SUPERIOR COURT

(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000975-199

DATE: October 11, 2022

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

RUEDIGER MARTIN GRAAF

and

NORMAND LAFRENIÈRE

Plaintiffs

v.

SNC-LAVALIN GROUP INC.

and

NEIL BRUCE

and

SYLVAIN GIRARD

Defendants

JUDGMENT

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1. OVERVIEW

[1] Applicants Graaf and Lafrenière seek authorization to institute a worldwide secondary-market securities class action and, as well, an action for damages pursuant to s. 225.4 of the *Quebec Securities Act*[1] in relation to alleged misrepresentations by SNC-Lavalin Group Inc. during the period from February 22, 2018 to July 22, 2019.

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1 RLRQ/CQLR, c. V-1.1 (the "QSA" or the "Act").

[2] Those dates are the inclusive boundaries of the proposed "Class Period"[2].

[3] The class they wish to represent is defined as follows ("Class")[3]:

> **"Class"** and **"Class Members"** means all persons and entities, wherever they may reside or be domiciled, other than the **Excluded Persons** who acquired **Common Shares** in the secondary market during the **Class Period** and held some or all of such **Common Shares** [...] through one or more of the following: (i) the release of **SNC**'s news release entitled "SNC-Lavalin announces lower than anticipated Q4 results impacting full year 2018" on January 28, 2019, communicated herewith as **Exhibit P-3**; (ii) the release of **SNC**'s news release entitled "SNC-Lavalin provides update on new facts about the Mining & Metallurgy project" on February 11, 2019, communicated herewith as **Exhibit P-4**; (iii) the release of **SNC**'s news release entitled "SNC-Lavalin reports first quarter results for 2019" on May 2, 2019, communicated herewith as **Exhibit P-5**; and (iv) the release of **SNC**'s news release entitled "SNC-Lavalin Forges New Strategic Direction with Corporate Reorganization" on July 22, 2019, communicated herewith as **Exhibit P-6**;

[4] The two Applicants, one residing in Mississauga, Ontario, and the other in Gatineau, Quebec, allegedly purchased in the secondary market common shares of SNC-Lavalin Group Inc. ("SNC") during the Class Period. They continue to hold shares.

[5] SNC is described as "a global fully integrated professional services and project management company and a major player in the ownership of infrastructure"[4].

[6] As a reporting issuer in Quebec, SNC was required to issue and file certain documents of a financial nature with Quebec's market regulator, the *Autorité des marchés financiers* ("AMF"), and on the Canadian Securities Administrators ("CSA") system for electronic document analysis and retrieval ("SEDAR"); those documents are alleged to be the following[5]:

(i) within 45 days of the end of each quarter, quarterly interim financial statements prepared in accordance with international financial reporting standards ("IFRS") that must include a comparative statement to the corresponding periods in the previous year;

(ii) within 90 days of the end of the fiscal year, annual financial statements prepared in accordance with IFRS, including comparative financial statements to the preceding financial year;

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2 Amended Motion for Authorization of a Class Action and for Authorization to Bring an Action Pursuant to Section 225.4 of the *Quebec Securities Act* (the "Amended Application"), para. 1j) and p. 44.

3 Amended Application, para. 1i) and pp. 43-44.

4 *Idem*, para. 6.

5 *Idem*, paras. 9 (i) to (iv).

(iii) contemporaneously with each of the above, a narrative explanation of the company's performance, referred to as Management's Discussion and Analysis ("MD&A")

(iv) within 90 days of the end of the fiscal year, an Annual Information Form ("AIF"), an annual disclosure document describing the company, its operations and prospects, risks and other external factors that impact the company specifically.

[7] In addition, pursuant to the CSA National Instrument 51-102 respecting continuous disclosure obligations, material change reports need be filed within 10 days of the occurrence of a material change.

