CITATION: O'Brien v. Maxar Technologies Inc., 2022 ONSC 1572
COURT FILE NO.: CV-19-631107-00CP
DATE: 20220311

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Charles O'Brien and James Rae	)	Albert Pelletier, Daniel Bach, Rachael Sider and Jared Rosenbaum, for the plaintiffs
Plaintiffs	)	
	)	
– and –	)	
	)	
Maxar Technologies Inc., Howard L. Lance, Anil Wirasekara, Biggs C. Porter, Nick S. Cyrpus and KPMG LLP	)	David R. Byers, Daniel S. Murdoch, Sinziana Hennig and Gavin Inkster, for the Defendants
	)	
Defendants	)	
	)	
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	)	
	)	**HEARD:** January 10, 11 and 12, 2022

J.T. AKBARALI J.

Overview

[1] The proposed representative plaintiffs bring this motion, pursuant to Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5, seeking leave to commence a global class action against the defendant, Maxar Technologies Inc. ("Maxar"), and certain of its directors and officers, for alleged material misrepresentations in Maxar's public disclosure documents and financial statements from February 22, 2018 to February 28, 2019 (the "Class Period"). They seek certification of the statutory claim and of their related common law negligent misrepresentation claim.

[2] The plaintiffs allege that the defendants misrepresented that Maxar's financial statements fairly presented Maxar's financial position and performance in accordance with International Financial Reporting Standards ("IFRS"). They allege that Maxar's financial results were misrepresented in two ways: (i) by failing to impair assets when required, leading to inflated assets; and (ii) by improperly employing the percentage of completion approach to revenue recognition, resulting in inflated revenues. They also argue that management misrepresented that Maxar's internal controls over financial reporting ("ICFR") and disclosure controls and processes ("DC&P") were defective throughout the class period, and allege that the deficiencies in ICFR support their allegations about improper revenue recognition.

[3] The plaintiffs allege that these misrepresentations were partially corrected in August 2018, upon the release of a report from a short-seller, Spruce Point Capital Management, that raised concerns over Maxar's financial reporting practices. They further allege that the company partially corrected its disclosures upon the release of its 2018 Q3 financial statements, when it took impairment charges of USD $345.9 million, and then fully corrected its disclosures on the release of its FY 2018 financial statements, when it took impairment charges of over USD $750 million.

[4] The defendants argue that Maxar experienced a series of negative developments and significant decline in its share price beginning in the second half of 2018 and into early 2019, all of which were disclosed in a timely way and in accordance with applicable securities laws. Its financial statements have not been restated, amended or refiled, nor has it been the subject of investigation by securities regulators. The defendants argue that the plaintiffs have not adduced credible evidence to show they have a reasonable possibility of success at trial. In particular, the defendants allege that the plaintiffs' case rests principally on their proposed expert's evidence, and they argue that his evidence is inadmissible.

[5] In the defendants' view, this action arose because Maxar made timely disclosure of negative information that led to a decline in its share price. The defendants point to the shifting nature of the plaintiffs' claim over time and argue that the plaintiffs have reverse engineered their claim (at least twice) in response to the evidence, consistent with a strike suit. They also argue that in so doing, the plaintiffs have engaged in impermissible case splitting.

[6] If leave is granted, the defendants take issue with the constitution of a global class. Whether or not leave is granted on the statutory claim, the defendants argue that the common law claim should not be certified.

Brief Conclusion

[7] For the reasons that follow, I dismiss the plaintiffs' motion for leave to proceed with their claim under s. 138.3(1) of the *Securities Act* because I conclude that there is no reasonable possibility that the action will be resolved at trial in favour of the plaintiffs. The parties agree that if the statutory claim is not granted leave, neither it nor the common law claims should be certified. Accordingly, the certification motion is also dismissed.

Brief Background to the Claim

[8] Maxar is a global leader in advanced space technology solutions. It employs approximately 4000 people in more than 20 global locations. Its predecessor, MacDonald, Dettwiler and Associates Ltd. ("MDA") was known for its work in high-profile government projects, including the Canadarm robotic arms on NASA's space shuttle and the International Space Station.

[9] On October 5, 2017, MDA acquired DigitalGlobe Inc. ("DigitalGlobe") and changed its name to Maxar. The acquisition combined Maxar's position as a leader in commercial communication satellites with DigitalGlobe's high-resolution Earth imaging capabilities, including five in-orbit satellites.

[10] During Q2 2017, Maxar registered its common shares with the US Securities and Exchange Commission and, upon closing the DigitalGlobe transaction, Maxar became dual listed on the Toronto Stock Exchange and the New York Stock Exchange.

[11] After the DigitalGlobe transaction, and before January 1, 2019, Maxar reported to securities regulators in both Canada and the United States, and prepared its financial statements in accordance with IFRS.

[12] Effective January 1, 2019, Maxar changed its jurisdiction of incorporation from British Columbia to Delaware (the "U.S. Domestication"), after which Maxar prepared its financial statements in accordance with U.S. Generally Accepted Accounting Principles ("U.S. GAAP") beginning with its FY 2018 financial statements.

[13] In connection with the U.S. Domestication, on July 29, 2018, Maxar's Canadian auditor, KPMG LLP (Canada) resigned, and at the same time, Maxar appointed KPMG LLP (U.S.) as its auditor.

[14] Following the DigitalGlobe transaction, and during the period at issue in this proceeding, Maxar had three reportable segments: space systems, imagery, and services.

[15] Within the space systems segment there were three reporting units:

a. SSL, GeoComm: through Maxar's subsidiary Space Systems/Loral, LLC ("SSL"), Maxar manufactures GeoComm satellites which operate in geosynchronous equatorial orbit approximately 36,000 km above the Earth's equator;

b. SSL, Other: also through SSL, Maxar manufactures low earth orbit ("LEO") satellites which operate at an orbit of 2000 km or less above Earth;

c. MDA: Maxar continued the historical MDA business, which supplies satellite antennas, space robotics, and other solutions, until its sale on April 8, 2020.

[16] The distinction between GeoComm satellites and LEO satellites has some relevance in this case. Commencing in 2015, Maxar began reporting a market-wide decline in the GeoComm business. A growing number of satellite operators had begun transitioning their GeoComm satellites at end-of-life to LEO satellites which are less expensive to build, launch, and service. As a result, there were fewer GeoComm satellite contracts available to be won than there historically had been. In addition, satellite operators began to delay award decisions to evaluate geostationary and other competing satellite system architectures and other changes in the industry, which also had a negative impact on the opportunities for revenue generation in the GeoComm market. The declining GeoComm market provides important context in this case, as will become clear.

Maxar's Impugned Reporting During the Class Period

[17] The plaintiffs provided me with a chart entitled "Impugned Documents", which I attach to these reasons as Appendix A. It identifies six events, or points in time, where they allege that

Maxar made a misrepresentation in its disclosures to the public. All but one of these alleged misrepresentations is contained in a core document, and in some cases, multiple documents are associated with each event or timeframe.

