CITATION: Dyck v. Tahoe Resources Inc., 2021 ONSC 5712
COURT FILE NO.: CV-18-00606411-00CP
DATE: 20210826

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ABRAM B. DYCK, Plaintiff

AND:

TAHOE RESOURCES INC. and RONALD WAYNE CLAYTON, Defendants

BEFORE: Glustein J.

COUNSEL: *Michael Robb, Anthony O'Brien, and Sana Ebrahimi*, for the Plaintiff

Lara Jackson, Derek Ronde, and Jessica Lewis, for the Defendants

HEARD: July 21 and 22, 2021

REASONS FOR DECISION

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REASONS FOR DECISION

1. OVERVIEW

1.1 Nature of the motion

[1] The plaintiff, Abram B. Dyck (Dyck), and the proposed class acquired shares of the defendant, Tahoe Resources Inc. (Tahoe), in the period following a May 24, 2017 Tahoe news release (the May 24 News Release) until the end of the trading day on July 5, 2017.

[2] Dyck and the proposed class seek damages for alleged misrepresentations by omission by Tahoe and the defendant Ron Clayton (Clayton), the President and Chief Executive Officer of Tahoe as of the May 24 News Release. The claim is based on (i) the statutory cause of action in Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S. 5 (*Securities Act*) and (ii) negligent misrepresentation.

[3] Under s. 138.8(1) of the *Securities Act*, Dyck must seek leave from this court to assert the statutory cause of action. In the present motion, Dyck seeks an order from the court (i) granting such leave, and (ii) certifying the class action under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*CPA*).

1.2 Background

[4] The present action arises out of amparo litigation that was brought before the Guatemala Supreme Court in May 2017 by a Guatemalan non-profit organization, CALAS.[1]

[5] A petition for amparo is a remedy available under Guatemalan law that protects citizens against violations of their rights and against abuses of authority by the government. The petition sought the suspension of Tahoe's exploitation license (the License) for the Escobal mine, which was described by Tahoe as its "flagship" asset and was critical to its business. The Escobal mine was operated through Tahoe's wholly-owned Guatemalan subsidiary, Minera San Rafael, S.A. (MSR).

[6] The License was required for Tahoe to continue its extractive activities at the Escobal mine. CALAS asserted that prior to granting the License, the Guatemalan Ministry of Energy and Mines (MEM) failed to consult with the local Xinka indigenous people as required under International Labour Organization Convention 169 on Indigenous and Tribal Peoples (ILO 169), which forms part of Guatemalan law.

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[1] In Spanish, the organization is Centro de Acción Legal, Ambiental y Social de Guatemala, which translates as the Center for Legal-Environmental and Social Action of Guatemala.

[7] In the petition for amparo, CALAS requested both a "provisional" amparo and a "definitive" amparo.

[8] The provisional amparo sought the suspension of the License until the courts could determine the merits of CALAS' request for the definitive amparo.

[9] In the definitive amparo, CALAS sought an order (i) requiring that the MEM consult with the Xinka people and (ii) suspending the License pending such court-ordered consultations.

[10] A provisional amparo is similar to an interlocutory injunction. In Guatemala, because amparo litigation generally takes a long time to be finally determined, even a provisional suspension of a license can have severe consequences for a company holding the license.

[11] In response to the CALAS petition, the defendants issued the May 24 News Release, in which they represented that CALAS had filed a claim alleging that the granting of the License "violated the Xinca indigenous people's right of consultation in advance of granting the Escobal mining license to … Minera San Rafael".

[12] In the May 24 News Release, the defendants made the following representations:

(i) There was a "lack of indigenous communities in or around the mine";

(ii) "[B]oth MEM and [MSR] participated in and documented hundreds of public and private meetings and open consultations in and around the mine dating back to 2010";

(iii) "[MSR] consulted with a number of indigenous people during its many meetings";

(iv) The MEM and MSR had engaged in an "extensive consultation and socialization process … leading to issuance of the Escobal license";

(v) Tahoe was "confident that the current claim is without merit";

(vi) The litigation was "an attempt by an anti-mining NGO [non-governmental organization] to oppose mining and other development in Guatemala"; and

(vii) Tahoe stated that it "believes that the claim by CALAS is without merit".

[13] On July 5, 2017, the Supreme Court of Guatemala granted the provisional amparo requested by CALAS and suspended the License until the definitive amparo could be determined. The effect of the decision was to shut down operations at the Escobal mine during the suspension.

[14] By news release dated July 5, 2017 (the July 5 News Release), Tahoe disclosed the provisional suspension of its License. It also disclosed the risks that (i) it would be unsuccessful in challenging the provisional suspension; (ii) ILO 169 consultations would be ordered with the Xinka; and (iii) the suspension of the License would continue while the consultations were held. Tahoe also disclosed that suspension of the License could be very lengthy (up to 30 months) based on the various litigation results.

[15] Tahoe's share price declined by $3.50 per share after the July 5 News Release. This was 32.5% of its value, representing a loss of approximately $1.1 billion in market capitalization in one trading day.

1.3 Positions of the parties

[16] Dyck asserts that the defendants failed to disclose the following facts (which he asserts are material) in the May 24 News Release (collectively defined by Dyck as the "Omissions"):

(i) the relief sought: a provisional suspension of the License while the merits of the definitive amparo request were determined and the continued suspension of the License while ILO 169 consultations were held,

(ii) the risk that the License would be provisionally suspended pending the final determination of the definitive amparo request, which would likely last between eight and eighteen months, and

(iii) the risk that, on the definitive amparo request, ILO 169 consultation would be ordered to take place and the License would remain suspended during this period of consultation, which would likely take another six months to a year.

[17] Dyck submits that leave under Part XXIII.1 should be granted since there is a reasonable possibility, based on credible evidence and a plausible interpretation of the *Securities Act*, that:

(i) The defendants failed to disclose material facts in the May 24 News Release; and

(ii) Under s. 138.4(1) of the *Securities Act*, the defendants either (a) knew that the May 24 News Release contained a misrepresentation by omission, (b) deliberately avoided acquiring such knowledge, or (c) were "guilty of gross misconduct in connection with the release" of the May 24 News Release.[2]

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[2] Since the May 24 News Release is a "non-core" document under s. 138.4(1) of the *Securities Act*, the plaintiff must, on the leave motion, demonstrate a reasonable possibility of success (based on credible evidence and a plausible interpretation of the legislation) that at least one of the s. 138.4(1) requirements will be established at trial.

[18] Dyck further submits that the proposed class action should be certified under s. 5 of the *CPA*.

[19] The defendants oppose both leave and certification.

[20] With respect to Dyck's motion for leave to proceed under Part XXIII.1, the defendants submit that there is no reasonable possibility that the secondary statutory market misrepresentation claim will be successful. They raise 12 objections to the leave motion (quoted *verbatim* from the defendants' factum):

(i) CALAS did not have proper standing to bring the amparo;

(ii) Tahoe's contemporaneous disclosure explains all relevant risks;

(iii) The May 24 News Release was sufficient disclosure;

(iv) The July 5 News Release was not corrective disclosure;

(v) In any event, the risk of provisional suspension from the amparo was not material;

(vi) Tahoe properly handled all necessary forward-looking information;

(vii) The Guatemalan Supreme Court confirmed that Tahoe's initial position on the amparo was correct;

(viii) Tahoe had a reasonably held view that there were no Xinka at Escobal;

(ix) The plaintiff's expert[3] cannot establish the materiality of the alleged misrepresentations;

(x) Dr. Escobar's[4] evidence should not be admitted;

(xi) Dr. Escobar's opinion evidence is inconsistent and unsupportable; and

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[3] Dyck proffered the expert evidence of Dr. Michael Hartzmark who opined that it is reasonable to conclude that the Omissions were material to investors from an economic perspective.

[4] Dyck proffered the expert evidence of a former Guatemalan jurist, Dr. Claudia Escobar. Dr. Escobar's opinion is that based on Guatemalan law, as of May 24, 2017, (i) it was highly likely that there would be a provisional suspension of the License; (ii) it was highly likely that the CALAS claim would succeed on the merits; and (iii) there was a risk of a continued suspension while consultations with the Xinka people under ILO 169 occurred.

(xii) The plaintiff mischaracterizes the June 19, 2020 ruling of the District Court in Las Vegas.

[21] With respect to the certification motion, the defendants raise two objections[5] (quoted *verbatim* from the defendants' factum):

(i) The proposed class definition is overbroad and inappropriate: U.S. shareholders should not be certified as members of the proposed class; and

(ii) Dyck is not an appropriate representative plaintiff.

1.4 Summary of conclusions

[22] For the reasons that follow, I reject the objections raised by the defendants.

[23] The only issue before the court on a leave motion under s. 138.8(1) is whether the plaintiff has established a reasonable possibility of success at trial, based on credible evidence and a plausible interpretation of the legislation.

[24] By way of a brief summary addressing the objections for leave to proceed under Part XXIII.1, I find:

(i) There is credible expert evidence from Dr. Escobar that establishes a reasonable possibility that a trial court could find that there was precedent under Guatemalan law for CALAS to be granted standing to bring the petition;

(ii) There is credible evidence that establishes a reasonable possibility that a trial court could find that Tahoe's contemporaneous disclosure explained only general risks of conducting mining business in Guatemala, without disclosing (a) the nature of the relief sought in the amparo petition (*i.e.* a suspension of the License), (b) the specific risk that the relief might be granted, and (c) the potential length of such suspensions;

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[5] The defendants also raised a third certification objection that "certain proposed common issues are inappropriate and insufficient". However, at the hearing, the defendants advised the court that they do not challenge the drafting of any of the proposed common issues (which are attached as Schedule A to these reasons), nor their suitability as common issues, other than relying on *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901 for the proposition that the court should not certify negligent misrepresentation claims if leave is not granted to proceed under Part XXIII.1.

Dyck does not challenge that proposition, but relies on the counter-proposition set out at para. 94 of *Bayens* (not challenged by the defendants) that if leave is granted to proceed under Part XXIII.1, the common law negligent misrepresentation claims should also be certified. Consequently, this certification issue is not in dispute between the parties.

(iii) There is credible evidence from the May 24 News Release that establishes a reasonable possibility that a trial court could find that the defendants did not disclose sufficient information for readers to understand that (a) amparo relief was being sought against MSR, (b) the risk of the suspension of the License, and (c) the potentially significant length of any such suspension;

(iv) There is credible evidence from the July 5 News Release, as well as support in the case law, to establish a reasonable possibility that a trial court could find that the July 5 News Release was a public correction, even though such a finding is not a requirement of the statutory cause of action;

(v) There is credible expert evidence from Dr. Escobar based on Guatemalan law that establishes a reasonable possibility that a trial court could find that the risk of provisional suspension of the License from the amparo petition was material;

(vi) There is credible evidence from the May 24 News Release that establishes a reasonable possibility that a trial court could find that the defendants did not comply with the statutory requirements to disclose forward-looking information;

(vii) There is credible evidence from Dr. Escobar that establishes a reasonable possibility that a trial court could find that the Supreme Court did not confirm that Tahoe's initial position on the amparo was correct. By the time the Supreme Court ruled on the definitive amparo, it had already provisionally suspended the License and confirmed the provisional suspension on an application for reconsideration of its decision. Further, in its decision on the definitive amparo, the Supreme Court (a) did not overturn its prior decisions granting the provisional amparo, and (b) found that (1) there were Xinka near the Escobal mine that were required to be consulted; and (2) no previous consultation had occurred. The Supreme Court ordered those consultations to take place;

(viii) There is credible evidence from (a) Tahoe's admission in a February 13, 2018 news release (the February 13 News Release), (b) the amparo petition, and (c) additional evidence reviewed by Dr. Escobar, to establish a reasonable possibility that a trial court could find that the defendants' statement in the May 24 News Release that there were no Xinka near the Escobal mine could not be reasonably supported;

(ix) There is credible evidence from Dr. Hartzmark that establishes a reasonable possibility that a trial court could find that the Omissions were material. Dr. Hartzmark concludes that more than $0.55 (the threshold for a material change to the Tahoe share price) of the $3.50 drop in share price after the July 5 News Release can be attributed to the failure to disclose the Omissions;

(x) Dr. Escobar's evidence is admissible on the motion under the test set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182;

(xi) There is a reasonable possibility that a trial judge could find Dr. Escobar's opinion evidence to be consistent and supportable; and

(xii) The results of the U.S. litigation, while not determinative on this motion, are consistent with Dyck's position.

[25] By way of a brief summary addressing the objections for certification, I find:

(i) The proposed class definition is not overbroad or inappropriate. U.S. shareholders should be certified as members of the proposed class, with any modifications to class membership to be subsequently addressed if required. I adopt the approach of the court in *Silver v. Imax Corp.*, 2009 CanLII 72334 (Ont. S.C.), at paras. 134 and 164, leave to appeal refused 2011 ONSC 1035 (Div. Ct.); and

(ii) Dyck is an appropriate representative plaintiff. The uncontested affidavit evidence is that he is a member of the class who purchased Tahoe shares between the May 24 and July 5 News Releases. The defendants' other concerns as to Dyck's suitability as a representative plaintiff are ill-founded.

2. ISSUES

[26] There are two overarching issues raised on this motion:

(i) Pursuant to s. 138.8(1) of the *Securities Act*, is there a reasonable possibility of the plaintiff succeeding at trial against the defendants with respect to the claim under Part XXIII.1 of the *Securities Act*? This involves analyzing the 12 objections raised by the defendants at para. 20 above.

(ii) Pursuant to s. 5 of the *CPA*, should the class action be certified? This involves analyzing the two objections raised by the defendants at para. 21 above.

3. BACKGROUND FACTS

[27] In this section, I review the background facts relevant to this motion. In my analysis of each of the individual objections, I address any further evidence (whether expert or otherwise) required to determine whether the "credible evidence" threshold has been established.