[8] In addition to SNC, the Applicants seek to have two individuals named as defendants, one of whom is Neil Bruce, a director, President and CEO of SNC from the start of the Class Period until June 11, 2019, approximately one month before its end. The other individual is Sylvain Girard, Executive Vice-President and CFO of SNC.

[9] They are alleged to have certified and signed quarterly and annual disclosures, CFO certifications and the AIF, all part of the alleged Impugned Documents issued for SNC[6].

[10] Applicants allege that many representations made by SNC in its numerous financial and reporting documents, collectively called the Impugned Documents, identified at Schedule I to the present judgment, were in fact misrepresentations.

2. ALLEGED MISREPRESENTATIONS BY SNC

[11] The alleged misrepresentations by SNC relate generally to:

(1.) SNC's execution of its lump-sum, or fixed price, turnkey contracts whereby it provided engineering services, materials and equipment and further, undertook construction activities ("EPC Fixed-Price Contract"), and its related internal controls over financial reporting ("ICFR") and disclosure controls and procedures ("DC&P") concerning the forecasted costs and revenues for such contracts; and

(2.) SNC's ability to secure business in the Kingdom of Saudi Arabia ("KSA") and the Middle East.

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6 *Idem*, paras. 1w) and 13-14.

2.1 Misrepresentations relating to EPC Fixed-Price Contracts

[12] Applicants allege that such contracts carry significant financial risk for SNC because cost increases above forecasted costs are absorbed by it, potentially eroding or eliminating the profitability for SNC in relation to a given project.

[13] SNC entered into such turnkey contracts through its Mining & Metallurgy Division ("M&M Division") in South America, including one for the Chilean state mining entity Codelco (the "Codelco Project") at an existing smelting operation, two oil and gas projects through its Oil & Gas Division ("O&G Division") and one through its M&M Division in the Middle East and as well, through its Infrastructure Division in North America, including the Samuel De Champlain Bridge project in Montreal/Brossard and the Ottawa LRT project.

[14] According to Applicants, the Codelco Project faced significant delays and cost overruns, all of which led to SNC being required to unexpectedly assume extra costs, none of which was disclosed in a timely manner during the Class Period.

[15] Ultimately, on March 25, 2019, Codelco cancelled the SNC contract. They allege that the problems relating to the Codelco Project had not been disclosed during the Class Period.

[16] Applicants also allege that all the other projects mentioned above also faced significant delays, late fees and expenses, cost overruns and problems with materials, along with inaccurate cost forecasts. These too were allegedly not disclosed during the Class Period.

[17] Applicants argue that SNC failed to make timely disclosure of material change in relation to all the foregoing projects.

[18] More specifically, as regards the Codelco Project, the alleged misrepresentations are stated to be:

1) SNC improperly recognized $65 million in variable revenue on the Codelco Project in its Q3 2018 financial statements and accompanying MD&A (released November 1, 2018);

2) SNC improperly failed to record a loss provision on the Codelco Project in the magnitude of $346 million. These misrepresentations were made in SNC's interim financial statements and accompanying MD&A for Q1 2018 (released May 3, 2018), Q2 2018 (released August 2, 2018) and Q3 2018 (released November 1, 2018);

3) The Defendants failed to disclose material operational and execution problems on the Codelco Project and, as a result, misstated SNC's operational and execution capabilities. These misrepresentations were made in SNC's FY/Q4 2017 MD&A and financial statements (released February 22, 2018), Annual

Information Form (released February 22, 2018) and Annual Report (released April 3, 2018), and in SNC's interim financial statements and accompanying MD&A for Q1 2018 (released May 3, 2018), Q2 2018 (released August 2, 2018) and Q3 2018 (released November 1, 2018);

4) In its MD&A for Q1 2018 (released May 3, 2018), Q2 2018 (released August 2, 2018) and Q3 2018 (released November 1, 2018), SNC misrepresented that it had effective ICFR and DC&P when, in fact, it had a material weakness in ICFR and a significant weakness in DC&P.