[18] The plaintiffs plead a single misrepresentation, defined in their claim as "the statement made in the Impugned Documents, whether explicitly or implicitly, that the document fairly presented Maxar's financial position and its financial performance".

[19] As I have noted, the plaintiffs allege that Maxar's financial position and financial performance were misstated because the company failed to take an impairment when it should have and because the company recognized revenue improperly. The plaintiffs claim the company also misrepresented that it had effective ICFR and DC&P, which they claim supports their argument that the company improperly recognized revenue.

[20] They allege this misrepresentation was made in Maxar's: (i) 2017 annual report and certifications dated February 22, 2018; (ii) management information circular of March 29, 2018; (iii) interim financial statements, MD&A, and certifications for Q1 2018 dated May 9, 2018; (iv) interim financial statements, MD&A and certifications for Q2 2018 dated July 31, 2018; (v) press release responding to the report of the short-seller, dated August 24, 2018; and (vi) interim financial statements, MD&A, and certifications for Q3 2018 dated October 31, 2018.

[21] To the extent necessary, I address the evidence corresponding to these allegations in detail below. However, at this stage, I foreshadow one aspect of the evidence that was at the heart of the plaintiffs' oral argument. In Q1 2018, Maxar announced it had successfully won a contract to build a satellite known as AMOS 8 for an Israeli company, Spacecom. The contract was conditional on the payment of a first instalment, which was never paid, and by the contract's own terms, it never became effective. The loss of the contract was announced in Q3 2018, at around the same time that the payment was due but not paid. The plaintiffs allege that there is evidence that the contract failed in Q2 or earlier, and as a result, Maxar should have taken impairments earlier than Q3.

[22] The plaintiffs' own factum makes clear the importance of AMOS 8 to its arguments on the impairment issue:

> The Impairments — particularly the first — largely turn on the AMOS 8 contract with an Israeli company, Spacecom. There is clear evidence that the AMOS 8 project had failed as late as Q2 (if not earlier) and the related impairments should have been taken earlier than Q3.

[23] I address the evidence around AMOS 8 in greater detail below. At this stage, I note that the defendants allege that the plaintiffs' case was re-framed around AMOS 8 in their reply evidence, to which the defendants had no opportunity to respond. They argue that the plaintiffs have impermissibly split their case, and as a matter of procedural fairness, I ought not to entertain this argument.

[24] For the sake of completeness, I note that the plaintiffs originally claimed against Maxar's Canadian auditor, KPMG LLP, but the claim was dismissed against it on consent on September 23, 2021.

[25] I also note that the claim originally included an allegation that Maxar failed to disclose in a timely manner that one of its satellites, Worldview-4, experienced a failure. Relying on a tweet from an anonymous account that suggested Worldview-4 failed in October 2018, the plaintiffs claimed that Maxar's disclosure of Worldview-4's failure on January 7, 2019 demonstrated the company's failure to disclose a material fact as soon as practicable, and in any event, within ten days of the satellite's failure. This claim was maintained up until the first day of the hearing of the motion, when the plaintiffs abandoned it.

Issues

[26] The issues raised on this motion are:

a. What is the scope of the admissible evidence before me? In particular,

   i. Is the expert evidence proffered by the parties admissible?

   ii. Have the plaintiffs engaged in impermissible case-splitting, and if so, what consequences flow?

b. Should the plaintiffs be granted leave to commence a claim under s. 138.3 of the *Securities Act*? This requires a consideration of whether the plaintiffs have brought this claim in good faith. It also requires me to consider, for each alleged misrepresentation, whether:

   i. the statement, in its context, was a misrepresentation;

   ii. the misrepresentation was material; and

   iii. the misrepresentation was publicly corrected.

c. If leave is granted in respect of any or all of the alleged misrepresentations, should the action, in whole or in part, be certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.?

The Admissibility of Expert Evidence

[27] There is evidence in the record from four experts: (i) Andrew Mintzer, on behalf of the plaintiffs; (ii) Donald Newell and (iii) Steve Aubin, who have prepared a joint report on behalf of the Maxar defendants; and (iv) James Saloman, put forward by KPMG LLP, which has now been let out of the action, but whose evidence on the motion was placed before me.

[28] The defendants argue that the evidence of Mr. Mintzer is inadmissible, because he is not qualified to offer the opinions he purports to offer. No such argument is made in respect of the defence experts.

[29] Determining whether to admit expert evidence involves a two-stage analysis. In the first stage, there are four threshold requirements that must be established (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 19 and 23,

citing *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-25; see also *R. v. Abbey*, 2017 ONCA 640, 140 O.R. (3d) 40 (C.A.) at para. 48):

a. Relevance, which at this stage means logical relevance;

b. Necessity in assisting the trier of fact;

c. Absence of an exclusionary rule; and

d. A properly qualified expert, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is impartial, independent and unbiased.

[30] If the threshold requirements are met, the court moves on to the second stage of the analysis. There, the judge, as gatekeeper, determines whether the benefits of admitting the evidence outweigh its potential risks, considering factors such as legal relevance, necessity, reliability, and absence of bias.

[31] The plaintiffs argue that this test is too stringent on a leave motion, where the test for admitting expert evidence is not as onerous as it is in other contexts. In support of this argument they rely on *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81, where, at para. 118, Glustein J. identified a number of principles with respect to the treatment of expert evidence on a leave motion such as this one, including, at (i):

> The leave motion is also not the forum in which to resolve conflicts in the expert evidence, unless it can be established that there is no reasonable possibility that an expert's opinion would be accepted by a trial judge.

[32] The plaintiffs go on to argue that because their expert takes a different view about the application of the IFRS standards than the defence experts, by necessity they have established a reasonable possibility of success at trial, and leave should be granted.

[33] I do not accept the plaintiffs' argument. There is a difference between a judge on a leave motion weighing competing expert evidence that has been admitted, and a judge exercising her gatekeeping function to determine whether to admit expert evidence at all. Whenever expert evidence is offered, the court has an obligation to consider whether it should be admitted.

[34] In *White Burgess*, the Supreme Court of Canada, at paras. 16-19, noted that the jurisprudence has emphasized "the important role that judges should play as 'gatekeepers' to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission." The Court reiterated the dangers of expert evidence, relying on its earlier decision in *Mohan*, including: (i) that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it; (ii) the potential prejudice created by the expert's reliance on unproven material not subject to cross examination; and (iii) that it may lead to an inordinate expenditure of time and money.

[35] These dangers do not only arise at trial. There is no principled reason why a court on a leave motion should not ensure that, before it considers expert evidence in the context of the leave analysis, that evidence should be properly admissible.

[36] Moreover, I note that, although the plaintiffs rely on *Lundin Mining*, in that case, Glustein J. considered the proposed expert's evidence in the context of the test for admission of expert evidence before concluding that it was admissible: see paras. 117-127.