3.1 The parties

[28] During the period from May 24, 2017 to July 5, 2017 inclusive (the Class Period), Tahoe was a publicly traded company listed on the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE). The company's head office was situated in Reno, Nevada.

[29] The Escobal mine was operated through Tahoe's wholly-owned Guatemalan subsidiary, MSR.

[30] On February 22, 2019, Pan American Silver Corp. (Pan American) acquired all of Tahoe's shares under a plan of arrangement. Tahoe merged with 0799714 B.C. Ltd., a wholly-owned subsidiary of Pan American.

[31] Clayton was CEO and President of Tahoe during the relevant time period and also sat on the company's board of directors. Clayton was a member of Tahoe's founding executive team and led the construction of the Escobal mine. Tahoe announced that Clayton was retiring from all his positions with the company in June 2018.

[32] Dyck is a retail investor who lives in Winkler, Manitoba. Dyck acquired shares during the Class Period. He subsequently sold his shares at a substantial loss on December 4, 2018. Dyck seeks to represent a class comprised of all investors who acquired shares of Tahoe during the Class Period.

3.2 Mining rights in Guatemala and ILO 169

[33] Guatemala has a mining law that governs the administration process for the MEM to consider applications for (i) exploitation licenses, such as the one needed to operate the Escobal mine, and (ii) exploration licenses. The difference between these two license types can be summarized as follows:

(i) An exploration license grants the holder the right to identify and sample potential mineral rights in a defined area; and

(ii) An exploitation license is typically granted for 25 years, covers a smaller area of approximately 20 km², and allows the holder the exclusive right to extract identified deposits within the license area. In order to obtain an exploitation license from the MEM, an applicant must prepare an environmental impact study for review and approval by the Ministry of the Environment and Natural Resources.

[34] As explained by the defendants' expert on Guatemalan law, Mr. Francisco Chávez Bosque[6], the law governing license applications states that the MEM must conduct consultations under ILO 169 when a project "may affect communities residing near the project area, or communities in whose lands the project will be developed". Both Mr. Chávez and the plaintiff's expert on Guatemalan law, Dr. Escobar, agree that "land" is defined broadly in ILO 169 and is not confined to areas of exclusive ownership. It includes lands that indigenous peoples use, such as for traditional and subsistence activities.

[35] ILO 169 was adopted into Guatemalan law on March 5, 1996.

[36] Guatemala has failed to enact domestic legislation that specifies when or how indigenous peoples should be consulted pursuant to ILO 169. Mr. Chávez acknowledged on cross-examination that the absence of such domestic legislation creates uncertainty about whether the requirements of ILO 169 have been properly considered by the Guatemalan government.

3.3 The Escobal mine

[37] Tahoe was formed to acquire the assets that became the Escobal mine and the "Juan Bosco" exploration license[7] from Goldcorp Inc., which it did in 2010. The MEM issued (i) the exploration license for Escobal in 2012, (ii) the Juan Bosco exploration license in April 2012, and (iii) the exploitation license for Escobal (previously defined as the License) in April 2013.

[38] The License covers 20km². The Juan Bosco exploration license covers 59.9 km².

[39] The Escobal mine is located in the department of Santa Rosa in southeast Guatemala, which is one of 22 departments into which the country is divided. Counsel advised at the hearing that a department is similar to a province which is then divided into various municipalities.

[40] The Escobal mine is located approximately three kilometres from the municipality of San Rafael Las Flores, which is also within the department of Santa Rosa.

[41] Tahoe's application for the License included an environmental impact study (EIS). The EIS indicated that the Escobal mining project covers 262.13 hectares (approximately 2.6 km²) in which no community resides. The EIS also refers to a broader "area of influence" of approximately 45 km² around the area where mining operations would take place.

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[6] (referred to by the parties, and in these reasons, as Mr. Chávez)

[7] There is no issue before this court related to the Juan Bosco exploration license. However, since the CALAS amparo petition referred to the Juan Bosco exploration license, I also refer to background facts relevant to the Juan Bosco exploration license.

[42] When in production, the Escobal mine ranked as one of the best silver mines in the world and was indispensable to the success of Tahoe's business, driving revenues and funding expansion activities. Tahoe described the Escobal mine as a "flagship" asset and emphasized the importance of the Escobal mine in its public statements. Analysts covering Tahoe also recognized the importance of Escobal to Tahoe's business. Most analysts attributed over 50% of Tahoe's net asset value to the Escobal mine.

[43] The Escobal mine has been controversial. There were ongoing protests, consultation demands, activism, and violence against the Escobal mine from the outset. By a news release issued on July 30, 2019 announcing the settlement of a civil proceeding in British Columbia brought by individuals injured in an April 27, 2013 protest, Pan American, on behalf of Tahoe, apologized and acknowledged that the protesters had been engaged in protests "regarding the issue of prior community consultation."

[44] Escobal faced ongoing challenges from certain community, religious and environmental groups and NGOs (such as CALAS) including protests, roadblocks, and lawsuits contesting the validity of the License and the mine's compliance with environmental laws.

[45] During the initial Tahoe licensing process, CALAS filed 240 objections, 14 motions for reconsideration, seven administrative litigation proceedings and one petition for amparo, most of which were rejected, and none of which resulted in the suspension of the License.

3.4 The Royalty Agreement

[46] Under a royalty agreement signed by MSR with the MEM on April 16, 2013 (the Royalty Agreement), MSR agreed to pay royalties to the municipalities set out in the Royalty Agreement as San Rafael Las Flores, San Carlos Alzatate, Mataquescuintla, Jalapa, Santa Rosa de Lima, Barberena, Casillas, Nueva Santa Rosa, Santa Cruz el Naranjo and Cuilapa.

3.5 The Xinka

[47] The Xinka are indigenous people of southeastern Guatemala with their own organization, sociopolitical structure, and cultural characteristics dating to pre-colonial times. Their ancestral and present-day homelands are in the departments of Santa Rosa, Jutiapa, and Jalapa. The Xinka have their own representative institution, the Xinka Parliament.

[48] The Xinka have long faced discrimination in Guatemala and have, at times, struggled to obtain recognition from the Guatemalan government. It was not until after the Guatemalan Peace Accords were signed in 1996, which ended years of internal conflict, that the Xinka were officially recognized as a distinct ethnic group.

3.6 The Guatemalan judicial system

[49] The Guatemalan judicial system is comprised of the Constitutional Court, the Supreme Court, the Court of Appeals, the Court of first instance or jurisdiction, and the Courts of the

justice of the peace or for minors. The Constitutional Court is the highest court in Guatemala for constitutional matters.

3.7 CALAS' petition for amparo

3.7.1 A review of the amparo petition process

[50] A petition for amparo is a constitutional tool used to prevent the violation of rights or to restore rights when the violation has already occurred. A petition for amparo can be filed against the MEM to rectify the breach of ILO 169 consultation obligations. Such a petition for amparo must be filed with the Supreme Court of Guatemala.

[51] A petition for amparo functions much like a request for injunctive relief. In the first stage of the proceeding, the Supreme Court of Guatemala can grant preliminary relief, called a provisional amparo, analogous to an interlocutory injunction, until the court determines the merits of the petition. A provisional amparo can be granted when the court considers it appropriate and is mandatory where, among other reasons, there is a continuing serious or irreparable harm or illegality.

[52] The Supreme Court's decision on the provisional amparo can be appealed to the Constitutional Court. If the Constitutional Court upholds the provisional amparo, it remains in effect until the merits of the proceeding are determined on the definitive amparo and appeals are exhausted.

[53] The second stage of the proceeding, the definitive amparo, is akin to a permanent injunction. The Supreme Court determines the merits of the petition for amparo and the appropriate relief. As with the provisional amparo, appeals from the definitive amparo decision are brought to the Constitutional Court.

3.7.2 The CALAS amparo petition

[54] On May 17, 2017, CALAS filed a petition for amparo in the Supreme Court asserting that the MEM failed to consult with the Xinka in the departments of Santa Rosa and Jalapa as required by ILO 169 prior to granting the License and the Juan Bosco exploration license.

[55] The petition for amparo requested the following two specific heads of relief, both of which sought suspension of the continued operations of the Escobal mine:

(i) a request for a provisional amparo suspending the License and the Juan Bosco exploration license while the merits of the petition for a definitive amparo were determined, and

(ii) a request for a definitive amparo suspending the License and the Juan Bosco exploration license while ILO 169 consultations were held with the Xinka.

[56] The petition for amparo described the evidentiary and legal basis for the relief sought and attached evidence as schedules. This included:

(i) the MEM's acknowledgement in correspondence with CALAS that it had not consulted with the Xinka under ILO 169 prior to granting the licenses,

(ii) evidence from a 2016 assessment prepared for the Guatemalan Ministry of Culture and Sport titled "Situation of the Xinka Culture", which "reveals how the Xinka peoples have organized themselves and remained in the departments of Santa Rosa, Jalapa and Jutiapa, fully describing their location, distribution, customs and lifestyles",

(iii) a legal argument that the Constitutional Court previously found CALAS had standing to act to protect the collective rights of indigenous peoples, and

(iv) a legal argument that (a) the MEM's misconduct, such as the continued denial of the presence of Xinka in the area, justified the provisional amparo, and (b) the amparo was necessary to safeguard and protect against the ongoing violation of the Xinka's rights.

[57] MSR was named as a third party in the petition for amparo.

[58] On May 17, 2017, the Supreme Court decided to admit the petition for amparo indicating that it would hear the request for a provisional amparo and definitive amparo made by CALAS.

[59] MSR filed an appearance in the case on May 22, 2017 and requested a copy of the complete court file.

3.8 The May 24 News Release

[60] I set out the relevant statements by the defendants from the May 24 News Release at paras. 11-12 above.

[61] In the May 24 News Release, the defendants further advised that it contained "forward-looking statements related to the timing of MEM's response, the timing of the Supreme Court's ruling, as well as the Company's expectation that the CALAS claim has no merit and that the Company's position will prevail". Investors were advised that the purported forward-looking statements were based on management's "reasonable assumptions" but "may prove to be incorrect", and that, as such, "readers should not place undue reliance on forward-looking statements".

[62] There was no statistically significant change in the Tahoe share price following the May 24 News Release.

[63] As of the date of the May 24 News Release, Tahoe was in takeover negotiations with Pan American.

3.9 Public information that CALAS was seeking to suspend the License

[64] CALAS' petition was not publicly available when Tahoe issued the May 24 News Release.

[65] The lawyer for CALAS that filed the amparo, Rafael Maldonado, tweeted a picture of the last page of the amparo petition on May 17, 2017, which stated that CALAS sought the suspension of the resolution that granted the licenses. He also tweeted on May 23, 2017 that CALAS hoped to close "San Rafael", referring to the Escobal mine.

[66] CALAS subsequently issued a news release on or about May 25, 2017 in which it stated that it was challenging the issuance of the license by the MEM.

3.10 The July 5, 2017 Supreme Court decision

[67] On July 5, 2017, the Supreme Court of Guatemala issued a provisional amparo ordering a temporary suspension of operations at the Escobal mine.

3.11 The July 5 News Release

[68] After the close of trading on July 5, 2017, Tahoe disclosed that the Guatemalan Supreme Court granted CALAS' request to provisionally suspend the License. Tahoe disclosed other facts including the relief sought in CALAS' petition for amparo and the risks inherent in the amparo proceedings.

[69] In the July 5 News Release, Tahoe stated that:

(i) It did not know whether it would be successful in challenging the Supreme Court's decision granting the provisional amparo and if unsuccessful, the License could remain suspended for twelve to eighteen months while the definitive amparo was considered; and

(ii) It did not know whether it would be successful on the definitive amparo and, if unsuccessful, the definitive amparo could result in court-ordered consultations under ILO 169 and the continued suspension of the Escobal exploitation license while consultations occurred, which could last another six to 12 months

[70] Consequently, Tahoe disclosed the risk of a suspension of the License for up to 30 months.

[71] Tahoe's share price declined by $3.50,[8] representing a 32.5% or $1.1 billion decline in Tahoe's market capitalization.

3.12 Subsequent developments after the July 5, 2017 provisional amparo

[72] On July 28, 2017, the Supreme Court denied MSR's request to reconsider its provisional suspension of the License.

[73] On August 24, 2017, Tahoe announced that the Constitutional Court upheld the Supreme Court's decision provisionally suspending the License until the final ruling by the Constitutional Court on the definitive amparo.

[74] The Supreme Court issued its decision on the merits of the petition for definitive amparo on September 8, 2017. The Supreme Court ruled that the MEM had to consult with the Xinka pursuant to the requirements of ILO 169. The Supreme Court confirmed that there were Xinka in the area of the mine and that previous consultations had not taken place. The Supreme Court did not order the continued suspension of the License while consultations were undertaken. However, under Guatemalan law, the Constitutional Court's provisional suspension of the License remained in force until the Constitutional Court's decision on the definitive amparo.

[75] The Constitutional Court issued its decision on the definitive amparo on September 8, 2018. It held that there were Xinka in the communities near Escobal who had not been previously consulted under ILO 169. The Constitutional Court ordered the continued suspension of the License until ILO 169 consultations were held.

[76] Tahoe suffered significant financial consequences as a result of the suspension, including deferring capital expenditures and exploration efforts, cancelling a longstanding dividend, and incurring a significant loss of $8.4 million in the first quarter the Escobal mine was not operating (compared to a $33.5 million profit for the previous quarter).

[77] At present, the ILO 169 consultations with the Xinka have not been completed and the License remains suspended.

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[8] There is a minor discrepancy in Dr. Hartzmark's first report (in which he states that the share price declined by $3.57) and in his reply report (in which he states that the share price declined by $3.50). For the purposes of these reasons, I consider the lower amount of $3.50 per share.

3.13 The February 13 News Release acknowledging Xinka presence near the Escobal mine

[78] In the February 13 News Release, Clayton stated that "Tahoe wishes to clarify and specifically acknowledge the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka."

