, at all times, natural surface waters had to be diverted away from the waste rock facility and conducted back to natural watercourses.[45] CMN also acknowledged at that time that it had failed to build three components of the so-called "contact" portion of the water management system: the reverse osmosis unit, the forced evaporation system and the hydrogen peroxide unit.[46] It did so without ever acknowledging that those shortcomings were neither minor nor insignificant, and the decisions subsequently made by various Chilean authorities tend to demonstrate that they were by no means minor, but rather significant enough to justify ordering the suspension of all work on the project's site.[47] The proposition that those shortcomings were neither minor nor insignificant finds further support in Barrick's June 28, 2013 statement indicating that bringing the water management system into compliance with the RCA required work that would span a period of no less than 18 months.[48]

[68] From these circumstances, one can easily conclude that the appellant has a reasonable chance of demonstrating that, had Barrick disclosed on July 26, 2012, that pre-stripping had begun *notwithstanding that the water management system did not meet relevant RCA requirements in significant respects*, the market could reasonably have been expected to react in a significantly different manner.

[69] I now turn to considering whether the evidence offered by the respondents is so compelling as to "demolis[h] or fully rebu[t]"[49] the appellant's submissions regarding the materially misleading nature of the July 26, 2012, statement.

[70] The respondents submit that the appellant's arguments miss the mark in that they overlook the critical fact that the components missing from the water management system in May 2012 could be added easily and at a low cost, and that — as the motion judge found — Pascua Lama failed not as a result of those shortcomings, but rather because of the design flaw discovered in the winter of 2013. In other words, even if the water management system did not fully comply with the RCA when pre-stripping operations began — a point the respondents have not conceded — those shortcomings never jeopardized the project's progress and therefore could not possibly be characterized as material. The respondents further point to the fact that the appellant filed no expert report on the issue of materiality. They also claim that his position is flawed because it improperly

---

45 See e.g. Exhibit P-7.1, J.S., p. 6699.1; sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 24a, J.S., p. 17755.

46 See sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 24a, J.S., p. 17757.

47 See e.g. Exhibit P-11A, J.S., pp. 6855-6859, 6902-6903; Exhibit P-17.1, J.S., p. 7537.31.

48 Exhibit P-4fff, J.S., p. 6408.

49 See above, para. 42.

relies on the benefit of hindsight in support of his contention that the materiality criterion was met on July 26, 2012.

[71] I disagree.

[72] First, the appellant correctly points out that none of the evidence currently in the record indicates that the project failed as a result of the design flaw discovered in the winter of 2013. Also, and tellingly, the minutes of the October 31, 2013, Barrick board of directors meeting makes no mention of the design flaw in a section identifying the main factors that led to the suspension of the project.[50] Therefore, the evidence is, at best, contradictory on this issue. It is also likely to be incomplete, because the true cause of Pascua-Lama's failure is precisely the kind of issue in respect of which a full picture can often only be obtained once the discovery process has been completed.

[73] Second, even assuming that the respondents are correct in arguing that Pascua-Lama failed because of the design flaw discovered in the winter of 2013, that finding would not necessarily demolish the appellant's case on the issue of materiality. At the very least, a reasonable possibility would remain that he will succeed in demonstrating that the July 26, 2012, statement was materially misleading because it failed to disclose that the water management system never had the capacity to operate in full compliance with the RCA.[51]

[74] Furthermore, I am not convinced that the appellant is surely mistaken in relying on the subsequent findings of various Chilean authorities in order to demonstrate that the water management system's shortcomings were significant. Nor am I convinced that he is patently wrong in relying on the Supreme Court's decision in *Sharbern* to argue that evidence of subsequent events may be relevant to the materiality assessment.[52] In my view, it is reasonable to assert that the weight and importance to be afforded to the Chilean authorities' findings and to other events subsequent to the July 26, 2012, statement on the issue of materiality are best left to the trial judge.

---

[50] The relevant passage reads as follows: "[a]mong other things, Mr. Mullany noted that the Pascua-Lama project was currently unattractive from a risk/return perspective, primarily due to unfavourable gold and silver prices, increased capital expenditure costs and high monthly expenditure rates, and uncertainty about obtaining or retaining required permits from Chilean authorities" (Affidavit of Ivan Mullany dated September 17, 2018, Exhibit 126, J.S., p. 24814).