[37] I thus turn to consider the admissibility of the proposed expert evidence in this case, beginning with the plaintiffs' expert, Mr. Mintzer. As I have noted, the defendants argue that Mr. Mintzer's evidence is inadmissible. They do so arguing that he (i) is not a properly qualified expert, and (ii) has inappropriately acted as an advocate.

[38] Mr. Mintzer held a staff position, working in auditing, at Ernst & Young in the U.S., from the beginning of his career in 1978 until 1991. Between 1991 and 1995, he was a partner at Ernst & Young's Los Angeles office. He left Ernst & Young in 1995, and began to focus principally on client work consisting of litigation services and forensic reviews.

[39] As a result, Mr. Mintzer has not done any auditing work since 1995, and therefore no auditing work since the enactment of the *Sarbanes-Oxley Act* ("SOX") in 2002. This is relevant because auditors were only required to audit a company's ICFR after SOX was enacted. Mr. Mintzer has never audited a company's ICFR.

[40] In 2005, Mr. Mintzer qualified as a Chartered Professional Accountant ("CPA") in British Columbia. However, his credentials do not include holding an audit license, which would permit him to perform audit engagements in British Columbia. Nor does he hold a review license, which would permit him to perform review engagements in British Columbia. Mr. Mintzer has never worked for an accounting firm in Canada. He obtained his Canadian qualifications for purposes of testifying in Canadian litigation, and to establish his credentials, as he described it, "in the international theatre of public accounting" in order to become involved in accounting professional standards on an international level. However, there is no indication in his *curriculum vitae* that he in fact has become involved in accounting professional standards on an international level, apart from his work as an expert accountant in Canadian securities class actions.

[41] Mr. Mintzer has never audited a Canadian public company. He has no recollection of having conducted a review engagement for a Canadian public company, and certainly has not done so since he obtained his CPA qualifications in British Columbia. Mr. Mintzer has never served on the audit committee of any public company. He has never audited, reviewed, or prepared financial statements applying IFRS 15, the accounting standard relating to revenue recognition that is relevant in this case. Nor has he published on IFRS 15. There is no evidence that he has audited, reviewed, or prepared financial statements applying IFRS generally. Nor is there evidence that he has published on IFRS generally.

[42] Mr. Mintzer's *curriculum vitae* contains a profile which states that he is an expert in international accounting and auditing standards. In support of that contention, in a brief paragraph, the profile makes reference to Mr. Mintzer's Canadian CPA designation and his

successful completion of the American Institute of Certified Public Accountants' ("AICPA's") International Financial Reporting Standards Certificate Program. It does not say when he completed the course, or what the course required. There is nothing in Mr. Mintzer's *curriculum vitae*, apart from the reference to the IFRS Certificate Program, that suggests he has any experience with IFRS.

[43] Mr. Mintzer has experience as a member of the Accounting Standards Executive Committee of the AICPA, in which capacity he voted on additions to, and revisions of, Generally Accepted Accounting Principles. There is no indication he has any similar experience with IFRS.

[44] Mr. Mintzer has been qualified as an expert in Canadian securities class actions before, but always in cases involving U.S. GAAP. There is no evidence he has ever been qualified as an expert in IFRS. In *Poirier v. Silver Wheaton Corp. et al.*, 2022 ONSC 80, a motion for leave under the *Securities Act* and for certification, I declined to admit Mr. Mintzer's evidence, at paras. 109-110, in part because of his lack of qualifications relating to IFRS.

[45] The plaintiffs allege that, notwithstanding the paucity of IFRS-related qualifications on Mr. Mintzer's *curriculum vitae*, he is qualified to opine on IFRS. They argue that he identified the same standards from IFRS that are relevant to this case as did the defendants' experts; it is only in the application that the experts differ. Of course, the application of the standards lies at the heart of the expertise. Anyone who can read stands a good chance at identifying the correct standards. Applying them is a different matter. I do not consider the fact that Mr. Mintzer has identified the same IFRS standards as the proposed defence experts to be a matter demonstrating any expertise in IFRS.

[46] The plaintiffs also argue that there is no significant difference between IFRS and US GAAP, but the evidence does not support this conclusion. Rather, the evidence supports a conclusion that, even if the end result of applying either is roughly the same, there are differences between them. Nothing in the record allows me to determine how significant those differences are — no expert opined on that question. Driving an automatic car is similar to driving a manual car, and both can get you where you want to go, but if your experience is only with driving an automatic car, you would have a difficult time trying to drive a stick shift to get there.

[47] I also have concerns with Mr. Mintzer's impartiality. Although Mr. Mintzer makes reference in his reports to certain National Instruments, Mr. Mintzer has no legal qualifications. In addition, although Mr. Mintzer purports to analyze in his report when the AMOS 8 contract was likely in jeopardy, he has no relevant aerospace or satellite industry experience, and no experience negotiating government contracts in those industries. In both these instances, he is offering evidence outside of the scope of his claimed expertise.

[48] Moreover, it is plain that Mr. Mintzer has made errors in his evidence regarding the application of IFRS in this case. These errors reflect either his lack of understanding of IFRS or his willingness to advocate for the plaintiffs, both of which are problematic.

[49] For example, in his first report, Mr. Mintzer opined that IFRS require Maxar to certify that its financial statements "do not contain any untrue statement of a material fact or omit to

state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made". On cross-examination, Mr. Mintzer agreed that IFRS has no such requirement; rather, the requirement arises out of securities laws.

[50] Another example lies in a chart Mr. Mintzer prepared relating to the plaintiffs' impairment claims. It is common ground that the relevant International Accounting Standard (IAS 36) requires Maxar to, among other things, consider whether there are indicators of impairment each quarter (a qualitative analysis), and if they are present, to conduct a quantitative analysis to determine if an impairment needs to be taken. In other words, the standard requires the company to consider changes in the financial reporting period that may require the quantitative analysis to be undertaken.

[51] In the chart he prepared, Mr. Mintzer identified indicators of impairment in FY 2017, Q1 2018, Q2 2018, Q3 2018 and FY 2018. However, in describing the indicators of impairment pursuant to IAS 36, he omitted to note that in order to be a qualitative indicator of impairment in a financial reporting period, the change necessarily must have occurred during the reporting period at issue — a significant and important requirement. On cross-examination, he agreed that most of the indicators of impairment he identified in his chart were long-standing issues, like decreases in the number and dollar value of satellite contracts available to be awarded due to the declining GeoComm market, which Maxar began reporting to the market in 2015. The plaintiffs argue that his omission of the words reflecting that the changes had to occur in the reporting period to be a qualitative indicator of impairment in that period is a harmless shortcut. They note that Mr. Mintzer properly quoted IAS 36 earlier in his report. But that misses the point. The real problem is not the words he used (which were inaccurate), but his application of the standard in such a way as to ignore a key component of it. In short, it is plain not just that he misstated the temporal requirement in his chart, but more importantly, that he misapplied it.