[79] This acknowledgement of Xinka presence in the communities near Escobal was made while the CALAS amparo proceeding remained ongoing.

3.14 U.S. litigation

[80] Concurrent to the present action, there is ongoing securities litigation in the U.S. under Rule 10b-5 against Tahoe, Clayton, and other defendants. One of the central allegations in the U.S. litigation is that the defendants misrepresented the presence of the Xinka in the area of the Escobal mine and failed to disclose that consultations had not been undertaken, resulting in the risks to Escobal being understated.

[81] On June 19, 2020, Boulware J. of the Nevada District Court denied a motion by the defendants to dismiss the plaintiff's claim. Leave to certify an appeal of that decision was refused. One of the key issues on the motion to dismiss was whether the plaintiff had pled sufficient facts to establish *scienter*. In Rule 10b-5 litigation, *scienter* is the requirement that the plaintiff prove the defendants' intention to deceive, manipulate, or defraud. It can be established by proof of the defendants' knowledge or recklessness.

[82] Boulware J. found, on the pleadings, that *scienter* had been adequately alleged for the following reasons: (i) public information referred to by the defendants indicated that there was an indigenous population near the Escobal mine, (ii) indigenous activism against the Escobal mine, including protests that Tahoe attempted to stop, (iii) the importance of the Escobal mine, in conjunction with the small size of Tahoe, suggests that the defendants would have been involved in daily operations and would have known about activities and circumstances pertinent to the mine's operations, (iv) Tahoe management's prior experience mining in Guatemala, (v) the acknowledgement that NGOs had criticized Tahoe for lack of consultation, and (vi) the defendants had a financial motive to make the misrepresentations.

[83] Boulware J. also found, on the pleadings, that the defendants could not credibly rely on information from a 2002 Guatemalan census, given its public criticism and the information the defendants said was public about the presence of the Xinka in the area of the mine and indigenous activism.

[84] On the pleadings, Boulware J. concluded that "it would be illogical and unreasonable for Tahoe not to be aware of the indigenous population in the Escobal area, the consultation requirements under the ethical guidelines and Guatemalan law, and the opposition to the project by indigenous people".

[85] When deciding a motion to dismiss in the U.S., similar to a motion to strike a claim in Ontario, Boulware J. stated that the "courts must … accept all factual allegations in the complaint as true." The ruling did not make any conclusions about the merits of the claim.

4. ANALYSIS

[86] I first review the issues arising out of the leave motion, and then consider the certification issues.

4.1 The issues arising out of the leave motion

[87] I first consider the applicable test to grant leave to assert the statutory cause of action under Part XXIII.1. I then address each of the 12 objections raised by the defendants, with reference to additional evidence and law if applicable.

4.1.1 The test to grant leave to bring the Part XXIII.1 claim[9]

[88] Leave shall be granted under s. 138.8(1) of the *Securities Act* if the court is satisfied that (i) the action is brought in good faith; and (ii) there is a reasonable possibility that the action will be resolved in the plaintiff's favour at trial.

[89] Dyck commenced this action to recover losses he suffered on his investment in Tahoe, for reasons that are consistent with the purpose of the statutory right of action and not a collateral purpose. The defendants do not challenge Dyck's good faith.

[90] Consequently, the only issue for leave in the present case is whether Dyck has a reasonable possibility of success at trial.

4.1.1.1 The applicable law

[91] Under settled law in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, the court is required to engage in a "robust screening mechanism" to ensure that "cases without merit are prevented from proceeding". The threshold is "more than a 'speed bump'": at para. 38.

[92] However, the screening mechanism is not intended to become a "mini-trial". The plaintiff must only establish a "reasonable or realistic chance that the action will succeed": *Theratechnologies*, at para. 38. Consequently, the requirement for a reasonable possibility of success is satisfied if the plaintiff can establish "both a plausible analysis of the applicable

[9] The parties agree that for the purposes of determining the present motion, the court can treat the proposed Fresh as Amended Statement of Claim as the operative pleading without a further motion required for leave to amend.

legislative provisions, and some credible evidence in support of the claim". In *Theratechnologies*, the Court held, at para. 39:

> A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success - and the time and expense they impose - are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour. [Italics in original.]

[93] Consequently, in assessing the evidentiary record, the court should not engage in a finely calibrated weighing process, and it should keep in mind the relatively low threshold and limits of the record: *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179, 145 O.R. (3d) 100, at para. 69.

[94] 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: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, at para. 315; *Swisscanto Fondsleitung AG v. Blackberry Ltd.*, 2015 ONSC 6434, at para. 48.

[95] Morgan J. summarized the applicable test in the recent decision of *Gowanlock v. Auxly Cannabis Group Inc.*, 2021 ONSC 4205 by stating that the leave test is "very much stacked in the moving party's favour". Even if the motion judge believes that the defendant has a strong chance of success at trial, the court can conclude that the plaintiff has a reasonable possibility of success at trial if the plaintiff meets such lower threshold: *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, 148 O.R. (3d) 755, at paras. 32-35, rev'd on other grounds 2021 ONCA 104.

[96] I do not accept the defendants' submission that a plaintiff requires a "seriously arguable claim" in order to grant leave. That statement of the leave test was from case law prior to the decision of the Supreme Court in *Theratechnologies*. The *Theratechnologies* test was reaffirmed in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 118-22.

4.1.1.2 Application of the law to the present case

[97] The defendants tendered no evidence on this motion upon which they can rely to establish the affirmative defences afforded to them under Part XXIII.1. Those defences include a "reasonable investigation" defence under s. 138.4(6)(a) of the *Securities Act*.

[98] In particular, the defendants do not assert that they conducted a reasonable investigation before advising investors of any of the statements in the May 24 News Release. The failure to tender such evidence is determinative of the defence for the purposes of this motion, although it does not foreclose the defence as the action proceeds on its merits.

[99] Further, while the defendants stated in the May 24 News Release that (i) "both MEM and Minera San Rafael participated in and documented hundreds of public and private meetings and open consultations in and around the mine area dating back to 2010"; (ii) there was an "extensive consultation and socialization process followed by both MEM and Minera San Rafael leading to issuance of the Escobal license"; and (iii) MSR "consulted with a number of indigenous people during its many meetings", the defendants led no evidence of the truth of any of those statements.

[100] Mr. Chávez did not opine that ILO 169 consultations occurred. The MEM's records indicate that ILO 169 consultations did not occur and the MEM acknowledged in communication with CALAS (attached to the petition) that that no such consultations occurred. No evidence was led to the contrary.

[101] Consequently, for the purposes of this motion, it is not contested that there is a reasonable possibility a trial court could conclude that the MEM and MSR did not consult with the Xinka people before the License was issued.

[102] For the above reasons, the *Theratechnologies* test is to be applied only to those objections raised by the defendants. Those objections, if accepted by the court, would establish no reasonable possibility of success even if MSR failed to consult with the Xinka people.

[103] I now address each of the objections raised by the defendants to oppose leave to bring a Part XXIII.1 claim under s. s. 138.8(1) of the *Securities Act*.

4.1.2 Objection 1: CALAS had no standing to bring the petition

[104] The defendants submit that the decision of the Supreme Court and Constitutional Court to grant CALAS standing to bring the petition was a "black swan" (*i.e.* a result so contrary to precedent that it could not have been reasonably foreseen), and as such, there is no reasonable possibility that the defendants could have anticipated that the CALAS amparo petition would have been granted. I do not agree.

[105] The standing issue was not raised in the May 24 News Release as a basis for the defendants' view that the CALAS claim was "without merit", nor is there any evidence that the

defendants relied on standing as a basis to represent that the CALAS amparo petition was without merit.

[106] Nevertheless, if the court on this motion accepted the defendants' submission that there is no reasonable possibility that a trial court could find (based on Guatemalan law) that the defendants could have anticipated that the Guatemalan courts would have granted standing to CALAS to bring the amparo petition, then there would be no basis for the defendants to have disclosed the information in the Omissions, and leave could not be granted.

[107] On my review of the evidence of Dr. Escobar and Mr. Chávez, I find there is a reasonable possibility, based on the credible expert evidence on Guatemalan law, that a trial court could find that there is precedent supporting CALAS' standing to bring the amparo petition.

[108] Mr. Chávez concludes in his report that standing to file an amparo is generally restricted to affected parties or to the General Prosecutor and the Human Rights Prosecutor. Mr. Chávez relies on article 25 of the *Ley de Amparo*, Exhibición Personal y de Constitucionalidad, Decree 1-86 (*Ley de Amparo*), which grants standing to the General Prosecutor and the Human Rights Prosecutor to file an amparo petition.

[109] However, article 10 of *Ley de Amparo* provides that any person has the right to ask for an amparo in the following circumstances: (i) to maintain or be restored of his rights or guarantees established by the Constitution or other laws, (ii) in specific cases, to obtain a ruling declaring that a law, bylaw, decision or act of any authority does not affect the petitioner because it contravenes or restricts any of the rights guaranteed by the Constitution or any other law, or (iii) when an authority of any jurisdiction issues a bylaw or decision of any nature which is considered an abuse of power or to exceed its legal powers or to exercise its legal powers in such a way that the harm caused or that may be caused cannot be repaired by any other legal means of defense (*i.e.* irreparable harm).

[110] While Mr. Chávez took the position in his reports that the lack of standing was "obvious", he acknowledged on cross-examination that the Constitutional Court had "leeway" with respect to standing and did not have to follow the strict precepts of the standing requirements he referenced. Mr. Chávez's acknowledgement of "leeway" was consistent with the evidence of Dr. Escobar.

[111] Dr. Escobar interpreted the amparo law as "a guarantee against arbitrariness; its objective is to protect anyone from violations of their constitutional rights". Consequently, Dr. Escobar did not agree that article 25 of the *Ley de Amparo* restricted standing to bring an amparo petition to those representatives, or to persons directly affected by an authority's acts.

[112] In particular, Dr. Escobar relied on the decisions of both the Supreme Court and Constitutional Court in an earlier matter (known as the *La Puya* or "El Tambor" matter), in which the courts granted CALAS standing to bring an amparo petition to suspend a mining exploitation license.

[113] In *La Puya*, as in the present case, CALAS filed a petition for amparo with the Supreme Court asserting that the MEM failed to consult with indigenous people under ILO 169 prior to granting a mining exploitation license in relation to the El Tambor gold mine.

[114] On November 3, 2015, the Constitutional Court in *La Puya* ordered the Supreme Court to admit the amparo petition presented by CALAS.

[115] On November 11, 2015, the Supreme Court in *La Puya* granted a provisional amparo suspending the El Tambor mine's exploitation license while the court determined the definitive amparo.

[116] On May 5, 2016, the Constitutional Court in *La Puya* upheld the provisional suspension of the exploitation license.

[117] On June 28, 2016, the Supreme Court in *La Puya* granted the definitive amparo to CALAS and ordered the continued suspension of the exploitation license while ILO 169 consultations were undertaken. The Supreme Court found that CALAS had standing to defend homogeneous collective and individual rights. The Supreme Court indicated that under certain circumstances, such as where CALAS acted on behalf of indigenous people affected by the mining project, the requirement that the person presenting the amparo be the aggrieved person can be dispensed with, in view of the primacy of the fundamental rights that are denounced as infringed.

[118] Consequently, standing for CALAS was accepted by the courts in the *La Puya* matter.

[119] Mr. Chávez acknowledged that CALAS obtained standing in *La Puya*. However, he sought to distinguish the granting of standing in *La Puya* because the Supreme Court accepted that CALAS had standing "based on fact it is an environmental NGO and that one of the rights to be preserved through consultation is the right to protect the environment".

[120] Mr. Chávez took the position that because CALAS focuses on environmental issues, the Constitutional Court "ought to have prevented CALAS from obtaining standing in respect of a matter like Escobal that focused on the indigenous consultative process rather than environmental issues".

[121] However, Dr. Escobar's evidence is that Mr. Chávez's purported distinction is not valid. In her reply report, Dr. Escobar refers to the right of indigenous peoples under article 7 of ILO 169 to "decide their own priorities for the process of development, especially in matters that affect their lives". In particular, she refers to article 7(3) of ILO 169, which provides:

> Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

[122] Dr. Escobar further refers to article 15(2) of ILO 169, which requires the government to engage in consultation in order to establish if the interests of indigenous people could be affected by projects that could have environmental consequences.

[123] Consequently, Dr. Escobar concludes from the above that Mr. Chávez's attempt to distinguish *La Puya* is not well-founded, as CALAS could be given standing based on a failure to consult under ILO 169 since the lack of consultation would result in the failure of the MEM to consider the environmental impact of the Escobal mine.

[124] Dr. Escobar's evidence is further supported by the CALAS mandate, which is to provide "leadership and influence in sociopolitical environmental activism, the defence of environmental human rights and the rights of indigenous peoples with respect to the environment".

[125] Similarly, Mr. Chávez agreed in his cross-examination that (i) under Guatemalan law, consultation is a collective right of indigenous people; (ii) environmental impact could affect indigenous peoples' use or enjoyment of the land in the area where the mining project is being undertaken; and (iii) the impact on the use or enjoyment of land is a reason why consultation with indigenous peoples is required. All of these factors could support the application of the *La Puya* decision to the CALAS petition.

[126] On the above evidence, I find that there is a reasonable possibility that a trial court could find, based on credible expert evidence of Dr. Escobar, that there was precedent under Guatemalan law supporting CALAS' standing to bring the amparo petition.

[127] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.3 Objection 2: Tahoe's contemporaneous disclosure explains all relevant risks

[128] Tahoe submits that its disclosure to investors prior to the May 24 News Release was sufficient, on its own, to explain "all relevant risks" of "operating Escobal and the fundamentally tenuous nature of the licensing process".

[129] For the reasons I discuss below, Dyck has established a reasonable possibility that a trial court could find that Tahoe's contemporaneous disclosure did not explain "all relevant risks", and in particular, did not explain the information Dyck alleges should have been disclosed in the Omissions.