[51] In this respect, see e.g. the January 2013 report in which CMN acknowledged that, according to the RCA, "[t]he construction and installation works required '...the excavation of sectors of rock along the length of the canal, and, to a lesser extent, colluvial and fill materials,' in order to thereby ensure that those canals would be capable of '...carrying flows equivalent to a 1,000-year swell and employ materials ensuring a long useful life for the installations.' (RCA, Whereas Clause 4.3.1 a.1)". See also *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, para. 67, where Belobaba J. noted that "[o]bviously, the non-contact WMS had not been designed or built to weather a significant water event, let alone a '1000-year flood' as required by the RCA".

[52] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, para. 61.

[75] I thus find that there is a reasonable possibility that the appellant will succeed in demonstrating that Barrick's July 26, 2012, representations on Pascua-Lama's compliance with the RCA were materially misleading.

[76] ***Public correction.*** As was mentioned earlier, the public correction requirement plays a modest role at the authorization stage because the clearing of the material misrepresentation threshold, combined with the fact that appellant decided to commence a legal proceeding, suggests that there was a public correction.[53]

[77] This is all the more so in the present case, as the parties do not disagree on whether any materially misleading aspect of Barrick's July 26, 2012, statement was publicly corrected, but rather when such correction occurred. The appellant claims that the relevant date is either April 10, 2013, June 28, 2013, or October 31, 2013. The respondents' position is that the motion judge made no reviewable error when he concluded that any material misrepresentation had already been publicly corrected by the fall of 2012.

[78] I add that my review of the record leaves me with little doubt that there is a reasonable possibility that the appellant will succeed in demonstrating that any materially misleading aspect of Barrick's July 26, 2012, statement was first publicly corrected either on April 10, 2013, when Barrick reported on the interlocutory injunction issued the preceding day, or on June 28, 2013, when Barrick released a statement acknowledging that changes to the water management system were required to ensure its compliance with the RCA.[54]

[79] ***Due diligence.*** I am also of the view that the appellant has demonstrated a reasonable possibility that he will defeat the due diligence defence asserted by the respondents in relation to the water management system's alleged non-compliance.

[80] The respondents contend that they reasonably believed that, although that system was missing certain components when pre-stripping operations began in May 2012, it had achieved hydraulic conductivity and was thus sufficiently operational to meet the requirements set out in the RCA. In support of their contention, they point to various aspects of the record, including the following:

- section 4.3.1)a) of the RCA, which states that "[t]he construction of works and facilities for management and treatment of acid drainage […] will be carried out in such a manner that they are operational before starting the pit pre-stripping";[55]

---

[53] See above, para. 55.

[54] In the Ontario case, the June 28, 2013, statement was held by Belobaba J. as arguably satisfying the requirement of a public correction: *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, paras. 96-99.

[55] Exhibit P-6B, J.S., p. 6691.112.

- a report issued in April 2012 by Chile's General Water Authority[56] allegedly confirming that the water management system was operational within the meaning of section 4.3.1)a) of the RCA, which report contributed to the respondents forming the belief that pre-stripping could begin in May 2012;[57]

- a short email sent on May 6, 2012 by Jose Antonio Urrutia[58] — CMN's external environmental lawyer — which allegedly indicated that the General Water Authority had informally approved the beginning of pre-stripping operations and which also contributed to the respondents forming the belief that pre-stripping could begin in May 2012;[59]

- reports prepared in May and December of 2012 by Jorge Proust[60] — an environmental consultant hired by CMN to conduct an independent assessment of the water management system — allegedly concluding that relevant requirements of the RCA had been satisfied, which reports also contributed to the respondents forming the belief that pre-stripping could begin in May 2012;[61]

- the results of an environmental audit which allegedly showed that CMN was in compliance with its relevant environmental obligations when pre-stripping operations began;[62]

- statements by Barrick representatives to the effect that, between May and October 2012, none of the Chilean regulatory authorities who visited the Pascua-Lama project raised any concerns about the pre-stripping operations' compliance with relevant RCA requirements.[63]

[81] While these aspects of the record do show that the respondents' plea of due diligence is by no means frivolous, the appellant is right in contending that several other aspects of the record raise serious questions as to the likelihood that the respondents' position will prevail in a trial on the merits.