[52] To give one example of the misapplication of the standard, on cross-examination, Mr. Mintzer agreed that of the six indicators of impairment he identified in respect of Q1 2018, the only new development was the resignation of Maxar's CFO. However, according to IAS 36, the resignation of an executive is not a potential indicator of impairment. Given that the other five indicators were not new developments, not one of the six indicators Mr. Mintzer identified were properly classified as an indicator of impairment in that reporting period.

[53] Other aspects of Mr. Mintzer's evidence were also troubling:

a. Mr. Mintzer repeatedly used the phrase "reasonable possibility" to describe the likelihood that Maxar had failed to comply with IFRS standards. "Reasonable possibility" has no particular meaning under IFRS. Mr. Mintzer claimed he used the words "as they appear in the dictionary", and described them to mean something more than remote but less than likely. "Reasonable possibility" is, of course, the legal standard that I have to apply on this motion —a fact Mr. Mintzer agreed he "ha[d] heard" — suggesting that Mr. Mintzer's evidence was geared at the ultimate issue before me. Apart from being troubled by the concentration of his evidence on the ultimate issue before me, I am troubled by his failure to acknowledge on cross-examination that he was trying to speak to the legal standard by using those words. It is simply not credible that he would just happen

to use the phrase "reasonable possibility" more than 30 times in his report without meaning to invoke the legal standard.

b. In claiming that Maxar should have undertaken a quantitative impairment analysis in FY 2018, Mr. Mintzer ignored the publicly reported fact that Maxar did undertake a quantitative analysis at that time. Mr. Mintzer agreed on cross-examination that, assuming a quantitative impairment analysis is done in a financial reporting period, there is no need to undertake the first step — the qualitative analysis — because all that will do is tell you whether you need to move on to the quantitative analysis stage of the process.

c. Mr. Mintzer refused to make reasonable concessions on cross-examination. For example, it is common ground that IAS 36 requires a company to conduct annual testing for impairment of goodwill. Maxar's accounting policy also required Maxar to conduct annual testing for impairment of non-financial assets. On cross-examination, Mr. Mintzer refused to acknowledge that Maxar's policy goes beyond what is required by IAS 36. Rather, he said he did not know if Maxar's policy "went beyond" IAS 36. He described Maxar's policy as "not counter to IAS 36" and "consistent" with IAS 36. At the same time, Mr. Mintzer admitted that if Maxar's policy had not provided for annual testing of non-financial assets, it would still have been in accordance with IAS 36.

d. Mr. Mintzer took things out of context. For example, in his report, he stated that it was "noteworthy" that there was a substantial increase in intangible assets given the negative industry trends and downward projection of Maxar's space systems business segment. On cross-examination, he agreed that the negative industry trends were in Maxar's GeoComm business while the vast majority of the increase in intangible assets were in the imagery and services segments.

e. Mr. Mintzer made factual errors. For example, Mr. Mintzer made reference to the fact that, following the DigitalGlobe transaction, Maxar marked down the fair market value of the DigitalGlobe satellites. He testified on cross-examination that he considered the markdown to be an indicator of the obsolence of Maxar's GeoComm business. Mr. Mintzer was not aware that the DigitalGlobe satellites were LEO satellites. When it was suggested to him on cross-examination that the mark down of LEO satellites had no relevance to the value of Maxar's GeoComm business, he refused to agree, and rather, offered it "as an indicia of the satellite industry in particular and the manufacturer of satellites, and it's part of the mantle of data points that [he] took note of and included." Mr. Mintzer treated the mark down as an indicator of impairment of Maxar's GeoComm business in his report. Moreover, it is clear that the GeoComm business had been slowing down since 2015 in part due to the preference of many operators for LEO satellites given their greater cost-effectiveness. Mr. Mintzer's position was inaccurate, and he would not admit it.

[54] Finally, the manner in which Mr. Mintzer approached his reply report was very troubling. In his reply report, he raised new issues for the first time, or elevated issues to a level of importance that was not apparent before. The evidence indicates he did this of his own accord.

[55] In particular, Mr. Mintzer instructed his associates to obtain information about the cancellation of the AMOS 8 satellite contract. A reply affidavit from class counsel attaches many public communications about the AMOS 8 satellite contract which are in Hebrew, and their English translations. Mr. Mintzer used these documents to opine that the cancellation of the AMOS 8 contract likely took place before Q3 2018 and should have led Maxar to undertake an impairment analysis earlier than Q3 2018.

[56] The cancellation of the AMOS 8 contract is pleaded in the statement of claim, but the pleading comprises just two paragraphs of the 70-page claim. The pleading describes AMOS 8 as "illustrative of the industry-wide and Maxar-specific conditions that negatively impacted Maxar's geostationary communication satellites manufacturing business." The cancellation of AMOS-8 was not identified as an indicator of impairment in any financial reporting period in the chart Mr. Mintzer prepared in his original report. It was only in Mr. Mintzer's reply report that AMOS 8 rose to prominence as the issue that "largely" (according to the plaintiffs' factum) drives the plaintiffs' impairment argument.

[57] Mr. Mintzer also raised, for the first time, an argument related to Maxar's intersegment revenue. Intersegment revenue is revenue generated when one segment of the business performs work for another segment. On consolidation, the revenue generated gets eliminated. Mr. Mintzer suggested that Maxar's intersegment revenue in the space systems segment should have been excluded for purposes of impairment assessments. On cross-examination, he agreed there was no accounting standard supporting the exclusion of intersegment revenue for that purpose.

[58] Mr. Mintzer raised a third issue for the first time in his reply report. He indicated that Maxar's Q1 2018 Adjusted EBITDA (earnings before interest, taxes, depreciation and amortization) was impacted by $17 million more of investment tax credits ("ITCs") as compared to Q1 2017. He noted that ITCs must be accounted for in accordance with IAS 20, but on cross-examination clarified that he was not taking the position that Maxar did not properly account for the ITCs.

[59] I address the defendants' case-splitting argument relating to these new issues below. At this stage, Mr. Mintzer's decision to raise new issues in his reply report, of his own accord, raises concerns about his impartiality. In addition, his comments about the intersegment revenue, described above, also suggest a lack of familiarity with IFRS, in that he suggested the intersegment revenue should be treated in a way that is unsupported by any relevant accounting standard.

[60] I conclude that Mr. Mintzer's evidence is inadmissible. He does not have the requisite expertise to testify on IFRS. He is not a properly qualified expert because of his willingness to step into the role of advocate. Moreover, he made obvious errors in his report, leading me to conclude that his evidence is not helpful, and because it is unhelpful, it is unnecessary. In my view, his evidence fails to satisfy the first branch of the *Mohan* test. If I am wrong, I would exclude his evidence under the second branch of the *Mohan* test for the same reasons. If I am

wrong about that too, and his evidence should be admitted, I would accord it no weight, for the same reasons.