4.1.3.1 Tahoe's contemporaneous disclosure

[130] Tahoe's 2016 Annual Information Form, dated March 9, 2017 (AIF), stated certain risks regarding operations in Guatemala. Under the heading "Operations in Guatemala, Peru and Canada", Tahoe advised that company activities may be affected by judicial activity and that there was ongoing opposition from NGOs. Tahoe also stated that "[t]he status of Guatemala as a

developing country may make it more difficult for the Company to retain licenses and obtain required financing for projects."

[131] Under the AIF heading titled "Licenses and Title to Assets", Tahoe stated that (i) "the validity of the licenses related to our operations may be contested"; and (ii) adverse court rulings could materially and adversely impact its rights to exploitation licenses.

[132] In the AIF section titled "Governmental Laws and Regulation", Tahoe further set out the risks associated in respect of changing laws and law enforcement in Guatemala and warned that "more stringent enforcement of current laws and regulations by governmental authorities, could cause … suspension of our operations." Tahoe also warned of laws and regulations permitting private parties to bring lawsuits.

[133] Under the AIF section titled "Community Action", Tahoe set out the specific threats to the company's operations from community action from NGOs, warning that NGOs have taken actions like initiating lawsuits and that such activities could have a material adverse effect on Tahoe's operations, financial position, cash flow and results.

[134] Under the AIF section titled "Claims and Legal Proceedings," Tahoe provided a general warning that legal proceedings against the company may "give rise to legal uncertainties or have unfavourable results." Tahoe further noted that the company's disputes could "materially adversely impact" the company's financial position, cash flow, and results of operations.

[135] The March 2017 Management Discussion and Analysis (MD&A) advised that mining activities "may be affected in varying degrees by government regulations relating to the mining industry, judicial activity or political change or instability." Tahoe noted that "[t]he status of Guatemala as a developing country may make it more difficult for the Company to retain licenses and obtain required financing for projects."

[136] The 2016 MD&A also provided details of previous unsuccessful NGO litigation against Tahoe.

4.1.3.2 Analysis of the contemporaneous disclosure

[137] For the reasons I discuss below, there is a reasonable possibility that a trial court would find that the contemporaneous disclosure did not disclose "all relevant risks" related to the suspension of the License, and in particular, did not disclose the specific risks set out in the Omissions of (i) the nature of the amparo relief sought, (ii) the risk of suspension of operations, and (iii) the potential duration of suspended operations.

[138] It is reasonably possible that a trial court could find that the contemporaneous disclosure only sets out general risks, relating to judicial activity, opposition from NGOs, and the general threat to Tahoe's operations from the possibility that licenses could be contested or laws and law enforcement could be changed. It is reasonably possible that a trial judge could find that the

contemporaneous disclosure did not advise shareholders of the specific risk of a lengthy suspension of operations at Escobal arising from the CALAS petition.

[139] Such an interpretation would be consistent with the absence of a statistically significant price reaction following the May 24 News Release.

[140] Tahoe's general risk disclosure also represented that "there are no indigenous populations currently living in the immediate area of the Escobal" site. That representation is consistent with the same assertion in the May 24 News Release. Accordingly, even if the May 24 News Release was read in the context of Tahoe's general risk disclosure, a reasonable reader of the disclosures might conclude that there was no risk to the License from the CALAS litigation.

[141] There is a reasonable possibility that a trial judge might find that the potential consequences of the CALAS amparo litigation went beyond the general risk levels discussed in the contemporaneous disclosure. Dyck's claim is that CALAS' petition for amparo increased the risk of an Escobal mine suspension relative to the general risks the market already understood. That position is supported by credible evidence, both from the contemporaneous disclosure itself and by expert evidence.

[142] For the above reasons, Dyck has established a reasonable possibility that the contemporaneous disclosure did not disclose the specific risks arising from the CALAS litigation. Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.4 Objection 3: The May 24 News Release was sufficient disclosure

[143] Tahoe submits that the May 24 News Release was sufficient disclosure since it "fairly convey[ed] the Amparo and any inherent risks to Tahoe shareholders".

[144] I find that Dyck has established a reasonable possibility that sufficient disclosure was not made in the May 24 News Release based on the language contained in the news release.

[145] Tahoe's statement in the May 24 News Release was that a claim had been made against the MEM, with CALAS "alleging that MEM had violated the Xinca indigenous people's right of consultation in advance of granting the Escobal mining license to Tahoe's Guatemalan subsidiary, Minera San Rafael".

[146] There was no reference in the May 24 News Release to the fact that CALAS sought amparo relief against MSR, or that as part of such relief, CALAS sought both a suspension of the License on the provisional amparo (pending the hearing of the definitive amparo) and a suspension of the License on the definitive amparo (pending consultation with the Xinka people). There was no reference to the length of time that the License might reasonably be suspended if either the provisional or definitive amparos were obtained.

[147] The defendants also made a categorical declaration that they were "confident" that the CALAS litigation was "without merit". It is reasonably possible that such language could be read as advising investors that Tahoe had little or no doubt as to the result of the litigation.

[148] In submitting that there was sufficient disclosure from the May 24 News Release, the defendants rely on a single report from an analyst from Desjardins Capital Markets (Desjardins). The defendants submit that based on the May 24 News Release (which the defendants submit was reflected in the comments of the Desjardins analyst), "the market understood that CALAS was seeking to shut down the mine".

[149] The Desjardins analyst described the "takeaway" from the CALAS litigation as "negative". However, the analyst did not change his price forecast for Tahoe, consistent with an understanding that there was little or no risk from the CALAS litigation. Consequently, the analyst's view is consistent with the defendants' "confidence" that the claim was "without merit" based on the representations in the May 24 News Release.

[150] Further, the Desjardins analyst described the claim as being "against [the MEM] alleging that the MEM failed to consult with a local indigenous group prior to granting the mining license for Escobal", which tracked the language in the May 24 News Release and did not reflect an understanding that a suspension of mining operations was being sought for both the provisional and definitive amparos.

[151] The Desjardins analyst referred to a 2013 court decision which held (as the analyst described) that the "MEM should have conducted a hearing in connection with a written opposition to the Escobal mining license, but did not go so far as to invalidate the mining license". Again, there is a reasonable possibility that a reference to 2013 litigation, which did not "invalidate the licence", does not establish that the Desjardins analyst (let alone the market) understood that "CALAS was seeking to shut down the mine", as submitted by the defendants.

[152] In any event, the defendants led no evidence of any other analyst who even discussed the May 24 News Release, let alone understood that "CALAS was seeking to shut down the mine".

[153] Even if the Desjardins analyst had somehow determined from the May 24 News Release that the operation of the Escobal mine was at stake, the comments of a single analyst do not constitute notice to investors.

[154] For the above reasons, I find Dyck has established a reasonable possibility that the trial court will find that the May 24 News Release was not sufficient disclosure of the nature, scope, and risks of the CALAS litigation.

[155] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.5 Objection 4: The July 5 News Release was not corrective disclosure

[156] The defendants submit that (i) a s. 138.3(1) claim requires a public correction; and (ii) the July 5 News Release is not a public correction.

[157] For the reasons below, I find that (i) the law does not require a public correction as a constituent element of a s. 138.3(1) claim; and (ii) in any event, there is a reasonable possibility that the July 5 News Release was a public correction.

[158] I first address the applicable law and then consider the disclosure in the July 5 News Release.

4.1.5.1 The applicable law

[159] In the recent decision of *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, the motion judge held that a public correction was a constituent element of the secondary market misrepresentation claim (at para. 21). The Court of Appeal disagreed, holding that it was not a requirement a plaintiff must prove to succeed on the claim. Instead, the public correction serves as a "time-post for the proposed class period and any eventual damages calculation": at para. 66.

[160] A public correction is not one of the safeguards to protect against unmeritorious claims on a leave motion, since "[w]here there is a reasonable possibility of a misrepresentation, the plaintiff's claim can hardly be characterized as a strike suit": *Barrick Gold*, at paras. 68 and 70.

[161] Consequently, while a plaintiff must have transacted the relevant securities prior to the public correction of the misrepresentation, the lack of a public correction does not prevent a plaintiff from asserting the cause of action provided by Part XXIII.1 where there is a reasonable possibility of establishing a misrepresentation. As Hoy J. comments in *Barrick Gold*, "the clearing of the misrepresentation threshold, combined with the fact that the plaintiff brought an action, suggests that there was a public correction. The plaintiff must have learned of the misrepresentation somewhere": at para. 71.

[162] For the above reasons, the defendants cannot rely on an alleged lack of a public correction as a basis to dismiss the claim.

4.1.5.2 The July 5 News Release can be a public correction

[163] As the court held in *Barrick Gold*, a public correction must be "reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": at para. 76.

[164] The defendants submit that the disclosure in the July 5 News Release that the Supreme Court *granted* the provisional amparo and suspended the License does not correct their alleged failure to disclose the *risks* of that event occurring. Under the defendants' approach, only the

mirror-image of the misrepresentation—an explicit statement that their previous assessment of the risk was incorrect—could serve as a public correction. I disagree.

[165] In *Barrick Gold*, Hoy J. held that a public correction was not designed to limit investor claims "only to those misrepresentations later explicitly corrected": at para. 67. A public correction "need not specifically identify the omitted material fact or specifically relate the information in the correction to the omitted material fact": at para. 76. Instead, it is enough if the alleged correction casts doubt on the reasonableness or accuracy of the earlier disclosure: at paras. 56 and 76. Consequently, it is reasonably possible that a trial court could conclude that the materialization of the risk that the defendants said did not exist meets the *Barrick Gold* test.

[166] A review of the contents of the July 5 News Release demonstrates that there is a reasonable possibility that a trial court could find that it was a public correction. In particular, while the defendants had asserted in the May 24 News Release that (i) there were no indigenous communities near the Escobal mine; (ii) indigenous peoples had been consulted; and (iii) the CALAS claim was without merit, it is reasonably possible that a court could conclude that a reader of the July 5 News Release would reasonably understand that the earlier statements had been corrected.

[167] Further, Dyck alleges that the Omissions include the failure to disclose the relief sought in CALAS' petition for amparo, the risk of a suspension on the definitive amparo while consultations were undertaken, and the likely length of the potential suspensions. All of these Omissions were corrected and disclosed to the public in the July 5 News Release.

[168] For the above reasons, Dyck has established a reasonable possibility that the July 5 News Release was a public correction. Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.6 Objection 5: In any event, the risk of provisional suspension from the amparo was not material

[169] The defendants submit that the risk that the Supreme Court would suspend the License on the petition for a provisional amparo was so unlikely that there would have been no reasonable basis for the defendants to disclose any of the Omissions, even if (i) there had been Xinka present near the Escobal site; and (ii) the Xinka people had not been consulted under ILO 169 before the License was issued.

[170] The defendants describe the July 5, 2017 Supreme Court decision suspending the License on the provisional amparo as another example of a "black swan" event.

[171] Consequently, the issue before the court on the leave motion is whether Dyck has established a reasonable possibility that, based on Guatemalan law, a provisional suspension of the License could reasonably have been foreseen on the basis of the CALAS petition. For the reasons that follow, I find that Dyck has met this threshold.

[172] Dr. Escobar relies primarily on the *La Puya* decision as well as decisions by both the Supreme Court and Constitutional Court in litigation referred to by the parties as the *Oxec* matter.

[173] As I discuss at para. 115 above, the Supreme Court in *La Puya* granted CALAS' petition for a provisional amparo and suspended the El Tambor mine's exploitation license while the court determined the definitive amparo. That decision was upheld by the Constitutional Court (see para. 116 above).

[174] On June 28, 2016, the Supreme Court granted the definitive amparo to CALAS and ordered the continued suspension of the El Tambor exploitation license while ILO 169 consultations were undertaken (see para. 117 above).

[175] Similarly, Dr. Escobar relies on the *Oxec* decisions which were decided prior to the CALAS amparo petition. In the *Oxec* matter, (i) the Supreme Court provisionally suspended the license for a hydroelectric project license; (ii) the Constitutional Court also held that the license for the hydroelectric projects should be provisionally suspended while the litigation was adjudicated; and (iii) the Supreme Court also ordered the continued suspension of the license on the definitive amparo while consultations were undertaken.

[176] The Constitutional Court in the *Oxec* matter later lifted the suspension while consultations were undertaken, but this occurred after May 24, 2017.

[177] The defendants submit that Dr. Escobar (i) "admitted" that there was no Constitutional Court precedent for a suspension of the License and (ii) agreed that it was "unprecedented". However, this submission is not supported by the evidence.

[178] Dr. Escobar stated in her report and on cross-examination that as of May 24, 2017, the Constitutional Court had not previously upheld the suspension of a license on a *definitive* amparo. However, Dr. Escobar opined (and there is no dispute on the issue) that the Constitutional Court had previously granted *provisional* amparos suspending licenses under ILO 169 in both the *Oxec* and *La Puya* cases.

[179] The defendants' submissions ignore the above evidence, as well as the evidence of the Supreme Court granting suspensions of operations on definitive amparo applications.

[180] Consequently, there was Constitutional Court precedent for a suspension of the License on a provisional amparo based on ILO 169, and Supreme Court precedent for a suspension of the License both for a provisional and definitive amparo.

[181] Mr. Chávez seeks to distinguish the *La Puya* decisions on the basis that (i) they involved numerous amparos and there were different bases of complaints, including concerns about the absence of an ILO 169 consultation; (ii) there was a history of company misconduct alleged in respect of the mining project; and (iii) the El Tambor mine operated in an area that had an uncontroverted indigenous population.

[182] Mr. Chávez seeks to distinguish the *Oxec* decisions on the basis that they involved a hydroelectric project and there was no dispute as to whether an indigenous population was impacted by the project.