---

56 Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 13.1, J.S., p. 17316.

57 Sworn statement of Kelvin Dushnisky dated August 22, 2018, J.S., pp. 15003-15004; Sworn statement of Ivan Mullany dated September 17, 2018, J.S., pp. 20562-20563; Sworn statement of Michael Nicholas Luciano dated September 4, 2018, J.S., pp. 18188-18190; Sworn statement of Rodolfo Westhoff dated August 31, 2018, J.S., pp. 16111-16112.

58 Sworn statement of Kelvin Dushnisky dated August 22, 2018, Exhibit 30, J.S., p. 15181.

59 Sworn statement of Kelvin Dushnisky dated August 22, 2018, J.S., p. 15004. See also Sworn statement of Ivan Mullany dated September 17, 2018, J.S., p. 20563.

60 Sworn statement of Jorge Proust Duclos dated June 29, 2018, Exhibit 2, J.S., p. 7918, and Exhibit 4.2, J.S., p. 7948.

61 Sworn statement of Ivan Mullany dated September 17, 2018, J.S., p. 20563; Sworn statement of Michael Nicholas Luciano dated September 4, 2018, J.S., pp. 18190-18191; Sworn statement of Rodolfo Westhoff dated August 31, 2018, J.S., pp. 16112-16113.

62 Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 16.1, J.S., p. 17371.

63 See eg. sworn statement of Kelvin Dushnisky dated August 22, 2018, J.S., p. 15005.

[82] For example, internal reports issued between July 2011 and June 2012 tend to demonstrate that the respondents' own understanding was that the water management system had to be "fully operational" before the beginning of pre-stripping operations, that this was a "key commitment", and that the entire project would be "in grave danger of being paralyzed" in case of non-compliance.[64]

[83] In addition, the General Water Authority's April 2012 report — on which the respondents place much emphasis to support their allegation regarding CMN and Barrick's understanding of the RCA's requirements as of the spring of 2012 — specifically states that its scope was limited to an assessment of Pascua-Lama's compliance with a permit other than the RCA.[65] Moreover, during cross-examination on his sworn statement, key CMN representative Rodolfo Westhoff admitted that the General Water Authority's report neither addressed the water management system's compliance with relevant RCA requirements nor constituted an authorization to begin pre-stripping operations.[66]

[84] Furthermore, Mr. Proust made a similar concession when he was cross-examined on his sworn statement by the appellant's lawyers. While pressed on the scope of his May 2012 report, he admitted that it did not provide an assessment of regulatory compliance and provided no assurance as to whether CMN was lawfully entitled to begin pre-stripping operations.[67]

[85] Another noteworthy aspect of the record is Jose Antonio Urrutia's January 2013 testimony before the SMA, during which he stated that the water management system was not operational and that it was missing components that were essential to ensure its compliance with relevant RCA requirements.[68] That testimony raises questions about the meaning of Mr. Urrutia's May 6, 2012, email, as well as the extent to which that email could reasonably be relied upon by CMN and Barrick to conclude that pre-stripping operations could lawfully begin in May 2012.

[86] One last example is CMN's April 2013 acknowledgment that the water management system lacked certain components that were required by the RCA before pre-stripping operations could begin. CMN's concessions were unqualified by any suggestion that it reasonably believed in May 2012 that the system was sufficiently operational to meet relevant RCA requirements. This is all the more significant given that, in the very same document, CMN raised a due diligence defence in relation to other charges that had been brought by the SMA.

---

64 See e.g. sworn statement of Michael Nicholas Luciano dated September 4, 2018, Exhibit 20, J.S., pp. 18571-18572 (July 2011 report). Similar language appears in subsequent monthly reports.

65 Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 13.1, J.S., p. 17316 ("1. General Overview").