[61] The question of the admissibility of the defendants' experts can be dealt with much more quickly. I note that there is no objection to the admission of their evidence.

[62] The defendants put forward the evidence of Donald Newell, retired partner, and Steve Aubin, partner, with Deloitte LLP. Mr. Newell and Mr. Aubin have authored a joint report.

[63] Mr. Newell has over 40 years of public accounting, auditing and professional services experience. He served as an advisory and audit partner at Deloitte LLP. He led Deloitte's audit practice in Toronto and was the Regional Service Leader for Deloitte's Prairies public company audit practice. He was Deloitte Canada's IFRS Services Leader for four years, leading the implementation of IFRS in Canada by Deloitte.

[64] Mr. Aubin has over 22 years of experience providing audit, accounting advisory and transaction services. He is an audit partner at Deloitte. He has complex accounting and transaction expertise assisting public and private companies with the application of IFRS. He was the technical editor for three editions of "*iGAAP IFRS for Canada*" and has presented on IFRS.

[65] Both Mr. Newell and Mr. Aubin have provided expert evidence in Canada in cases involving IFRS.

[66] Both Mr. Newell and Mr. Aubin are qualified to give evidence on IFRS.

[67] The evidence offered by Mr. Newell and Mr. Aubin is relevant, in that it relates to the plaintiffs' allegations that Maxar failed to comply with IFRS. Their evidence is necessary because the requirements of IFRS are beyond my experience as a layperson. Moreover, no exclusionary rule applies. Both the first and second stages of the *Mohan* analysis are met.

[68] I thus admit the evidence of Mr. Newell and Mr. Aubin.

[69] The record also includes the evidence of KPMG's expert, James S. Saloman. That evidence was placed before me and the defendants indicated that they rely on it notwithstanding KPMG's removal from the litigation. Some of the evidence deals with the auditor's obligations, and as such is irrelevant to the issues, as it is geared towards the now-withdrawn allegations of KPMG's liability. However, other parts of Mr. Saloman's report are relevant to the issues before me, including: (i) his evidence about ICFR and whether the determination that Maxar's ICFR were not effective as at December 31, 2018 reveals anything about Maxar's ICFR prior to that time; (ii) his evidence about impairment testing, and Maxar's impairment testing in particular; and (iii) his evidence about the standards governing revenue recognition, and whether Maxar was improperly applying them. I thus consider whether Mr. Saloman's evidence is properly admissible.

[70] Mr. Saloman is a consultant to CPA Canada where he assists in the preparation of publications on accounting and auditing matters, among other things. In 2014, he retired from PricewaterhouseCoopers LLP ("PwC"), where he had been a partner in PwC's Accounting

Consulting Services Group. In that role, he dealt with clients' complex accounting, auditing, and reporting issues, among other things. He continued to consult with PwC until 2020. Until 2017, he held the role of Vice-Chair of the Accounting Standards Board's ("AcSB") IFRS discussion group. His *curriculum vitae* describes him as a "leader in achieving a successful transition to IFRS in Canada", including through involvement with CPA Canada, AcSB, PwC, and securities regulators, and as a member of the large Canadian accounting firms' group focusing on IFRS and a group advising the Canadian member of the IFRS Interpretations Committee.

[71] Mr. Saloman was a member of PwC's Global Accounting Consulting Services, which is responsible for dealing with and resolving the complex issues relating to the application of IFRS worldwide, and which develops the PwC position on all IFRS application matters. He chaired PwC's Global IFRS 1 Working Group and was the senior IFRS technical partner in Canada. He has presented on IFRS, and assisted a number of clients with converting to IFRS. Mr. Saloman was on secondment to the International Accounting Standards Board as Technical Director from September 1999 to February 2002, heading the staff responsible for the setting of IFRS and IAS.

[72] There is no doubt that Mr. Saloman is qualified to give evidence on IFRS. As with Mr. Newell and Mr. Aubin, to the extent Mr. Saloman's evidence relates to the issues that remain in this proceeding, it is relevant and necessary. Moreover, no exclusionary rule applies. Both branches of the *Mohan* test are made out.

[73] I thus admit Mr. Saloman's evidence in this motion.

Have the plaintiffs engaged in impermissible case-splitting?

[74] I have described the three issues that the defendants allege Mr. Mintzer raised for the first time in his reply report. In short these are:

a. The cancellation of the AMOS 8 contract;

b. The exclusion of intersegment revenue for purposes of conducting an impairment analysis; and

c. The ITCs.

[75] Of these, the most significant is the cancellation of the AMOS 8 contract which, as I have noted, has become "largely" the reason why the plaintiffs argue that Maxar should have taken an impairment earlier than it did. The factual basis for the argument is largely found in the reply affidavit of Alex Dimson, who attaches a number of publicly available documents regarding AMOS 8, and their English translations.

[76] In the 70-page statement of claim, AMOS 8 is mentioned in only two paragraphs, where the failure of the contract is pleaded to be "illustrative of the industry-wide and Maxar-specific conditions that negatively impacted Maxar's geostationary communication satellites manufacturing business". The claim pleads that, on March 26, 2018, Maxar announced it had been selected by Spacecom to build the AMOS 8 satellite. However, "unbeknownst to investors", Maxar revealed in its MD&A for Q3 2018 that the AMOS 8 contract was not a

definitive award, and it became "void and null as Spacecom did not achieve financing and did not make the initial payment to Maxar".

[77] The claim does not plead what the plaintiffs argued before me — that the contract had failed, or Maxar knew it was likely that the contract would fail, before it announced it, and it should have disclosed it earlier and taken impairments earlier as a result.

[78] Mr. Mintzer's chart in his original report, which sets out what he identified as the qualitative indicators of impairment in each financial reporting period, makes no reference whatsoever to AMOS 8.

[79] The lens applied to the AMOS 8 contract in the argument of the motion arises from the reply affidavit of Mr. Dimson and the reply report of Mr. Mintzer. I agree with the defendants that this late-breaking argument is impermissible case-splitting that deprived the defendants of the opportunity to properly address this argument in their materials.

[80] As Perell J. noted in *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496, at paras. 44-48, the appropriate test to determine whether to strike Mr. Mintzer's reply report and Mr. Dimson's reply affidavit is whether there is any prejudice that cannot be addressed by admitting the report and permitting the defendants to file a responding report. The plaintiffs argue that the defendants could have sought leave to file sur-reply materials but they did not.

[81] I note, as Perell J. did in *Johnson*, at para. 47, that the parties agreed to a timetable and are taken to have agreed to the rules that govern reply evidence. Mr. Mintzer's reply report (to the extent it raises new issues) and Mr. Dimson's reply affidavit (to the extent it deals with AMOS 8) are improper reply.