[183] However, Mr. Chávez did not file any evidence to establish that the factual distinctions upon which he relied were the basis for the suspension of operations in either *La Puya* or *Oxec*. The Constitutional and Supreme Courts in those cases granted a suspension of operations on a provisional amparo until determination on the merits of whether there was a breach of the ILO 169 consultation obligations, just as was alleged by CALAS in the petition relating to the Escobal mine.

[184] In any event, in the present case, CALAS not only alleged that the "MEM violated the Xinka indigenous peoples' right of consultation under ILO 169 in advance of granting the License" but also alleged that the MEM "*otherwise discriminated against the Xinka*", raising additional issues such as in *La Puya*, even if the license suspension on the provisional application required such additional claims (which Mr. Chávez did not establish).

[185] Further, Mr. Chávez's attempts to distinguish the *La Puya* and *Oxec* decisions on the basis that there was no dispute in those decisions as to whether an indigenous population was impacted by the project fails to address the evidence before the Guatemalan courts which could have established the presence of Xinka people in the Escobal area. As I note at para. 78 above, Tahoe admitted in the February 13 News Release that "Tahoe wishes to clarify and specifically acknowledge the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka."

[186] Finally, Mr. Chávez acknowledged that CALAS had an "arguable case" and that he would not have described the litigation as "without merit". While Mr. Chávez concluded that the action had "so many flaws that it should have been dismissed", the issue for the trial court will be to determine the likelihood of such a result in the face of Dr. Escobar's evidence that the suspension of the License on the provisional amparo was highly likely.

[187] For the above reasons, Dyck has established that it is reasonably possible that a trial court would find that there was Constitutional Court and Supreme Court precedent granting provisional amparos suspending operating licenses under ILO 169, and Supreme Court precedent suspending operating licenses on a definitive amparo application.

[188] Consequently, it is reasonably possible that a trial court could find that (i) the risk of a suspension of the License on the provisional amparo application (or the definitive amparo application) was significant; and, as such (ii) the Omissions (which addressed the nature of the relief sought, the risks of such an order being granted, and the length of any possible suspension) were material and ought to have been disclosed.

4.1.7 Objection 6: Tahoe properly handled all necessary forward-looking information

[189] The defendants submit that they were not required to disclose "forward-looking information" about the length of time of any potential suspension of the License that would result if CALAS succeeded on their petition.

[190] The defendants submit that "[t]his allegation borders on the absurd and essentially would punish Tahoe for not making forward-looking guesses about the consequences of events that had not occurred", "would constitute guess work", and "would be entirely inappropriate in the context of Ontario's securities regime". The defendants submit that as of the May 24 News Release, "there was no reasonable basis to provide forward-looking information on future events whose risk of materialization remained broadly uncertain" and that as such, it was not appropriate to "speculate on hypothetical events".

[191] However, the defendants' submission is circular. Part 4A.2 of National Instrument 51-02 addresses forward-looking information. It provides that "[a] reporting issuer must not disclose forward-looking information unless the issuer has a reasonable basis for the forward-looking information."

[192] Consequently, if the defendants' objections as to standing and materiality of the risk are not accepted at trial, a court could find that the defendants had a reasonable basis to conclude that (i) it was highly likely that the provisional amparo might be granted suspending the License, and (ii) there was a risk that the definitive amparo could be granted suspending the License. If the court held as such, it is reasonably possible that a court could find that the defendants were required to disclose the forward-looking information as to the length of time the License could be suspended upon either provisional or definitive amparo relief being granted.

[193] Further, the defendants are not absolved from disclosure of material facts simply because the risk had not yet arisen. They are required to disclose the risk in the May 24 News Release if material at the time. Laws governing the disclosure of forward-looking information are not intended to operate as a license for reporting issuers to withhold disclosure of material information relating to risks affecting a business' operations.

[194] In subsection 4.1.2 above, I held that there is a reasonable possibility that a trial court could find, based on credible expert evidence of Dr. Escobar, that there was precedent supporting CALAS' standing to bring the amparo petition.

[195] In subsection 4.1.6 above, I found that there is a reasonably possibility that a trial court could find that the risk of suspensions from the CALAS petition was material.

[196] In subsection 4.1.9 below, I find that Dyck has also established a reasonable possibility that a trial court could find that the defendants had no reasonable basis for their assertion in the May 24 News Release that there was a lack of Xinka presence in the area.

[197] As I discuss at paras. 99-101 above, there is no evidence to support any reasonable basis for the defendants' assertion in the May 24 News Release that they had "consulted with a number of indigenous peoples [let alone the Xinka people] during its many meetings".

[198] Consequently, it is reasonably possible that a trial court could find that the Omissions (which addressed the nature of the relief sought, the risks of such an order being granted, and the length of any possible suspension) were material and ought to have been disclosed.

[199] In fact, the defendants made the forward-looking disclosure sought in the Omissions in the July 5 News Release, which disclosed that (i) the License could remain suspended for 12 to 18 months while the definitive amparo was considered; and (ii) the continued suspension while consultations with the Xinka were undertaken could last another six to 12 months.

[200] Consequently, there is credible evidence that as of the May 24 News Release, (i) Tahoe had a reasonable basis to make the forward-looking statements as to the risk and duration of any License suspension; and (ii) as such, the forward-looking information in the Omissions ought to have been disclosed in the May 24 News Release.

[201] For the above reasons, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.8 Objection 7: The Guatemalan Supreme Court confirmed that Tahoe's initial position on the amparo was correct

[202] The defendants submit that "[t]he view expressed by Tahoe in the May 24 News Release, that the Amparo Application brought before the Supreme Court would not result in a suspension of the License, was ultimately supported by the Supreme Court on September 8, 2017, when the Court overturned the provisional Amparo and held that the license should not be suspended".

[203] The defendants rely on the decision of the Court of Appeal in *Kerr v. Danier Leather Inc.*, 2005 CanLII 46630 (Ont. C.A.), in which the court held that the fact that the Q4 projections in the forecast of results were attained was relevant to whether management's assessment of the projections was reasonable. The court in *Kerr* noted that "it is a contradiction in terms to say that a Forecast which accurately predicts what will occur is not, at the very least, one of the alternatives management could reasonably select": *Kerr*, at para. 153.

[204] However, there is credible evidence from Dr. Escobar that supports the conclusion that the Guatemalan Supreme Court did not confirm that Tahoe's initial position on the amparo was correct. In particular:

(i) On July 5, 2017, the Supreme Court provisionally suspended the License, which was contrary to Tahoe's position;

(ii) On July 28, 2017, the Supreme Court confirmed the provisional suspension on an application for reconsideration of its decision, which was again contrary to Tahoe's position; and

(iii) On August 24, 2017, the Constitutional Court confirmed the provisional suspension on appeal, also contrary to Tahoe's position.

[205] Further, the Supreme Court's September 8, 2017 decision on the definitive amparo did not overturn the provisional suspension, which remained in place until the Constitutional Court's decision on the definitive amparo.

[206] The Supreme Court's September 8, 2017 decision on the definitive amparo also found that (i) there were Xinka near the Escobal mine who were required to be consulted; and (ii) no previous consultations had occurred, again contrary to Tahoe's initial position. The Supreme Court ordered those consultations to be held, which Tahoe opposed.

[207] Consequently, the Supreme Court's September 8, 2017 decision rejected both bases for Tahoe's statement in the May 24 News Release that the petition for amparo was "without merit".

[208] Finally, the Constitutional Court, in its September 8, 2018 decision, ordered the continued suspension of the License while consultations were held.

[209] For the above reasons, it is reasonably possible that a court could find that the Supreme Court in September 8, 2017 did not confirm Tahoe's initial position on the amparo (*i.e.* that the claim was without merit).

[210] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.9 Objection 8: Tahoe had a reasonably held view that there were no Xinka at Escobal

[211] As I discuss above, the defendants filed no evidence as to what information they relied upon to assert in the May 24 News Release that there was a "lack of indigenous communities in or around the mine". The only basis for that statement set out in the news release is that "[t]he last official census shows the San Rafael community to be overwhelmingly non-indigenous".

[212] The defendants ask the court to find that it is not reasonably possible for Dyck to establish that the defendants either (i) knew of the presence of Xinka at Escobal, (ii) deliberately avoided acquiring such knowledge, or (iii) engaged in gross misconduct by failing to learn of the Xinka presence (as those requirements are set out for a non-core document under s. 138.4(1) of the *Securities Act*). For the reasons that follow, I find that it is reasonably possible for Dyck to succeed at trial on this requirement.

[213] I first consider the Tahoe admission in its February 13 News Release that there were Xinka near the Escobal mine. I then consider the information available in the petition for amparo. Finally, I consider the other information that could have been available as of the May 24 News Release, since the defendants filed no evidence as to what information they had in their possession to assert that there was "a lack of indigenous communities in or around the mine".

4.1.9.1 The February 13 News Release

[214] In the February 13 News Release, Clayton stated that "Tahoe wishes to clarify and specifically acknowledge the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka".

[215] The acknowledgement of Xinka presence in the communities near Escobal was made while the CALAS amparo proceeding remained ongoing. It can reasonably be inferred that Tahoe would not have made this admission against interest unless there was no credible argument to the contrary.

[216] Mr. Chávez acknowledged on cross-examination that he was not aware of any evidence that the Xinka moved into the communities near Escobal after the License was approved in 2013.

[217] The defendants filed no evidence on the motion to explain why they knew about the presence of the Xinka people in February 2018, less than nine months after the May 24 News Release yet advised investors otherwise in May 2017. Consequently, there is no basis on the record for the defendants to suggest that they did not have the same knowledge of Xinka presence at the May 24 News Release.

[218] As the court held in *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241, at para. 48, the court on a leave motion should consider the evidence that a defendant has chosen *not* to provide.

[219] The defendants did not refer to the February 13 News Release in any capacity, even though the issue was raised prominently by Dyck in his motion record, factum and in his submissions at the hearing. In particular, I note the following:

(i) The defendants provided no evidence from a Tahoe representative. The reports prepared by Mr. Chávez did not address any evidence about changes to Xinka presence near Escobal since 2013;

(ii) The lengthy factum filed by the defendants for this hearing made no reference to the February 13 News Release, despite repeated references to it in the Dyck factum; and

(iii) The defendants made no submissions to the court on the issue, even after Dyck relied on the February 13 News Release in his submission.

[220] The defendants are sophisticated parties represented by experienced counsel, who can be taken to understand the consequences of not providing the court with any evidence on this issue.

[221] For these reasons, the admission in the February 13 News Release is sufficient to establish a reasonable possibility that a court could find that (i) the defendants had no basis for their assertion in the May 24 News Release of the lack of indigenous presence in the area; and (ii) the s. 138.4(1) requirements for liability for misrepresentation in a non-core document were met.

4.1.9.2 Evidence set out in the CALAS petition for amparo

[222] As I set out at para. 34 above, (i) Mr. Chávez acknowledged that the MEM is required to conduct consultations under ILO 169 when a project "may affect communities residing near the project area, or communities in whose lands the project will be developed"; and (ii) both experts agree that "land" is defined broadly in ILO 169 and is not confined to areas of exclusive ownership. It includes lands that indigenous peoples use, such as for traditional and subsistence activities.

[223] In its petition, CALAS relied on a 2016 report prepared by Claudia Dary Fuentes for the Ministry of Culture and Sports titled "Situation of Xinka Culture", in order to establish the presence of Xinka in the communities near Escobal and their use of the land.

[224] The 2016 report states that the community of San Carlos Alzatate was formally registered as indigenous, peasant or agrarian in the 20th century and that the name Xinka was added after the 1996 Peace Accords.

[225] MSR had entered into the Royalty Agreement with the MEM that recognized San Carlos Alzatate as one of ten municipalities in the area of direct influence of the Escobal mine and the community was a municipal party to the Royalty Agreement.

[226] The defendants submit that the 2002 census data relied upon by CALAS in its petition did not establish the existence of the Xinka people in the area near Escobal. However, even if the census data is accurate (which is contested), that census data shows that there were two Xinka people living in San Rafael Las Flores, and more in the surrounding areas. Mr. Chávez acknowledged that there is no minimum number of indigenous people required to trigger the consultation obligations under ILO 169. The defendants have not adduced any evidence to suggest that they received legal advice to the contrary.

[227] Consequently, given the 2016 report and the absence of any evidence of a minimum population requirement for consultation, it is reasonably possible that a court could find that based on the evidence in the petition, (i) the defendants had no basis for their assertion in the May 24 News Release of the lack of indigenous presence in the area; and (ii) the s. 138.4(1) requirements for liability for misrepresentation in a non-core document were met.

4.1.9.3 Other evidence of Xinka presence available as of May 24, 2017

[228] Prior to May 24, 2017, there was evidence of both ongoing Xinka activism in opposition to the Escobal mine and protests at the mine. The Xinka had demanded that they be consulted in accordance with ILO 169, including through their representative institution the Xinka Parliament. Tahoe was aware of the Xinka activism and consultation demands.

[229] A report on Tahoe prepared by the Council on Ethics for the Norwegian Government Pension Fund Global in 2014 (the Norwegian Report) noted that "[t]he Xinka Parliament and other Xinka organizations have engaged actively in opposing the [Escobal] mine and what they consider the imposition of a development model based on major interventions in nature." The Norwegian Report notes that the Xinka consider themselves to be directly impacted by Tahoe and its mining licenses. The Norwegian Report further documented the Xinka demand for prior consultation. It also linked ongoing conflict and violence at the Escobal mine to a lack of adequate consultations, including with the Xinka.

[230] Tahoe provided a response to the allegations in the Norwegian Report. The response was found by the Norwegian pension fund to be lacking, leading to a divesture recommendation.

[231] Similarly, a complaint filed to the Inter-American Commission on Human Rights (IACHR) by the Mayan and Xinka peoples of Guatemala describes a protest at the Escobal mine where protesters demanded that consultations be held. The report also describes the arrest of protesters, including the President of the Xinka Parliament. In its Annual Information Form for 2014, Tahoe disclosed receiving the IACHR complaint.