66 Transcript of Rodolfo Westhoff's cross-examination, March 28, 2019, J.S., pp. 37579-37580.

67 Transcript of Jorge Proust's cross-examination, March 29, 2019, J.S., pp. 37661-37663.

68 Transcript of Jose Antonio Urrutia's testimony before the SMA, January 28, 2013, J.S., pp. 7808-7811.

[87] In sum, the record shows that whether the respondents' due diligence defence is meritorious is a highly factual and disputed issue with respect to which the evidence currently available is both inconclusive and conflicting. It is also an issue on which the discovery process is likely to shed further light. At this juncture, suffice it to say that there is a reasonable possibility that the appellant will defeat the respondents' due diligence defence in relation to the water management system issue.

[88] ***Conclusion.*** Based on the preceding analysis, I conclude that the appellant has cleared the threshold set by section 225.4 para. 3 of the *Act* with respect to his claim relating to the water management system's non-compliance with relevant provisions of the RCA.

ii) **The glacier protection measures**

[89] I come to a different conclusion with respect to the appellant's claim relating to the glacier protection measures that CMN was required to implement pursuant to the RCA.

[90] The gist of the appellant's case on this issue is that Barrick knew at least as of July 2011 that CMN was incapable of complying with relevant requirements, that Barrick was then aware that the problem jeopardized the entire project, and that Barrick issued public documents in October and December of 2011 — one of which constitutes a core document within the meaning of section 225.13 of the *Act* — that failed to disclose this situation of non-compliance as well as the ensuing risks to the project's continuation. The appellant also relies on the July 2013 decision in which a Chilean appellate court concluded that CMN had repeatedly failed to comply with the glacier protection plan it had committed to pursuant to the RCA.

[91] I have little difficulty in finding that the appellant has a reasonable chance of demonstrating that CMN failed to publicly disclose, in the fall 2011, that it was unable to comply with the glacier protection measures required by the RCA. The record shows that problems had been noted by Chilean authorities as early as May 2011, and the appellant is right to point out that Barrick representative Ivan Mullany admitted during cross-examination on his sworn statement that, by the summer of 2011, the company was well aware of CMN's inability to comply with relevant requirements.

[92] That being said, I am of the view that the appellant's argument fails on the issue of materiality.

[93] The combined effect of sections 5, 225.4 and 225.8 of the *Act* requires that the appellant establish a reasonable possibility that the disclosure of CMN's failure to comply with the glacier protection plan could reasonably have been expected, in the fall of 2011, to bear significantly on the price of Barrick's shares. However, the evidence relied upon by the appellant is insufficient to support such a finding.

[94] The appellant first points to Barrick internal reports showing that management was not only aware of CMN's inability to comply with the glacier protection plan, but that it was also concerned that the situation could lead Chilean authorities to suspend the project altogether. However, the purely subjective concerns expressed in those documents are not substantiated by additional evidence providing a more objective assessment of the potential impact, on Barrick's share price, of CMN's failure to comply with the glacier protection plan. Moreover, the documents relied upon by the appellant are monthly reports issued between October and December of 2012. As such, they are of very limited assistance, if any, in assessing the potential market impact of CMN's non-compliance in the fall of 2011 or, for that matter, at any other time prior to May 2012.

[95] The other evidence relied upon by the appellant is the July 2013 Chilean appellate court decision. However, while that decision does support his contention that CMN repeatedly failed to comply with the glacier protection plan, it does not support his further contention that those violations threatened the project's continuation. Significantly, the court's order regarding the suspension of the Pascua-Lama project was based solely on regulatory non-compliance relating to the water management system.[69] With respect to violations relating to the glacier protection plan, all that the court decided was to order CMN "to submit all information before the Environmental Superintendency related to the plan for tracking and monitoring glaciers and glaciarettes so that the latter may oversee and monitor thorough compliance with the environmental law, without prejudice to the corresponding administrative proceedings".[70]

[96] In my opinion, those documents fall short of the kind of evidence that could reasonably lead the trial judge to make a finding of materiality. They do not amount to credible evidence showing that the appellant has a reasonable chance of success on this issue.