[19] Insofar as other EPC Fixed-Price Contracts, what is alleged to constitute misrepresentations are:

- SNC failed to disclose material operational and execution problems with its EPC fixed-price contracts in North America and the Middle East.

2.2 Misrepresentations relating to SNC's ability to secure work in the KSA and the Middle East

[20] It is alleged that as a result of public statements made by Canada's then Minister of Foreign Affairs in early August 2018 regarding human rights issues in the KSA and the need to release two human rights activists, SNC and its oil and gas services company, Kentz Corporation Limited, became unable to obtain new work in the KSA and in certain other countries in the Middle East, all of which went undisclosed until a corrective disclosure was issued on January 28, 2019, at which time a $1.24 billion impairment charge against goodwill was made.

[21] SNC is said to have failed to report the material change as required, and as a result of the corrective disclosure relating to the impairment charge, a decline in the trading price of its common shares allegedly occurred.

[22] More specifically, the misrepresentations pertaining to KSA are described as follows:

- The Defendants misrepresented SNC's ability to obtain new business in the KSA consistent with historical levels in the Q3 2018 management conference call (which took place on November 1, 2018) and made a pure and simple omission of material fact in the Q3 2018 MD&A (released November 1, 2018) by failing to disclose SNC's inability to obtain new business in the KSA consistent with historical levels.

[23] The failure to make timely disclosure is framed as follows:

- By mid-November 2018, the Defendants failed to make timely disclosure of the material change to SNC's business, operations or capital because of its inability to obtain new business in the KSA consistent with historical levels.

2.3 Corrective Disclosures

[24] Applicants allege that the misrepresentations and failures to disclose material change were corrected by a series of corrective disclosures starting on January 28, 2019[7].

[25] The four (4) corrective disclosures, according to Applicants, were the following:

(1) The first, on January 28, 2019 by way of a news release issued by SNC revealing a serious problem with what was later identified as the Codelco Project, leading to the $1.24 billion impairment charge mentioned above, following which its common shares are said to have each declined by $13.49, or 28 %. On the following day, SNC filed a material change report;

(2) The second, on February 11, 2019, also by way of an SNC issued news release, disclosing both that the financial impact of the Codelco Project on its 2018 financial results would be greater than previously disclosed and that SNC had stopped bidding on future mining EPC projects. Following the corrective disclosure, the value of the common shares are alleged to have each declined by $2.71 or 7.4 % by closing on the same day. In its February 22, 2019, MD&A for the quarter ending December 31, 2018, SNC confirmed that its ICFR were not operating effectively and that there was no compensating internal disclosure DC&P that detected the deficiencies in a timely manner;

(3) The third is said to have been on May 2, 2019, when SNC reported on its financial results for the 2019 first quarter, ending March 31, 2019, by filing its first quarter financial statements, an accompanying MD&A and a news release, all of which are alleged to have revealed a significant loss caused by unfavourable cost reforecasts on certain major O&G and M&M projects and, as well, certain delays in claim settlements. SNC also announced that it was exiting all EPC Fixed-Price Contract work outside its core areas of expertise, not just in the M&M sector as announced a few months earlier. Following the alleged third corrective disclosure, the price of SNC's shares is said to have declined by $4.38 or 13.1 % at close of the same day;

(4) The fourth corrective disclosure, by way of a news release on July 22, 2019, is alleged to have revealed the "full truth" to the effect that the execution problems with SNC's EPC Fixed-Price Contracts were more financially significant than previously disclosed, necessitating a complete exit from bidding on such turnkey projects and requiring a $1.9 billion goodwill impairment charge in the Resources Division,

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7 *Idem*, paras. 30-32; Exhibits P-3, P-4, P-6 and P-34 to P-55.

which had previously been known as its O&G Division. Following that fourth disclosure, SNC's common shares are said to have each declined by $1.71, or 6.7 %, to $23.80 at close of trading the same day and, as well, continued to decline to $16.36 by August 6, 2019. A material change report was filed on July 25, 2019.