[82] I also note, as Perell J. did in *Johnson*, at para. 48, that the defendants were under no obligation to file any evidence on the leave motion at all, but they did. In such circumstances, it is both technically and substantively unfair to allow the plaintiffs to split their case in these circumstances, or conversely to expect the defendants to seek leave to respond to improper reply evidence.

[83] Finally, I note that the prohibition against case-splitting in this manner should not come as a surprise to the plaintiffs. The expert report Perell J. struck in *Johnson* was authored by Mr. Mintzer.

[84] I thus strike those portions of Mr. Dimson's reply affidavit and Mr. Mintzer's reply report that relate to (i) the cancellation of AMOS 8 as a matter which should have required Maxar to take an impairment charge earlier than it did; (ii) the inter-segment revenue argument; and (iii) the ITC argument.

Leave under s. 138 of the *Securities Act*

[85] Section 138.3(1) of the *Securities Act* provides, in part:

> Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of the responsible issuer releases a document that

> contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,
>
> a. the responsible issuer;
>
> b. each director of the responsible issuer at the time the document was released;
>
> c. each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document; …

[86] Section 1(1) of the *Securities Act* defines "misrepresentation" to be (a) "an untrue statement of material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made".

[87] "Material fact", when used in relation to securities issued, is defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

[88] Under s. 138.8(1), leave is required to commence a claim under s. 138.3(1). Section 138.8(1) provides that the court shall 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.

[89] In this case, the defendants challenge both elements of the leave test.

General Principles Applicable to the Leave Analysis

[90] In *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838, at para. 16, the Court of Appeal described the purpose of Part XXIII.1 of the *Securities Act* as being "aimed at deterring corporate nondisclosure, protecting investors, and incentivizing accurate and timely disclosure by public issuers, while avoiding the American experience of predatory 'strike suits'".

[91] In *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at paras. 36-38, the Supreme Court of Canada held that the leave requirement gives courts "an important gatekeeping role" in determining whether an action could be said to have a reasonable possibility of success. The Court found that the threshold should be more than a "speed bump", and the courts must "undertake a reasoned consideration of the evidence to ensure that the action has some merit." The Court described the legislative objective of the leave requirement as creating "a robust deterrent screening mechanism so that cases without merit are prevented from proceeding". In *Bradley v. Eastern Platinum Ltd*., 2016 ONSC 1903, at para. 51, Rady J. held that the leave test "is not a low bar".

[92] To establish a reasonable possibility of success, the claimant must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim." The threshold requires that there be a "reasonable or realistic chance that the action will

succeed." However, the leave stage should not be treated as a mini-trial: *Theratechnologies*, at paras. 38-39.

[93] In *Paniccia v. MDC Partners Inc.,* 2018 ONSC 3470, at paras. 89-91, Perell J. held that a judge on a leave motion must be cognizant of the fact that full production has not been made. While the court is entitled to weigh the evidence of both parties having regard to the affidavits and cross-examinations, the court must also take into account that a leave motion "involves merely a paper record and that the statutory leave test sets a low evidentiary threshold."

[94] In *Rahimi v. SouthGobi Resources*, 2017 ONCA 719, 137 O.R. (3d) 241 (C.A.), at para. 48, the Court of Appeal held that the motion judge "is also obligated to consider what evidence is *not* before her." Moreover, where there are contentious issues of credibility that impact on the decision whether to grant leave, "the motion judge must ask herself whether they can be resolved on the existing record": *SouthGobi*, at para. 49. To the extent the defendants argue that these comments are limited to affirmative defences, based on the particular facts at issue in *SouthGobi*, I disagree. The Court of Appeal's direction to be cognizant of gaps in the evidence was not restricted to affirmative defences, but rather applicable to the leave screening mechanism more generally. Moreover, it is both logical and just that a court considering the leave test be mindful of the fact that the defendant may have chosen not to produce relevant evidence to which the plaintiff has no access. "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": *SouthGobi*, at para. 48.

[95] The plaintiffs rely on the decision in *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, at para. 35, where Belobaba J. held that a 10-20 per cent chance of success for the plaintiff is enough to clear the "reasonable possibility" hurdle. With great respect to Belobaba J., I do not agree with his conclusion on this point. First, I note that Belobaba J.'s decision in *Barrick* was appealed to the Court of Appeal, which did not adopt this language, but rather emphasized the need for the motion judge to undertake a reasoned consideration of the evidence on a motion for leave: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, at paras. 73 and 76. Second, I also note that in *Theratechnologies*, at para. 4, Abella J. described the threshold for leave as requiring "more than a mere possibility of success".

[96] While I agree that the reasonable possibility, or, put another way, more than a mere possibility, threshold is lower than the balance of probabilities threshold, and that a court may grant leave on this lower threshold even if the motion judge believes that the defendant has a strong chance of success at trial, in my view, it is not helpful to ascribe percentages to what is fundamentally a qualitative analysis.

[97] The analysis as to whether there is a reasonable possibility that the claim will be resolved at trial in favour of the plaintiff must be undertaken for each alleged misrepresentation: *Paniccia*, at para. 86; *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179, at paras. 70-72.

Is there some credible evidence in support of the plaintiffs' claim?

[98] The question of whether there is some credible evidence in support of the plaintiffs' claim must be approached in the context of the admissible evidence. Given my determination that Mr. Mintzer's affidavits must be excluded, the plaintiffs have no expert evidence in support of their allegations that Maxar's statement that the impugned documents fairly presented its financial position and financial performance amounted to a misrepresentation.

[99] The only expert evidence before me indicates the opposite.

[100] Moreover, I am not persuaded that the gaps in the evidence are significant in this case. I address the most substantial of these alleged gaps in my analysis below.

The Impairment Allegations

[101] The expert evidence demonstrates that Maxar's accounting policy was more stringent than IAS 36, the relevant accounting standard, in that it required Maxar to quantitatively test all non-financial assets annually, while IAS 36 only provides for annual testing of goodwill. The evidence indicates that, with assistance from an independent valuation expert, Duff & Phelps, Maxar quantitatively tested all its non-financial assets in Q4 of FY 2017, and the quantitative analysis provided no basis on which to take an impairment. Rather, the quantitative analysis established that the fair value of Maxar's space systems segment exceeded its carrying value by approximately 100%, providing a reasonable cushion signaling that substantial events or changes would have to take place to cause these assets to be impaired. There is no credible evidence to suggest that Maxar should have taken an impairment in Q4 2017. Even if I had admitted Mr. Mintzer's evidence, he did not acknowledge that Maxar had undertaken quantitative impairment testing in Q4 2017; moreover, he did not offer any evidence that Maxar's quantitative testing yielded the wrong result in Q4 2017. To the contrary, there is evidence that Maxar's financial statements were not amended or restated, suggesting the analysis undertaken was satisfactory to Maxar's auditors.