[97] I am mindful that the Supreme Court emphasized in *Sharbern* that "[t]he materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient".[71] However, in my opinion, common sense does not suffice to bridge the gap in the evidence invoked by the appellant regarding the issue of materiality.

[98] I thus find that the appellant should not be authorized to assert a secondary market claim in relation to the glacier protection measures.

---

69 Exhibit P-17B, J.S., p. 7610.

70 *Ibid.*

71 *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, para. 61 [emphasis added].

iii) **The water quality monitoring system**

[99] I turn now to the appellant's claim in relation to aspects of the RCA that required CMN to monitor water quality in areas surrounding Pascua-Lama and activate emergency plans if predetermined levels of acidification were exceeded.

[100] In this respect, the appellant relies particularly on findings made by the Chilean environmental court in its March 2014 decision upholding the challenge to sanctions imposed by SMA that a local Indigenous group had launched in June 2013.[72] Those findings are to the effect that, from the beginning of construction at Pascua-Lama in October 2009 until April 2013, CMN repeatedly violated the RCA by failing to adequately respond to excessive levels of water acidification in surrounding areas.[73] The appellant adds that these environmental violations were never properly disclosed and that several public statements regarding Pascua-Lama's environmental compliance made by Barrick after October 2009, including some of which were made in core documents within the meaning of section 225.3 of the *Act*, were misleading.

[101] The respondents' position rests on the premise that, between the issuance of the RCA in February 2006 and the beginning of construction in October 2009, the water quality in areas surrounding Pascua-Lama deteriorated naturally to such an extent that the original acidification levels no longer made sense. This situation subsequently led CMN to seek a modification of those levels from Chilean authorities. The respondents further allege that the General Water Authority eventually agreed with the proposed revisions and that Chile's Environmental Assessment Service determined, in a decision issued on June 7, 2012,[74] that the proposed changes were not significant and that CMN was therefore entitled to implement the modified alert levels.

[102] In response to those arguments, the appellant points out that, in a second decision issued in June 2013, the Environmental Assessment Service emphasized that the modified alert levels required a formal amendment to the RCA before they could be lawfully applied.[75] The appellant thus claims that the respondents continue to falsely present the June 2012 decision as a formal authorization to modify the scope of CMN's obligations in relation to the monitoring of water quality.

[103] I agree with the appellant that the evidence on which he relies shows a reasonable possibility that he will succeed in proving that CMN repeatedly breached the RCA from October 2009 onwards, by failing to respond appropriately to excessive levels of water acidification in areas surrounding Pascua-Lama.

---

[72] Exhibit P-12A, J.S., p. 7115.
[73] *Id.*, pp. 7185-7188.
[74] Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 29a, J.S., p. 17973.
[75] Sworn statement of Rodolfo Westhoff dated August 31, 2018, Exhibit 29b, J.S., p. 17979.

[104] However, here as well, I find that the appellant's argument fails on the issue of materiality.

[105] To begin, the appellant misunderstands his burden when he writes in his brief that "the available evidence is insufficient to support a finding that he has no reasonable prospect of establishing at trial that the non-disclosure of this situation by Barrick was a material misrepresentation".[76] It is not the respondents' responsibility to point to evidence showing that he has no reasonable chance of success on the issue of materiality. It is rather for the appellant to present some credible evidence tending to show that CMN's non-compliance with RCA requirements concerning water quality monitoring is a fact that could reasonably have been expected to significantly impact the price of Barrick shares. And given how he has pleaded this issue, that evidence needs to point to a potentially significant market impact as early as October 2009.

[106] I agree with the respondents that it is insufficient for the appellant to rely on the findings made by the Chilean environmental court in March 2014. It may well be that, from October 2009 onwards, CMN repeatedly violated the RCA by failing to adequately respond to excessive levels of water acidification in surrounding areas. But how serious were these violations? Did they expose CMN to serious sanctions or jeopardize the continuation of the project? And even if they did, when exactly did the risk of serious consequences materialize? Was it as early as October 2009 or was it later? As it currently stands, the record contains no plausible evidence purporting to provide answers to these important questions.