2.4 Resulting Damages

[26] According to Applicants, as a result of the Defendants' conduct and their misrepresentations in the Impugned Documents, "SNC's securities traded at artificially inflated prices during the Class Period"[8] and the putative class members accordingly acquired their securities at prices that were inflated, thereby not reflecting their true value. Moreover, they allege that following the corrective disclosures, the market price or value "plummeted", causing significant losses to them and the putative class members.

[27] Without specifying any particular amounts, Applicants seek to recover by their proposed class action "compensatory damages for all monetary losses", and this by way of collective recovery[9].

3. LEGAL PRINCIPLES APPLICABLE TO s. 225.4 QSA CLAIMS

[28] As mentioned above, Applicants seek authorization pursuant to s. 225.4 QSA and, as well, Art. 574 ff. *Code of Civil Procedure* ("C.C.P.") dealing with class actions. These demands are made concomitantly, as required.

[29] The Court will deal with Quebec class action requirements more specifically latter.

[30] An action for damages based on misrepresentation by an issuer in relation to its securities acquired or disposed of in a secondary market or for failure to disclose a material change in a timely manner is subject to the conditions set forth at s. 225.4 QSA, which reads as follows:

> **225.4.** No action for damages may be brought under this division without the prior authorization of the court.
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> The request for authorization must state the facts giving rise to the action. It must be filed together with the projected statement of claim and be served by bailiff to the parties concerned, with a notice of at least 10 days of the date of presentation.

> **225.4.** L'action en dommages-intérêts intentée en vertu de la présente section doit être préalablement autorisée par le tribunal.
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> La demande d'autorisation énonce les faits qui y donnent ouverture. Elle doit être accompagnée du projet de demande introductive d'instance et être signifiée par huissier aux parties

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8 Amended Application, para. 57.
9 *Idem*, para. 59 and p. 45.

> The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.
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> The request for authorization and, if applicable, the application for authorization to institute a class action required under article 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.
>
> visées, avec un avis d'au moins 10 jours de la date de sa présentation.
>
> Le tribunal accorde l'autorisation s'il estime que l'action est intentée de bonne foi et qu'il existe une possibilité raisonnable que le demandeur ait gain de cause.
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> Cette demande d'autorisation et, le cas échéant, celle visant à exercer une action collective prévue à l'article 574 du Code de procédure civile (chapitre C-25.01) doivent être faites au tribunal de manière concomitante.

[31] Accordingly, the applicable test is twofold. An applicant must demonstrate that (1) the action is in good faith and that (2) there is a reasonable possibility that it will be successfully resolved in applicant's favour.

[32] As regards the criteria of "good faith", little appears to have been written as to what it entails.

[33] In a number of Ontario cases, it has been given certain meaning that the Court considers would be equally applicable in Quebec. In *Cappelli* v. *Nobilis Health Corp.*[10], Perell J. of the Ontario Superior Court of Justice summarized it as follows:

> [132] In the leave test, "good faith" has been interpreted to mean that the plaintiff has brought his or her action in the honest belief that he or she has an arguable claim, for reasons that are consistent with the purpose behind the statutory remedy, not for an oblique or collateral purpose, and with the genuine intention and capacity to prosecute the claim if leave is granted.

[34] As for misrepresentations and failure to disclose, the QSA provides for four (4) different scenarios that may give rise to actions for misrepresentation and failure to disclose a material change, identifying for each such situation the persons against whom an action may be brought.

[35] All four scenarios relate to the acquisition or disposal of an issuer's security during specified periods of time between a misrepresentation or failure to disclose a material change and the time when the misrepresentation or failure to disclose was respectively publicly corrected or disclosed.

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[10] 2019 ONSC 2266, para. 132.