[232] The defendants' economic expert, Dr. Gompers, confirmed that since the Escobal exploitation license was granted in 2013, the Xinka had asserted that they had a presence near the mine. Dr. Gompers also confirmed that in 2013 the Xinka Parliament made public statements denouncing the MEM's decision to grant the Escobal exploitation license.

[233] Based on this available evidence, and without the defendants leading any evidence of reasonable investigation, it is reasonably possible that a trial court could find (i) the defendants had no reasonable basis for their assertion in the May 24 News Release of the lack of indigenous presence in the area; and (ii) the s. 138.4(1) requirements for liability for misrepresentation in a non-core document were met.

[234] For the above reasons, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.10 Objection 9: The plaintiff's expert cannot establish the materiality of the alleged misrepresentations

[235] The materiality requirement raises two issues.

[236] The court must first consider the evidence from the experts on Guatemalan law to determine whether it is reasonably possible for Dyck to establish at trial that the Omissions ought to have been disclosed, given the nature of the CALAS petition. That is matter of dispute between the parties with (i) Dr. Escobar concluding that (a) it was highly likely that the Supreme Court would suspend the License on the provisional amparo application while the definitive amparo was decided on its merits; and (b) there was a risk that the License would be suspended on the definitive amparo application; and (ii) Mr. Chávez concluding that the most likely outcome was that the amparo application would be dismissed.

[237] If the first requirement is met, the court must then consider the evidence from the economic experts on materiality to determine whether it is reasonably possible for a trial court to determine that the disclosure of the Omissions would have had a material effect on the Tahoe share price.

[238] I first address the applicable law on the issues of misrepresentation and materiality. I then consider the expert evidence on each of these issues below.

4.1.10.1 The applicable law

[239] Under s. 1(1) of the *Securities Act*, a "misrepresentation" occurs in one of three ways: (i) an untrue statement of material fact, (ii) an omission to state a material fact that is required to be stated, or (iii) an omission to state a material fact that is necessary to make a statement not misleading in the light of the circumstances in which it was made (which captures "half-truths"): *Kerr* at paras. 61 and 112.

[240] A "material fact" is defined under s. 1(1) of the *Securities Act* as any fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[241] In *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, the Supreme Court established the following principles with respect to the materiality of a fact, at paras. 51, 54, and 61:

(i) A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price;

(ii) "[T]he subjective views of the issuer do not come into play when assessing materiality" and the business judgment rule does not apply; and

(iii) In assessing materiality, the court must first look at the disclosed information and the omitted information. A court may also consider contextual information, such as concurrent or subsequent events.

[242] This concept of materiality from the Supreme Court in *Sharbern Holdings* has been applied to the *Securities Act*: *Wong v. Prettium Resources*, 2017 ONSC 3361, 139 O.R. (3d) 353, at para. 30; *Kauf*, at para. 60.

[243] "[R]isks are facts within the meaning of the [*Securities Act*]" that "must be disclosed if they are material": *Re YBM Magnex International Inc*, 2003 LNONOSC 337, (2003), 26 OSCB 5285, at para. 87; *Dugal v. Manulife Financial Corp*, 2013 ONSC 4083, at para. 54.

[244] As stated in *YBM Magnex*, at para. 87, "not only should the risk be disclosed, if material, but also the underlying facts."

[245] The probability/magnitude test balances the probability that the event will occur against the anticipated magnitude of the event in light of the total activity of the company: *YBM Magnex*, at para. 92; *Dugal*, at para. 54.

4.1.10.2 A review of the evidence on Guatemalan law as to the likelihood of a suspension of Escobal operations

[246] The conflicting expert opinions as to the strength of the CALAS petition is strong evidence, in itself, that there is a reasonable possibility Dyck could establish that the Omissions ought to have been disclosed.

[247] Dr. Escobar is a former trial lawyer from Guatemala with extensive experience, including litigating petitions for amparo. Dr. Escobar was appointed as a trial judge to the First Instance Court of the parish of Mixco. A few years later, she was designated as a judge at the Court of Appeals of the Civil Commercial Branch of Guatemala. The Court of Appeals is the court of first instance for amparos filed against lower ranking governmental authorities. At the Court of Appeals, Dr. Escobar heard petitions for amparo presented against governmental authorities. Dr. Escobar resigned as a judge and moved to the United States after she denounced an attempt in 2014 by senior officials to bribe her, which lead to threats against her and her family.

[248] Mr. Chávez has been a lawyer in private practice in Guatemala for over 45 years, specializing in civil and commercial litigation. In 1975, Mr. Chávez graduated from the School of Law at Universidad Rafael Landívar, in Guatemala City, Guatemala, and later obtained a Specialization Degree in Procedural Law from that same school. He has taught civil procedure at that law school.

[249] Dr. Escobar's opinion on the likely consequences of the petition for amparo is that, as at May 24, 2017:

(i) It was highly likely that the Supreme Court would issue a provisional amparo suspending the Escobal exploitation license while the definitive amparo was decided on its merits. If appealed, it was highly likely that the Constitutional Court would uphold the Supreme Court's decision on the provisional amparo;

(ii) The definitive amparo would take between eight and 18 months to be determined;

(iii) It was highly likely that, on the definitive amparo, the Supreme Court and Constitutional Court would force the MEM to consult with the Xinka pursuant to the requirements of ILO 169; and

(iv) There was a risk that on the definitive amparo the License would be suspended while ILO 169 consultations were held with the Xinka.

[250] The defendants submit that the suspension of the License was a "black swan" legal decision, without legal precedent. It is on that basis that the defendants submit that they were not required to disclose the Omissions.

[251] Mr. Chávez's opinion on the result of the petition for amparo is that, as at May 24, 2017:

(i) The most likely outcome of the amparo was that the court would dismiss it because: (a) CALAS obviously lacked standing to pursue claims on behalf of indigenous communities; (b) the MEM granted the License based on official data showing that consultation of indigenous groups under ILO 169 was not applicable; and (c) prior court decisions from the Constitutional Court refused to suspend mining exploitation licenses in similar situations;

(ii) Even if these flaws in the amparo were ignored, prior jurisprudence suggested that the appropriate relief that could be granted, if any, was an amparo ordering the MEM to consult with affected indigenous groups, not an order suspending the License. In this regard, prior decisions emphasized that the rights of private parties were not subject to suspension based on allegations that a government body did not satisfy legal obligations; and

(iii) Further, given the lack of any Guatemalan laws or regulations governing the ILO 169 consultation process and inconsistencies in the Guatemalan courts' decisions interpreting ILO 169's requirements, it is not credible to suggest that on May 24, 2017, suspension of the License was a likely outcome of the amparo.

[252] Mr. Chávez acknowledged on cross-examination that CALAS had an "arguable case" and that he would not have described the amparo application as being "without merit". He maintained his opinion from his reports that suspension was not a likely outcome and that the application "had so many flaws that it should have been dismissed".

[253] For the purposes of the leave application, it is not appropriate to determine which expert's evidence will be accepted at trial. As long as Dyck can establish that there is a reasonable possibility of success at trial based on credible evidence from Dr. Escobar and a plausible interpretation of the *Securities Act*, the issue as to the specific level of risk posed by the CALAS amparo petition is not to be resolved on this leave motion.

[254] In addressing the other objections discussed above, I have found that Dyck can establish a reasonable possibility of success, based on credible evidence, that:

(i) CALAS had standing to bring the amparo petition;

(ii) There were Xinka in the communities near the Escobal mine to whom a consultation obligation was owed;

(iii) No previous consultations had been undertaken with the Xinka; and

(iv) There was precedent in analogous cases before the Supreme Court and Constitutional Court to suspend the License on a provisional amparo, as well as before the Supreme Court to suspend the License on a definitive amparo.

[255] Given the above findings, it is reasonably possible that a court could accept Dr. Escobar's opinion.

[256] Consequently, it is reasonably possible that a court could find that the Omissions constituted a misrepresentation, particularly given the assurances given by the defendants (twice in the May 24 News Release) that the claim was without merit, and that the defendants were "confident" of that conclusion because of (i) "the lack of indigenous communities in or around the mine", (ii) "the fact that both MEM and Minera San Rafael participated in and documented hundreds of public and private meetings and open consultations in or around the mine area dating back to 2010" and "Minera San Rafael consulted with a number of indigenous people during its many meetings", and (iii) the "extensive consultation and socialization process followed by both MEM and Minera San Rafael leading to issuance of the Escobal license".

4.1.10.3 A review of the expert evidence on materiality

[257] Expert economic evidence as to the materiality of the Omissions was provided by Dr. Michael Hartzmark on behalf of Dyck, and by Dr. Paul Gompers on behalf of the defendants.

[258] Dr. Hartzmark opined that it is reasonable to conclude that the Omissions were material from an economic perspective based on the event study he conducted and from other analysis. According to Dr. Hartzmark, the concealment in the May 24 News Release of even a small degree of risk of a suspension at the Escobal mine would be material to investors, given the significance of the Escobal mine to Tahoe's operations.

[259] On July 6, 2017, the share price decline was $3.50 per Tahoe share, representing a $1.1 billion decline in Tahoe's market capitalization. Dr. Hartzmark concluded that an economically material decline in Tahoe's share price on July 6, 2017 was $0.55 per Tahoe common share, which is only 15.7% of the total $3.50 decline.

[260] Consequently, under Dr. Hartzmark's approach, as long as the risk of the suspension of Escobal's operations was greater than 15.7% (if the market had no perceived risk of the information concealed by the Omissions), then the failure to disclose the Omissions was economically material.

[261] Dr. Hartzmark found that it was reasonable to conclude that the Omissions met the threshold for materiality based on: (i) the above described calculation, (ii) Dr. Escobar's opinion on the high likelihood of a provisional amparo being granted, (iii) analysts expressing their surprise at the adverse outcome, which suggests that the risk was not previously disclosed, (iv) analysts reducing their estimates of Tahoe's future earnings per share after the adverse event, (v) Tahoe's high trading volume on July 6, 2017, and (vi) the material change report filed by Tahoe.

[262] Dr. Gompers concluded that Dr. Hartzmark had not established that the Omissions were material.

[263] Again, the conflicting expert evidence sends a strong signal that there is a reasonable possibility that Dyck can establish the economic materiality of the Omissions.

[264] The defendants submit that Dr. Hartzmark led no evidence of economic materiality because he did not disaggregate the decline following the public correction versus other information. However, it is reasonably possible that a trial court would accept Dyck's submission that the defendants and their expert confuse materiality with loss causation.

[265] Dr. Hartzmark concluded that the Omissions accounted for more than $0.55 of the July 6, 2017 share price decline, which he concluded is the threshold for materiality. Loss causation requires the quantum of the decline to be disaggregated between the share decline which would have resulted from disclosure of the information in the Omissions from the additional July 5 News Release, which included information that a provisional amparo had been granted, and that the License would be suspended, possibly for a lengthy period of time (as opposed to the risk that would happen, which would have been disclosed under the Omissions).

[266] The disaggregation of those amounts (and thus the loss causation) was not the subject of Dr. Hartzmark's report as it was not a relevant issue for the motion.

[267] Consequently, it is reasonably possible that a trial court could conclude that Dr. Hartzmark properly considered the materiality issue, since if the trial court accepts that there was more than a very small risk concealed, then there is a reasonable possibility the trial judge could accept that Dr. Hartzmark's model establishes the economic materiality of that risk.

[268] Under Dyck's approach, it was proper for Dr. Hartzmark to consider Dr. Escobar's reports in opining that there is a reasonable likelihood that the misrepresentations were material. Dr. Escobar's opinion considers the significance of the risks facing Escobal and provides credible evidence that such a risk will be found at trial.

[269] Finally, Dyck relies on the probability/magnitude test for materiality, under which the materiality of the defendants' misrepresentations is not solely dependent on Dr. Hartzmark's evidence of economic materiality. It is reasonably possible, based on credible evidence, that the misrepresentations will be proven to be material on that test given the significant risk facing Escobal's operations and the importance of the Escobal mine to Tahoe.

[270] Further, Dyck raises the following concerns about the approach taken by Dr. Gompers:

(i) Dr. Gompers concludes that there is reason to believe the Omissions are immaterial because those risks were already incorporated into Tahoe's share price based on inferences that could purportedly be made from external sources. However, Dr. Gompers provides no evidence that any investors actually found these sources, speculated about the risk posed to the Escobal mine by the petition for amparo based on them, or used that information to inform their investment decisions. Dyck relies on the decision in *Weiner v. Tivity Health, Inc.*, 334 F.R.D. 123 (M.D. Tenn. 2020), at 135, in which the court rejected similar arguments made by Dr. Gompers in a securities case and commented that the sources relied on "are not the types one would commonly expect investors to consult";

(ii) Dr. Gompers' approach is inconsistent with the commentary from the Desjardins analyst who relied on Tahoe management's representation that there was no merit to the CALAS claim, since the analyst maintained his valuation of the company with no apparent independent inquiry;

(iii) Even where contrary information may exist in the public domain, an issuer's statements can obscure that information and undermine its credibility and thereby prevent the information from being incorporated into a company's share price. Dr. Gompers acknowledged that the May 24 News Release is the only information that he knows was publicly available about the petition at the time; and

(iv) Dyck criticizes the reliance by Dr. Gompers on sources such as Spanish language tweets, blog posts, Spanish language news articles from local Guatemalan newspapers, and articles blocked by paywalls, which are not easily accessible by sophisticated institutional investors, let alone retail investors such as the plaintiff. By way of example, Dr. Gompers acknowledged on cross-examination that he did not know if the Twitter account of Mr. Maldonado (see para. 65 above) was locked on May 24, 2017 or how many followers he had and, thus, whether the tweets had any real possibility of being read by investors.

[271] Further, Dyck criticizes the approach taken by Dr. Gompers as being inconsistent with settled law that a defendant cannot escape their disclosure obligations because some institutional investors might have speculated about undisclosed risks if they happened to locate obscure information.