3. Conclusion on the appellant's secondary market claim

[107] In the end, I find that the appellant ought to be authorized to assert a secondary market claim based on sections 225.2 *et seq.* of the *Act*, but only in relation to the alleged misrepresentations regarding CMN's water management system. Moreover, in light of section 225.8 of the *Act*, the appellant's claim can also be directed at respondents Jamie Sokalsky and Ammar Al-Joundi, as they were Barrick officers and/or directors on July 26, 2012, when the July 26, 2012, public statement was released.

C. Should the appellant be authorized to assert claims on a class-wide basis?

[108] I now consider whether the appellant ought to be authorized, pursuant to article 575 *C.C.P.*, to assert claims on a class-wide basis. To properly answer this question, it is necessary to distinguish between his secondary market claim, his primary market claim and his claim based on article 1457 *C.C.Q.*

1. The secondary market claim

[109] As mentioned earlier, the reasonable possibility of success standard set out in section 225.4 of the *Act* is more demanding than the standard provided for in

[76] Para. 76.

article 575(2) *C.C.P.* ("the facts alleged appear to justify the conclusions sought/*les faits allégués paraissent justifier les conclusions recherchées*").[77] Therefore, my finding that the former standard is met with respect to the alleged misrepresentations regarding CMN's water management system entails that the latter standard is also met in relation to that claim.

[110] As for the other criteria listed in article 575 *C.C.P.*, the motion judge found that they were met in relation to the appellant's secondary market claim. Those findings are entitled to deference on appeal.[78]

[111] The appellant will therefore be authorized to assert his secondary market claim relating to the alleged misrepresentations regarding CMN's water management system on behalf of all Quebec residents who acquired Barrick securities between July 26, 2012, and October 31, 2013.

2. The primary market claim

[112] Should the appellant also be allowed to act on behalf of Quebec residents who acquired Barrick securities on the primary market during that period?

[113] Primary market claims, which are governed by sections 217 *et seq.* of the *Act*, are not subject to any screening mechanism comparable to the one that applies to secondary market claims. However, the appellant bears the burden of establishing that the criteria set out in article 575 *C.C.P.* are met.

[114] The motion judge found that they were not. In his opinion, the appellant failed to show that the facts alleged appear to justify the conclusions sought within the meaning of article 575(2) *C.C.P.* He came to that conclusion after having noted, firstly, that any misrepresentation made prior to April 30, 2011 was not actionable under the *Act* and, secondly, that the only Barrick prospectus that allegedly contained a misrepresentation dated back to September 2009. The judge also found that the appellant was not an appropriate representative to assert a primary market claim (article 575(4) *C.C.P.*). He explained that the appellant did not personally have such a claim against the respondents, and that the flexible approach to standing in a class action context — adopted in the Supreme Court's decision in *Marcotte*[79] — did not apply given the dissimilarity between the two causes of action.

[115] The appellant contends that the judge erred in two respects: firstly, by overlooking that he relied on five different prospectuses, and not merely on the one issued in September 2009, to support his primary market claim; secondly, by refusing to apply the more flexible approach to standing adopted in *Marcotte*.

---

[77] See above, para. 40.
[78] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 10.
[79] *Bank of Montreal v. Marcotte*, 2014 SCC 55, paras. 29 *et seq.*

[116] There is no need to determine whether the appellant is correct in respect of those two issues, because even assuming that he is, the judge's errors would not be determinative.

[117] To understand why, it is important to note at the outset that the appellant relies on prospectuses that were all issued before the July 26, 2012, statement in which Barrick announced that pre-stripping operations had commenced. Consequently, any misrepresentation contained in those prospectuses can only relate to violations of the RCA relating to either the glacier protection measures or the water quality monitoring system.