[102] Maxar's experts considered the potential impairment indicators Mr. Mintzer identified in his report, but their review did not reveal any evidence that Maxar failed to identify impairment indicators that could have resulted in the material misstatement of the financial statements taken as a whole during Q1 2018 or Q2 2018. I have already noted that Mr. Mintzer failed to apply IAS 36 properly when he prepared his chart of indicators of impairment. For Q1 2018, he did not identify a single indicator of impairment that had arisen in the reporting period.

[103] In Q2, the plaintiffs argue that the likely failure of the AMOS 8 contract was an indicator of impairment. They question Maxar's estimate that it would win three or four contract awards in FY 2018, arguing that the estimate was no longer sound given what Maxar knew about AMOS 8. There are several problems with this argument.

[104] First, had I admitted the evidence on AMOS 8, there may have been a reasonable possibility that the plaintiffs would succeed at trial had they alleged that Maxar should have disclosed that the AMOS 8 contract failed or was likely to fail before Q3 2018. However, even if the evidence they led was admissible and could support such an allegation, no misrepresentation along these lines was pleaded. I cannot grant leave for unpleaded misrepresentations. As Perell J.

put it in *Capelli v. Nobilis Health Corp.*, 2019 ONSC 2266, at para. 179, "[i]t is trite that a party cannot succeed on a cause of action that it has not pleaded."

[105] Second, to the extent the plaintiffs seek to tie the failure of the AMOS 8 contract to the impairment charges Maxar took in Q3 2018 and Q4 2018, and to argue they should have been taken in Q2 2018, I would have rejected this argument as being not credible even had I admitted the related evidence. The AMOS 8 contract was worth USD $112 million, while Maxar took impairments of USD $345.9 million in Q3 2018, and USD $1,030 million in Q4 2018. AMOS 8 could not, on its own, have credibly caused Maxar to take those impairments. I note that, after the Q3 impairment, Maxar's share price dropped, thus lowering its market capitalization. A lower market capitalization is an indicator of impairment, and was relevant to the impairment the company took in Q4 2018.

[106] Third, to the extent the plaintiffs take issue with Maxar's Q1 or Q2 estimate of the number of awards it was likely to win in FY 2018, there is no evidentiary foundation to support this allegation beyond the failure of the AMOS 8 contract in Q3. Evidence from Jill Windrum, Vice-President and Chief Financial Officer of Earth Intelligence at Maxar, indicates that Maxar maintained its estimate until Q3 2018. Maxar had projected there would be eight to twelve winnable awards in 2018, but in Q3 2018 it reduced that projection to five awards due to delays by operators in making award decisions. Given that the company's estimate was that it would win three to four awards, the loss of a single award — even assuming that Maxar knew the AMOS 8 contract was likely to fail before Q3 2018 — does not mean that the estimate of three to four awards was unsound in Q2 2018. Moreover, the plaintiffs did not cross-examine Ms. Windrum on this issue. There is no credible evidence to suggest that Maxar's estimate that it would get three to four awards in FY 2018 was suspect by Q2 2018.

[107] Maxar's experts' review of impairment indicators during the class period led them to agree that significant events or changes that occurred during Q3 2018 may affect the recoverable amounts of the space system segment. The loss of the Worldview-4 satellite and a significant reduction in Maxar's market capitalization were impairment indicators during the Q4 2018 reporting period. In both reporting periods, Maxar conducted quantitative analyses and took impairments.

[108] There is no evidence to suggest that the quantitative analysis Maxar performed to determine the impairments it had to take in Q3 2018 or Q4 2018 was improper. The plaintiffs argue that, without discovery, they cannot challenge this quantitative analysis, and as a result, I should be cognizant of this gap in the evidence. However, the fact remains that the only credible evidence before me suggests Maxar took impairments when it was obliged to do so. Moreover, the impairments it took were substantial. No evidence supports an inference that Maxar was not abiding by its obligations as a reporting issuer. Its financial statements were never amended, withdrawn, or restated. Suggesting that the impairments should have been higher is pure speculation.

[109] Finally, I note that, while the short-seller report raised concern about Maxar needing to take an impairment, it does not provide a basis to conclude that the plaintiffs have a reasonable possibility of success. The short-seller report may well have been motivated by the short-seller's own financial interest; it stood to gain on a drop in price of Maxar's shares. Moreover, the report

raised a number of issues, of which only two are complained of in this litigation — impairment and revenue recognition. Many of the shorstseller's other claims about Maxar's financial situation proved to be untrue. There is nothing in the short-seller report to suggest that there is any more to the impairment claims than has been suggested here. It is simply not reasonably possible that it will be found to be a reliable indicator of financial problems at Maxar.

The Revenue Recognition Allegations and the Allegations that ICFR and DC&P were Defective

[110] The plaintiffs also argue that Maxar improperly applied the percentage of completion ("POC") approach to revenue recognition, and thus overstated their revenues. They rely on material weaknesses in Maxar's ICFR that were identified in Maxar's FY 2018 financial statements that they say support their allegations about Maxar's improper revenue recognition.

[111] The POC revenue recognition method allows Maxar to recognize revenue over time on construction contracts by measuring the progress and performance of the contracts. It requires, among other things, that Maxar accurately and reliably estimate the costs and progress of its satellite construction work. The plaintiffs allege that Maxar was unable to make any reliable estimates, such that IFRS required it to not use the POC method.

[112] This allegation focuses on Maxar's accounting treatment of overhead, which is only one of many factors that are relevant to estimate total costs.[1] And within overhead, the plaintiffs focus only on future volume of contracts.[2] The plaintiffs allege that Maxar did not have reliable information to reasonably estimate future volumes at SSL's Palo Alto factory. This allegation relies on the claim, which I have already discussed in the context of the impairment analysis, that Maxar knew or should have known that it would not win three to four contracts in FY 2018.

[113] The plaintiffs argue that it was only in Q3 2018 that Maxar acknowledged that lower award volumes had contributed to reduced profitability from under-absorbed fixed-indirect overhead costs. They link this argument to AMOS 8, stating that the loss of AMOS 8 and other satellite contracts was the main cause of Maxar's problematic use of POC revenue recognition, as it was only as of Q3 2018 that Maxar revised its estimate and concluded that it would not be awarded three to four satellite projects during FY 2018. As I understand it, the plaintiffs argue that Maxar was not reliably recognizing its likely future contract awards before Q3 2018, and as such, its estimate of future contracts was unreliable, and therefore its estimate of overhead was unreliable. It is this alleged unreliability of Maxar's overhead estimate that leads the plaintiffs to argue that Maxar was not permitted to use the POC approach to revenue recognition, which can only be used when a company can make reliable estimates.

[114] The allegation applies to Q1 2018 and Q2 2018 only. The plaintiffs argue that the misrepresentation was corrected in Q3 2018, and on cross-examination, Mr. Mintzer agreed that the evidence did not support a claim that there was any issue with the POC approach to revenue

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[1] Other factors include, for example, direct labour, materials, and costs chargeable to customers.
[2] Other aspects of overhead include the factory capacity, historical volumes, backlogs, and number and size of expected contracts to be awarded.

recognition in FY 2017. Although I have excluded his evidence, his admission is consistent with the plaintiffs' argument, which focuses on the estimate of awards of contracts in FY 2018.