[272] There is a reasonable possibility that Dyck could establish at trial that Dr. Gompers' analysis is at odds with the purpose of Canadian securities regulation, which "is designed to create a 'level playing field' where all investors have access to the same information and all pricing and investment decisions are made from the same starting point." A policy of ensuring

the level playing field is "the most fundamental principle of securities regulation": *Theratechnologies*, at para. 25.

[273] It is reasonably possible that a trial judge could find that the defendants' position would favour sophisticated institutional investors with significant resources who might search for this type of information and trade on it to the detriment of retail investors without similar means.

[274] Dyck further submits that such an approach is contrary to the caution raised by the court in *SouthGobi Resources* that "[c]ontinuous disclosure obligations are not a shell game where investors are left to guess where the truth lies. Investors have a right to know a corporation's true state of affairs.": at para. 81.

[275] It is not the role of the court on a leave motion under s. 138.8(1) to determine which expert evidence will be accepted at trial. I review the expert evidence above in some detail only to conclude that Dyck has led credible evidence to establish a reasonable possibility, based on a plausible interpretation of the legislation, that Dr. Hartzmark's evidence on materiality would be accepted at trial.

[276] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.11 Objection 10: Dr. Escobar's evidence should not be admitted

[277] With respect to the objection raised by the defendants that Dr. Escobar's evidence ought to be ruled inadmissible, I first consider the law as set out in *White Burgess* and then apply the law to the case at bar.

4.1.11.1 The applicable law

[278] The court in *White Burgess* adopted a two-stage test for determining the admissibility of expert evidence: at paras. 23-24. The first stage involves a threshold requirement where the expert must be properly qualified by being willing and able to fulfil the duty to the court to provide evidence that is unbiased: at paras. 26, 32.

[279] The court in *White Burgess* stated that as a "matter of fact and degree" an expert is "clearly unwilling and/or unable to carry out the primary duty to the court" if the expert, "in his or her proposed evidence or otherwise, assumes the role of an advocate for a party": at paras. 49-50. If this is proven, then "the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded": at para. 48.

[280] Exclusion of an expert's evidence at this stage is "quite rare" and would occur "only in very clear cases": at para. 49. There is a high bar for exclusion.

[281] The second "gatekeeper" stage permits the court to balance the benefits of admitting evidence against its potential risks, considering such factors as bias: at para. 54.

4.1.11.2 Application of the law to the present motion

[282] The defendants submit that Dr. Escobar's evidence should be excluded under either threshold test. I do not agree. I first address the independence of Dr. Escobar under the first *White Burgess* threshold and then consider her alleged bias under the second (gatekeeper) stage.

4.1.11.2.1 Independence

[283] With respect to the first threshold requirement of being independent and providing unbiased evidence, the defendants raise the examples which I address below.

[284] The defendants submit that Dr. Escobar "put forward and evaluated evidence outside of her own expertise in order to support the plaintiff's claim", by considering "archeological evidence that did not necessarily show evidence of a Xinka population in the area around the Escobal mine".

[285] However, Dr. Escobar was not acting as an advocate. She referred to evidence that was considered by the Constitutional Court in the CALAS claim, as to the existence of an archaeological site in San Rafael Las Flores, and its use by Xinka groups. Consequently, while the defendants dispute that the Xinka used the archaeological site, Dr. Escobar is not acting as an advocate by relying on evidence which was considered by the Guatemalan court.

[286] By way of similar example, Mr. Chávez relies on the 2002 census data to support his opinions when the plaintiff disputes the accuracy of that data and Mr. Chávez's reliance on it.

[287] The defendants submit that Dr. Escobar's purported advocacy is demonstrated by internet searches she conducted for third-party information concerning the presence of the Xinka near the Escobal mine "to bolster the argument that that [*sic*] Tahoe ought to have known that there was a Xinka population affected by the Escobal mine".

[288] However, Dr. Escobar was responding to Mr. Chávez's assertion in his report that it was reasonable, as of the May 24 News Release, for the defendants to believe that there were no Xinka in the area. By searching for articles that demonstrate the ease of locating facts establishing the existence of Xinka in the area, Dr. Escobar was properly responding to the issue of whether the defendants either knew of the presence of the Xinka in the area, deliberately avoided acquiring such knowledge, or engaged in gross misconduct by failing to acquire that knowledge.

[289] Further, given that the defendants filed no evidence as to any information on which they relied in asserting that there were no Xinka in the area, Dr. Escobar was entitled to locate any evidence which existed, so that the basis for the defendants' assertion could be challenged through easily located publicly-available information from the internet.

[290] The defendants criticize Dr. Escobar for redacting a single sentence from a passage she relied upon from the Norwegian Report.

[291] Dr. Escobar cited a passage that included statements by the authors that (i) "[t]he Xinka Parliament and other Xinka organizations have engaged actively in opposing the [Escobal] mine and what they consider the imposition of a development model based on major interventions in nature"; (ii) "[a]ccordingly, they oppose the mining operation and demand that they be consulted before licenses are granted in the areas in which they live"; (iii) "the Xinka people consider themselves to be directly impacted by the company and the mining licenses in the region"; and (iv) the Xinka "regard El Escobal as the first of several mining projects that will affect them directly, which they do not want and which they feel unable to stop".

[292] The excluded portion from the above passage stated that "San Rafael Las Flores is not considered a traditional Xinka village, and the majority of the population (99.6 per cent) are ladinos, i.e. descendants of the indigenous population who speak Spanish and wear Western clothing".

[293] I do not agree that the impugned redaction demonstrates a lack of independence which would exclude Dr. Escobar's evidence. Dr. Escobar was not relying on any census information as to the population in the particular town – the Norwegian Report was relevant to Tahoe's knowledge that the Xinka people were demanding consultation. I cannot find that the redaction of a portion of the sentence was an attempt to mislead the court or otherwise impugns Dr. Escobar's independence.

[294] For the above reasons, I do not take the "rare" step of excluding Dr. Escobar's evidence on the basis of lack of independence. She acknowledged her duty as an independent expert under Rule 4.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and that duty prevails over any obligation to the plaintiff. The defendants have not established a realistic concern that her evidence should not be received because she is unable and/or unwilling to comply with the duty.

4.1.11.2.2 Bias

[295] The defendants ask the court to not admit Dr. Escobar's evidence based on alleged bias and prejudice. The defendants submit that her "background as an activist … puts her in a position of being unable to properly exercise her duty of confidentiality". The defendants rely on the Saskatchewan case of *R. v. Heimbecker*, 2019 SKQB 204, in which the court held that expert evidence was inadmissible from a criminal justice activist for indigenous women, for a case involving charges against an indigenous woman for cocaine possession for the purposes of trafficking: at paras. 44, 48.

[296] The "activist" role alleged by the defendants arises from Dr. Escobar's rejection by the government in 2018 of her application to be the Attorney General of Guatemala. The defendants describe Dr. Escobar as a "critic of the Guatemalan government". Dr. Escobar's view was that the rejection was reflective of corruption in Guatemala.

[297] Dr. Escobar's anti-corruption activism arose again when she was pressured by the government to provide a favourable ruling for the Vice-President.

[298] Finally, the defendants rely on an article she purportedly wrote "in support of indigenous rights".

[299] However, the defendants leap from Dr. Escobar's anti-corruption views to a conclusion that Dr. Escobar is a "critic of the Guatemalan government" at large, and then attempt a further leap to submit that Dr. Escobar is pre-disposed to finding that the MEM erred in relation to the License.

[300] There is no suggestion in Dr. Escobar's reports or in the evidence that the MEM or any other Guatemalan governmental actor engaged in corruption in connection with the granting of the License. The defendants also provide no explanation as to how the opinion that the MEM failed to consult with the Xinka pursuant to ILO 169 prior to the granting of the License would further Dr. Escobar's desire to end corruption within Guatemala. There is no connection between the matters on which she opined in this litigation and her anti-corruption work.

[301] The defendants also portray Dr. Escobar as an activist for indigenous rights and submit that she wishes to "punish" Tahoe because she views it as being at odds with indigenous rights. This argument is based on a single newspaper article listed in Dr. Escobar's lengthy *curriculum vitae*. In that newspaper article, she was reporting on constitutional reform that was under discussion in Guatemala in 2016 that included the right for the indigenous population to resolve conflicts in accordance with their own methods. In the context of that proposed constitutional reform, she expressed a view that a pluralistic legal system or indigenous law needed to be recognized. She noted in the article that she is not an expert on indigenous legal systems. Consequently, the evidence does not establish that she is an activist for indigenous rights as suggested by the defendants.

[302] Finally, even if there was a connection, that would not necessarily mean that her evidence is inadmissible. Ontario courts have admitted expert evidence even where the matter on which the expert is opining is directly related to the area in which the expert has previously engaged in advocacy and/or activism: *Wise v. Abbott Laboratories, Ltd*, 2016 ONSC 7275 at paras. 34–83; *Black et al. v. City of Toronto*, 2020 ONSC 6398, 152 O.R. (3d) 529, at paras. 25–38; *Affleck v. The Attorney General of Ontario*, 2021 ONSC 1108 at paras. 18–37.

[303] Consequently, I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.12 Objection 11: Dr. Escobar's opinion evidence is inconsistent and unsupportable

[304] The defendants submit that Dr. Escobar's evidence should not be accepted as credible because it is "inconsistent" and "unsupportable". By way of example, the defendants rely on Dr. Escobar's conclusion that it was more likely that the Supreme Court would suspend the License upon the provisional amparo application than on the definitive amparo application.

[305] However, as discussed above, it is reasonably possible that a court could find that it was more likely that the Supreme Court would suspend the License on a provisional amparo

application because there was precedent to do so from both the Constitutional Court and Supreme Court in both the *La Puya* and *Oxec* matters, whereas the Constitutional Court had not suspended a license on a definitive amparo application. Consequently, it is reasonably possible that a trial court would find Dr. Escobar's analysis to be consistent and supportable.

[306] The defendants submit, as another example of an "illogical" conclusion by Dr. Escobal, that she concluded "that external political events" such as violent protests "may have influenced the Supreme Court's decision concerning the Amparo".

[307] However, a review of the transcript relied upon by the defendants shows that Dr. Escobal commented that (i) the bringing of the petition could have been a consequence of the protests because the Xinka were asserting a lack of prior consultation; and (ii) a suspension of operations pending the hearing of the definitive amparo was "the most highly likely conclusion because [the court] had to determine what was happening there", given the lack of consultation which was at the core of the protests. Consequently, the transcript evidence does not necessarily support the defendants' submission.

[308] In any event, even if the trial court did not accept that this single comment (in the course of three reports and lengthy cross-examination) could be supported, it would not be a basis to find that all of Dr. Escobal's evidence should be held to be unsupportable, for the reasons I discuss above.

[309] Consequently, it is reasonably possible that a court will find Dr. Escobal's evidence to be credible and supportable. I do not agree that this objection constitutes a basis for denying leave to proceed under Part XXIII.1.

4.1.13 Objection 12: The Plaintiff mischaracterizes the June 19, 2020 ruling of the District Court in Las Vegas

[310] I do not rely on the U.S. litigation as a basis for finding that Dyck has established a reasonable possibility of success at trial. It is not evidence before the court, and the decision is based solely on the pleadings being accepted as true.

[311] Nevertheless, I do not agree that Dyck has mischaracterized the U.S. litigation. Dyck does not ask the court on the present motion to follow the U.S. approach, but only submits that the analysis in the U.S. litigation is consistent with the analysis Dyck proposes in this action.

[312] The evidence before the court in the present case addresses many of the similar allegations made before the U.S. court with respect to the *scienter* knowledge requirement (as similar to ss. 138.(4)(1)(a)-(b) of the *Securities Act*). Consequently, while I find that the parallel U.S. class action is not directly relevant to whether Dyck has established a reasonable possibility of success at trial, the U.S. decision is consistent with the basis for leave sought in the present case.

4.1.14 Summary on the leave motion

[313] It is not the role of the court on a leave motion to conduct a mini-trial, or to make findings of fact or law that should be made by a trial judge. Instead, the role of the court is to determine only whether the plaintiff has acted in good faith (which is not at issue in this case) and led credible evidence, based on a plausible interpretation of the legislation, to establish a reasonable possibility of success.

[314] For the reasons discussed above, Dyck has established a reasonable possibility of success at trial, based on credible evidence and a plausible interpretation of the legislation.

[315] First, Dyck has established a reasonable possibility of success at trial that a court would find that the Omissions were material. In summary:

(i) Dr. Escobar's expert evidence that a suspension of the License was "highly likely" on the provisional amparo is credible;

(ii) Given the magnitude of the consequences of a shutdown of the Escobal mine, and Dr. Escobar's credible evidence of the probability of that occurrence, Dyck has established a reasonable possibility that the Omissions were material, as the May 24 News Release did not disclose that (a) CALAS sought a suspension of the License both on the provisional and definitive amparo; (b) there was any risk to such relief being granted; or (c) the anticipated length of the shutdown if the suspensions were granted;

(iii) Dr. Hartzmark reaches a credible conclusion that disclosure would be required as long as the risk of the suspension of Escobal's operations was greater than 15.7% (if the market had no perceived risk of the information concealed by the Omissions). Given Dr. Escobar's opinion that the suspension on the provisional amparo was "highly likely", there is a reasonable possibility that Dr. Hartzmark's evidence on materiality would be accepted at trial; and

(iv) Dr. Escobar's evidence is admissible under the *White Burgess* test.