[118] However, as indicated earlier, the appellant has failed to show a reasonable chance of establishing that any such violations constituted material facts within the meaning of section 5 of the *Act*. I am mindful that I have reached that conclusion after a review of the evidentiary record, whereas article 575(2) *C.C.P.* provides that the appearance-of-right analysis is to focus on the facts as alleged in the appellant's application for authorization to institute a class action. However, the allegations regarding materiality found in the appellant's application are the kind of "vague, general or imprecise" allegations of fact that require the motion judge to go beyond the pleadings and scrutinize the record for some evidence that "form[s] an arguable case".[80] For that reason, my analysis of the issue of materiality under section 225.4 of the *Act* is applicable under article 575(2) *C.C.P.*

[119] I thus find that the appellant has not discharged his burden of establishing that the criterion set out in article 575(2) *C.C.P.* has been met in relation to his primary market claim.

3. The claim based on article 1457 *C.C.Q.*

[120] The last issue to be considered is whether the appellant ought to be authorized to assert a claim based on article 1457 *C.C.Q.* on a class-wide basis.

[121] The motion judge ruled against the appellant on the ground that he had failed to show an arguable case as required by article 575(2) *C.C.P.* The judge came to that conclusion after having repeated several findings he had made on issues such as CMN's alleged breaches of the RCA as well as the primary cause of Pascua-Lama's failure while considering whether to grant leave pursuant to section 225.4 of the *Act*. The judge also found that the appellant's pleadings were fatally flawed, firstly because he had failed to allege that he had relied on the alleged misrepresentations while purchasing Barrick shares, but also because he had failed to allege a sufficient connection between those misrepresentations and the successive decreases in the price of Barrick shares.

---

[80] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 59.

[122] I see no need to delve into all the issues in dispute with respect to this aspect of the case, because I agree with the respondents that the motion judge made no reviewable error when he held that the appellant had failed to adequately plead reliance.

[123] The appellant contends that the judge erred in law in holding that he was required to specifically plead and prove reliance in order to succeed on his secondary market claim based on article 1457 *C.C.Q.* He points to the Supreme Court's decision in *Asselin*,[81] which he reads as confirming that reliance can be proved through presumptions of fact and that specific allegations are not required to clear the hurdle set by article 575(2) *C.C.P.* He adds that, since *Asselin*, statements made by the Supreme Court in *Theratechonologies*[82] to the effect that reliance is an essential element of a secondary market claim based on article 1457 *C.C.Q.* should no longer be understood as imposing on the plaintiff a strict burden to specifically plead and prove reliance.

[124] In my opinion, the appellant reads too much into *Asselin*. First, *Asselin* is not a case about an issuer's continuous disclosure obligations under the *Act*. Rather, it concerns the contractual relationship between financial advisors and their clients, a very different context. Second, as noted by both our Court[83] and the Supreme Court,[84] Mr. Asselin had specifically pleaded reliance in his application for authorization to institute a class action, and the Supreme Court's comments on the use of presumptions of fact were made in the context of the commonality requirement set out in article 575(1) *C.C.P.* In other words, the Supreme Court was alluding to the possibility of relying on presumptions of fact to prove causation on a class-wide basis. It did not state that presumptions of fact could somehow operate so as to relieve the plaintiff from having to allege and eventually prove reliance. Third, nothing in *Asselin* casts doubt on *Theratechonologies*' holding that, in the context of a secondary market claim based on the *Civil Code of Quebec*, plaintiffs bear the "heavy burden" of proving that they relied on the alleged misrepresentation when they purchased securities.[85]

[125] In the present case, the appellant failed to plead reliance with any specificity, nor has he further explained how certain circumstantial facts could give rise to "serious, precise and concordant/*grav[e], précis[e] et concordant[e]*" presumptions[86] that he personally relied on the alleged misrepresentations when he purchased Barrick shares. In these circumstances, I see no basis to interfere with the motion judge's holding, which — it should be emphasized — is entitled to deference on appeal.[87]

---

81 *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 3.
82 *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18.
83 *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, para. 109.
84 *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 3, para. 64.
85 *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, para. 28. See also para. 33.
86 Article 2849 *C.C.Q.*
87 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 10.

III. Conclusion

[126] The preceding analysis leads me to the conclusion that the appeal ought to be allowed in part, so as to authorize the appellant to assert on a class-wide basis a secondary market claim based on sections 225.2 *et seq.* of the *Act*, but only in relation to the alleged misrepresentations regarding CMN's water management system.

FRÉDÉRIC BACHAND, J.A.