[115] One material weakness in Maxar's ICFR that was identified in Q4 2018 was that Maxar did not have effective control activities related to the design, operation and documentation of process-level controls over the cost-to-cost method used to determine the POC method affecting revenue and cost of sales. The plaintiffs argue that this material weakness precluded Maxar's use of POC revenue recognition because Maxar was unable to accurately estimate and track its project costs. They argue that if the material weakness existed in Q4 2018, it probably existed in Q1 2018 and Q2 2018, and impacted Maxar's revenue recognition during those quarters.

[116] The only admissible expert evidence on this motion does not support the plaintiffs' arguments about the POC method of revenue recognition, nor about Maxar's ICFR.

[117] Maxar's expert evidence indicates that Maxar's Q3 2018 revision of its overhead burden estimate due to an unanticipated decrease in the volume at the Palo Alto factory was contemporaneous with a significant decrease in the industry outlook of winnable programs and a significant decrease in the backlog at the factory, which impacted future expected volume. This is consistent with Ms. Windrum's evidence that Maxar did not revise its estimate about winnable awards in FY 2018 until Q3. She was not cross-examined on that point. There is no admissible evidence that Maxar's estimate was suspect in Q1 2018 or Q2 2018. Even the inadmissible evidence regarding AMOS 8 would not conclusively establish that the estimate of winnable awards was suspect before Q3 2018 in any event.

[118] Maxar's experts discuss what is required for estimates to be "reliable". Notably, estimates are not required to be absolutely accurate, but must be reasonable projections based on management's judgment and available information. Further, no errors can be made in selecting and applying an appropriate process for developing the estimates. Maxar's experts note that Maxar has employed the POC method over the last 20 years with no history of financial statement restatements, including the financial statements during the class period. There is no evidence that criticizes Maxar's process for producing the reported information.

[119] Maxar's experts concluded that the evidence suggests Maxar properly applied IFRS 15, which requires an entity to make reasonable estimates and update its estimates when information or developments arise. There is no admissible evidence to the contrary.

[120] The expert evidence also indicates that the presence of material weaknesses in Maxar's ICFR in Q4 2018 does not mean that its revenue recognition under the POC method did not comply with IFRS. Rather, Management's Report on ICFR as at December 31, 2018 stated that no material errors were identified in the financial statements as a result of the material weaknesses. KPMG U.S. opined on the issue in its audit report and concluded that the consolidated financial statements presented the company's financial situation fairly in all material respects.

[121] The evaluation of the effectiveness of ICFR and DC&P is a point in time assessment, as of the end of the reporting period. It is not an indication that the ICFR were not effective throughout the entire year.

[122] The evidence indicates that Maxar reported that it experienced many significant events and challenges during the reporting period, and listed five of them before identifying its related material weaknesses. These significant events included unexpected high turnover of critical accounting and finance roles. One of the material weaknesses identified was insufficient complement of personnel.

[123] Prior to the FY 2018 disclosure about the material weaknesses, Maxar represented in its quarterly filings that its ICFR and DC&P were effective. Once a material weakness is identified in ICFR, management is required to undertake appropriate procedures to satisfy continuous disclosure obligations, including procedures to ensure that any financial information impacted by the material weakness is accurate and complies with IFRS or U.S. GAAP, whichever applies. The auditor is required to design audit procedures to address the risk of material misstatement associated with the material weakness. KPMG Canada and KPMG U.S. each indicated they had done so in their audit reports in Maxar's 2018 Annual Filing Form 10-K.

[124] KPMG U.S. issued an unqualified opinion for 2018 notwithstanding the material weaknesses. KPMG Canada also issued an unqualified opinion with respect to the comparative figures it opined on, and it did not withdraw its 2017 audit opinion under IFRS or cause management to restate prior period results.

[125] The plaintiffs' argument about Maxar's ICFR is a logic exercise. In effect, they argue that if Maxar had material weaknesses in its ICFR at the end of FY 2018, material weaknesses must have existed before then too. But there is no evidence to support this theory. Even Mr. Mintzer did not offer any evidence about what material weaknesses might have existed in the prior financial reporting periods, or how they might have led to misrepresentations in the financial statements.

[126] Finally, I again note that the short-seller report raised a concern about Maxar's revenue recognition, but for the reasons I have already described, it does not provide a basis to conclude that the plaintiffs have some reasonable possibility of success at trial.

Conclusion on Leave

[127] I conclude that the plaintiffs have not established a reasonable possibility of success at trial. There is simply not enough reliable, credible, admissible evidence on which to ground their claims that Maxar misrepresented that the impugned documents fairly presented Maxar's financial position and its financial performance. On this basis alone, I would not grant leave to proceed. I do not need to consider whether the statements at issue were material or whether they were corrected.

[128] Nor do I need to consider whether the plaintiffs brought this action in good faith. However, without delving into the merits of that argument and its application to this case, I agree with the defendants that *pro forma* affidavits that do not grapple with changes in the case are not particularly helpful to a court in assessing whether the proposed representative plaintiffs have cleared the good faith hurdle. While establishing good faith will not typically be difficult, counsel should take care to ensure that the affidavits of the proposed representative plaintiffs actually address the case they are seeking to advance, not some prior version of it, and are not

merely perfunctory incantations of a plaintiff's good faith as if all that is required are some magic words. The affidavits should be meaningful and substantively address the requirement in the context of the case being advanced.

Certification

[129] The parties agree that if leave is not granted, the common law negligence claim should not be certified. Accordingly, the certification motion is also dismissed.

Costs

[130] I encourage the parties to reach an agreement on costs. If they are unable to do so, I will receive written submissions as follows:

a. From the defendants, written submissions not to exceed five pages within two weeks of the date of the release of these reasons, together with a bill of costs and any relevant offers;

b. From the plaintiffs, written submissions not to exceed five pages within one week of the date of receipt of the defendants' submissions, together with a bill of costs, and any relevant offers;

c. From the defendants, reply submissions not to exceed two pages within three business days of the receipt of the defendants' submissions.

[131] Submissions should be hyperlinked to case law. They may be sent to me by way of email to my assistant.

J.T. Akbarali J.

Released: March 11, 2022

CITATION: O'Brien v. Maxar Technologies Inc., 2022 ONSC 1572
COURT FILE NO.: CV-19-631107-00CP
DATE: 20220311

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Charles O'Brien and James Rae

Plaintiffs

– and –

Maxar Technologies Inc., Howard L. Lance, Anil Wirasekara, Biggs C. Porter, Nick S. Cyrpus and KPMG LLP

Defendants

REASONS FOR JUDGMENT

J.T. Akbarali, J.

Released: March 11, 2022.