[316] Second, Dyck has established a reasonable possibility of success at trial that a court would find that at least one of the requirements under s. 138.4(1)(a)-(c) of the *Securities Act* has been met for the May 24 News Release as a non-core document (*i.e.* that the defendants were aware of the material facts that are the subject of the Omissions, deliberately avoided acquiring knowledge of those facts, or engaged in gross misconduct by issuing the May 24 News Release with a marked departure from the standard of conduct expected given the risk). In summary:

(i) Given (a) Tahoe's acknowledgment in the February 13 News Release of "the presence and importance of the indigenous peoples located in the communities near Escobal, particularly the Xinka", (b) no evidence explaining any change in knowledge between the May 24 and February 13 News Releases, and (c) no

evidence of any change to the Xinka presence after the License was granted, there is credible evidence that the defendants either knew of the Xinka presence, deliberately avoided acquiring knowledge of those facts, or engaged in gross misconduct by issuing the May 24 News Release and representing that the CALAS claim had no merit "[b]ased on the lack of indigenous communities in or around the mine" and based on "extensive consultation" with indigenous peoples;

(ii) There is credible evidence that the 2016 report relied upon in the petition established a reasonable possibility that the Guatemala court could find that the Xinka people had a presence in the community of San Carlos Alzatate, which was a party to the Royalty Agreement; and

(iii) The only evidence before the court on the motion is that the Xinka were not consulted prior to the issuance of the License, as was acknowledged by the MEM in the correspondence attached to the CALAS petition. Consequently, there is credible evidence that the defendants either knew of the lack of consultation, deliberately avoided acquiring knowledge of those facts, or engaged in gross misconduct by issuing the May 24 News Release and advising investors that the CALAS claim had no merit, based on Tahoe's representations that "Minera San Rafael consulted with a number of indigenous people during its many meetings", "participated in and documented hundreds of public and private meetings and open consultations in and around the mine area dating back to 2010", and that there was "extensive consultation and socialization process followed by both the MEM and Minera San Rafael leading to issuance of the Escobal license".

[317] With respect to the defendants' statements in the May 24 News Release that CALAS' claim was "without merit", there is credible evidence that there was precedent under Guatemalan law to suspend mining operations as a result of a provisional amparo. Further, the defendants filed no evidence as to whether they obtained legal advice prior to making the representations as to the merit of the claim. Consequently, Dyck has established a reasonable possibility of success at trial that the facts known or readily available to the defendants as of May 24, 2017 contradicted the bases asserted by them for their "without merit" position.

[318] For the above reasons, Dyck has established a reasonable possibility that (i) the defendants either knew that the CALAS claim had merit, deliberately avoided acquiring knowledge of that fact, or engaged in gross misconduct by issuing the May 24 News Release and advising that the CALAS claim had no merit; and (ii) the defendants' failure to disclose the information in the Omissions was a breach of their obligations to disclose material facts in a non-core document under the conditions of s. 138.4 of the *Securities Act*.

[319] Consequently, I grant the motion for leave.

4.2 The issues arising out of the certification motion

[320] It is not contested that (i) the pleading discloses a cause of action under Part XXIII.1 and for negligent misrepresentation; (ii) the proposed common issues properly set out those issues to be determined on a common basis;[10] and (iii) a class proceeding is the preferable procedure since pursuing the claims on an individual basis would be uneconomical and the resolution of the common claims is highly significant in relation to the other issues raised in the action. Consequently, it is uncontested that the requirements under ss. 5(1)(a), (c), and (d) of the *CPA* have been met.

[321] As I set out at para. 21 above, I address the following two objections raised by the defendants to oppose certification (or limit the size of the proposed class):

(i) The proposed class definition is overbroad and inappropriate: U.S. shareholders should not be certified as members of the proposed class (s. 5(1)(b)); and

(ii) Dyck is not an appropriate representative plaintiff (s. 5(1)(e)).

4.2.1 Objection 1: The proposed class definition is overbroad and inappropriate: U.S. shareholders should not be certified as members of the proposed class

[322] Dyck proposes a global class of shareholders who purchased shares on either the TSX or the NYSE, regardless of where they reside.

[323] In the parallel U.S. class action, the proposed class includes only those persons who acquired Tahoe shares in the U.S. or on the NYSE (the U.S. Shareholders).

[324] The defendants submit that the court should exclude the U.S. Shareholders from the proposed class in the present action. I do not agree.

[325] In *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, at para. 107, the Court of Appeal held that certification of a global class is appropriate where: (i) there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and defendants; (ii) there are common issues between the claims of the representative plaintiff and the absent foreign claimants; and (iii) procedural safeguards of adequacy of representation and notice, as well as the right to opt out, are provided.

[326] The defendants do not dispute that the court has jurisdiction to certify a global class on the basis of the above case law.

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[10] The defendants' third certification objection that "certain common issues are inappropriate and insufficient" was addressed at the hearing and is not at issue between the parties, as set out at footnote 5 above.

[327] However, the defendants assert that this court should follow the approach in *Kaynes v. BP, PLC*, 2014 ONCA 580, 122 O.R. (3d) 162, in which the court applied the doctrine of *forum non conveniens* to exclude purchasers of the defendant company (BP) who had purchased their shares on the NYSE. The court relied on evidence of a parallel proceeding in the U.S.: at paras. 35 and 54. The court held that "when the issue of avoiding a multiplicity of proceedings is considered in the light of the entire context of the jurisdictional standards prevailing elsewhere, it weighs heavily in favour of declining jurisdiction": at para. 52.

[328] However, the decision in *Kaynes* does not stand for the proposition that any global securities class action must exclude shareholders who are part of a class or proposed class in another jurisdiction.

[329] In *Kaynes*, the court applied the doctrine of *forum non conveniens* in circumstances where BP, the foreign corporation, had ceased to be a reporting issuer in Canada: at paras. 7-9. In the present case, Dyck asserts claims under Ontario law against the defendants who, during the Class Period, were residents, domiciled and/or carried on business in Canada. Tahoe was a reporting issuer in Ontario at all material times.

[330] In 2016, the Court of Appeal in *Kaynes v. BP*, 2016 ONCA 601, 133 O.R. (3d) 29, lifted the stay due to a change in circumstances in the U.S. litigation. While BP had argued before the Court of Appeal at the initial hearing that U.S. law governed the Canadian shareholders' claims for trades under the NYSE, BP then successfully argued before the U.S. District Court that the Canadian plaintiffs' "pre-explosion" claims were governed by Ontario law: at para. 15. The Court of Appeal, in lifting the stay, noted that "the claim of exclusive jurisdiction was a significant factor in our assessment of comity and *forum non conveniens*": at paras. 13-14, and 17.

[331] Consequently, the 2016 decision in *Kaynes* demonstrates that the court should not narrow the class at an early juncture when the defendants are opposing certification. The doctrine of *forum non conveniens* is only available if the defendant can meet the high threshold required to displace the forum chosen by the plaintiff: *Paniccia v. MDC Partners Inc.*, 2017 ONSC 7298, at para. 40. However, in the present case, the evidence is that Ontario law applies against defendants who were residents, domiciled, and/or carried on business in Canada during the Class Period. The evidence before the court on the present motion does not establish the factors relied upon in the initial *Kaynes* decision.

[332] I adopt the approach of van Rensburg J. (as she then was) in *Silver*. The court in the 2009 decision certified a global class action because there was a real and substantial connection to Ontario. The scope of the class was later narrowed in a 2013 decision, but only after a settlement of the U.S. action where class members were provided with the opportunity to opt out: *Silver v. IMAX Corp.*, 2013 ONSC 1667, at para. 18.

[333] As in *Silver*, it would be premature in the present case to dismiss the claims of certain class members on the basis of ongoing U.S. litigation that may not secure access to justice for the

foreign class members. The U.S. class action could fail for reasons unrelated to the cause of action provided by Part XXIII.1.

[334] For the above reasons, I certify the global class of shareholders as proposed by Dyck.

4.2.2 Objection 2: Dyck is not an appropriate representative plaintiff

[335] The defendants submit that Dyck is not an appropriate representative plaintiff because:

(i) "[H]e has not produced any tangible evidence that he even purchased shares in Tahoe, either before or during the class period";

(ii) His evidence was that he was "concerned" when he read the May 24 News Release and "went through it very carefully" and understood that there was "always a risk" of negative events when dealing with investments in developing countries;

(iii) He "indicated that he had 'been involved in a class action before' but refused to provide any further details"; and

(iv) "[H]e did not know who Mr. Hartzmark … was [and] was unaware that [Dr. Escobar] had filed three, not one, expert reports for this motion".

[336] For the reasons that follow, I find that Dyck is an adequate representative plaintiff.

[337] Dyck provided uncontested affidavit evidence (i) that he acquired 620 Tahoe shares on July 4, 2017 and (ii) about the purchase price and the trading platform through which he executed the trade. Dyck was cross-examined on his affidavit, with no request for trading records and no challenge to his evidence on the purchase. Further, the defendants acknowledge that Dyck brought this action in good faith.

[338] Consequently, there is no evidence from the defendants to challenge the uncontested evidence of Dyck that he is a class member through his acquisition of Tahoe shares.

[339] With respect to Dyck's expressed "concern" about the contents of the May 24 News Release and his subsequent "careful" review of it, such evidence is irrelevant to a Part XXIII.1 claim, given the deemed reliance of any shareholder as provided in s. 138.3(1) of the *Securities Act*, which engages liability for misrepresentations "without regard to whether the person or company relied on the misrepresentation".

[340] Further, Dyck's evidence could support his position that the specific risks associated with the Omissions were not disclosed ether prior to or in the May 24 News Release, since even upon a "careful" review, he noted that he "checked the Tahoe web page", which said "the same" (*i.e.* that the claim was without merit).

[341] With respect to Dyck's prior involvement in a class action, the defendants offered no authority for the proposition that a representative plaintiff could not act in that capacity in more than one action, and I would not adopt such a principle. In any event, Dyck's evidence was that he was not a "lead plaintiff" in the prior class action, and his counsel advised by subsequent letter that Dyck was a class member in that class action which related to employment benefits and was settled approximately 19 years ago.

[342] Consequently, there is no support for the defendants' submission.

[343] Finally, the criticisms of Dyck's lack of detailed knowledge are not valid. He is not required to know all of the names of experts giving evidence, nor the number of reports filed by one of his experts. These matters have no bearing on Dyck's ability to carry out his function as a representative plaintiff.

[344] A representative plaintiff's role is to vigorously and capably prosecute the interests of the class: *1176560 Ontario Ltd v. Great Atlantic & Pacific Co of Canada Ltd* (2004), 70 O.R. (3d) 182 (Div. Ct.), at paras. 19-29. A representative plaintiff is not expected to have a detailed knowledge of the civil litigation process or the issues involved in the action: *Maxwell v. MLG Ventures Ltd*, [1995] O.J. No. 1136 (Gen. Div.), at para. 10.

[345] Dyck is capable of representing and protecting the interests of the class. He is a member of the class and his evidence (both from his affidavit and on cross-examination) shows that he understands the allegations in the action and the major steps to be taken, he has already taken steps to represent the proposed class, and he is prepared to continue to represent the interests of the Class Members.

[346] Finally, the defendants do not challenge that Dyck has a workable litigation plan to advance the proceeding through to completion, which provides a reasonable framework for the issues that are reasonably expected to arise as the case proceeds: *McKenna v. Gammon Gold Inc.*, 2011 ONSC 6630, at para. 45.

[347] For the above reasons, I find that Dyck is an adequate representative plaintiff.

[348] Consequently, I grant the certification motion.

5. ORDER AND COSTS

[349] I grant leave to bring the Part XXIII.1 action and certify the proceeding as a class action.

[350] If the parties are unable to agree on costs, Dyck shall deliver a costs submission of no more than five pages (not including the costs outline) by September 9, 2021. The defendants shall deliver responding costs submissions of no more than five pages (not including the costs outline) by September 23, 2021. Dyck may deliver a reply costs submission of no more than three pages by September 30, 2021.

GLUSTEIN J.

Date: 20210826

SCHEDULE A
PROPOSED COMMON ISSUES

Part XXIII.1 of the *OSA*

1. Did the May 24, 2017 News Release contain a misrepresentation within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation)?

2. If the answer to issue 1 is yes, are the Defendants, or either of them, liable under section 138.3 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?

3. If the answer to issue 2 is yes, how should damages be calculated under section 138.5 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?

4. If the answer to issue 2 is yes:

> a. what is the proportionate liability of each of the Defendants pursuant to section 138.6(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?
>
> b. regardless of the answer to issue 4(a), may the whole amount of the damages assessed in the action pursuant to Part XXIII.1 of the *OSA* be recovered from Clayton, pursuant to section 138.6(2) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation)?

5. If the answer to issue 2 is yes, do the liability limits set out in section 138.7(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation) limit the liability of either or both of the Defendants? If so, what are the limits of each such Defendant's liability?

Negligent Misrepresentation

6. Did the May 24, 2017 News Release contain a misrepresentation at common law?

7. If the answer to issue 6 is yes, did the Defendants, or either of them, owe the Class Members a duty of care to ensure that the May 24, 2017 News Release did not contain a misrepresentation? If so, which Defendants owed that duty?

8. If the answer to issue 7 is yes, did the Defendants, or either of them, breach their duty of care? If so, which Defendants and how?

Aggregate Damages

9. Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

Other Issues

10. Is Tahoe vicariously liable or otherwise responsible for the acts and omissions of Clayton and/or its other officers, directors and employees?

11. Should the Defendants, or either of them, pay the costs of administering and distributing the recovery? If so, what amount should the Defendants pay?

12. If the Court determines that the Defendants are liable to the Class Members, and if the Court considers that the participation of the Class Members is required to determine individual issues, what directions, procedural steps, and/or rulings with respect to the admission of evidence are required?

CITATION: Dyck v. Tahoe Resources Inc., 2021 ONSC 5712
COURT FILE NO.: CV-18-00606411-00CP
DATE: 20210826

ONTARIO

SUPERIOR COURT OF JUSTICE

ABRAM B. DYCK

Plaintiff

AND:

TAHOE RESOURCES INC. and RONALD WAYNE CLAYTON

Defendants

REASONS FOR DECISION

Glustein J.

Released: August 26, 2021