[36] The four scenarios are as follows:

- s. 225.8: when the issuer or a mandatory or other representative of the issuer released a document containing a misrepresentation;
- s. 225.9: when a mandatory or other representative made a public oral statement relating to the issuer's business or affairs containing a misrepresentation;
- s. 225.10: when an influential person or a mandatory or other representative of the influential person released a document or made a public oral statement relating to the issuer containing a misrepresentation; and
- s. 225.11: when the issuer failed to make timely disclosure of a material change.

[Underlined by the Court.]

[37] The essence of such claims, therefore, is that there must be a misrepresentation or failure to make a timely disclosure of a material change and then, either a correction of the misrepresentation or a disclosure of the material change, made by or on behalf of the issuer.

[38] The existence of these two boundary posts to a claim pursuant to s. 225.4 QSA is critical.

[39] As regards the authorization stage, the Ontario Court of Appeal has observed that the focus is primarily on the misrepresentation, which does the "heavy lifting"[11]. As well, the public correction need not be express and directly linked to a specific misrepresentation[12]. If the correction does not, on its face, reveal the existence of the alleged misrepresentation, the court should consider the evidence as to how it was made and how the correction "would be understood in the secondary market"[13].

[40] In other words, once a court has determined that there is a reasonable possibility of success as to the existence of a required misrepresentation, then the court should analyse the public correction requirement, which may involve either a clearly expressed correction to the misrepresentation or may require a reasoned consideration of the evidence as to how it come to be and how it would objectively be understood by those involved in the secondary market, including shareholders.

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11 *Baldwin* v. *Imperial Metals Corporation*, 2021 ONCA 838, para. 50.
12 *Idem*, para. 49.
13 *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund* v. *Barrick Gold Corporation*, 2021 ONCA 104, para. 76.

[41] In cases where the court has authorized an action, s. 225.12 QSA stipulates that the plaintiff is not required to prove reliance on the document or oral statement containing the misrepresentation or on the issuer having complied with its timely disclosure obligations. Absent that statutory stipulation, a plaintiff does have such burden, an issue which the Court will discuss at more length in the section on Quebec class actions.

[42] Moreover, in cases where a defendant is an "expert"[14] or the misrepresentation was contained in a "core document"[15], s. 225.13 stipulates that the plaintiff is not required to prove that the defendant either (1) knew that there was a misrepresentation being made or deliberately avoided acquiring such knowledge, or (2) was guilty of a gross fault ("*faute lourde*"). Otherwise, the plaintiff does have that burden of proof.

[43] Similarly, in cases involving the failure to disclose material change, s. 225.13 states that the knowledge/gross fault burden does not apply when the defendant is an issuer, the fund manager or an officer thereof.

[44] The Act also sets out, from s. 225.17 to 225.27, the burden of proof on a defendant for the purposes of defeating an action for misrepresentation or failure to make timely disclosure.

[45] Such defences include for example knowledge by plaintiff of the misrepresentation, defendant after having conducted a reasonable investigation having no reasonable grounds to believe there was a misrepresentation and a number of various other scenarios relating, amongst other things, to knowledge and even to the use of cautionary language in certain cases.

[46] Before proceeding further, it is useful to understand how certain key concepts have been defined.

[47] "Misrepresentation" is defined as follows at s. 5 QSA:

> means any misleading information on a material fact as well as any pure and simple omission of a material fact;

[48] "Material fact" is defined as follows in the same section of the Act:

> means a fact that may reasonably be expected to have a significant effect on the market price or value of securities issued or securities proposed to be issued;

[49] It is interesting to note that as regards a material fact, the Quebec Legislator chose to use in English the word "may" in the expression "may reasonably be expected" as opposed to "would", which is found in the *Ontario Securities Act*. That said, in the French version of the definition of a "*fait important*" at s. 5 QSA, it is stated as "*dont il est*

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14 As defined at s. 225.3 QSA.

15 *Ibid.*

raisonnable de s'attendre qu'il aura un effet appréciable", representing in the Court's view, more certainty than mere possibility.

[50] As regards "materiality", that term is not defined in the QSA.

[51] However, the Supreme Court of Canada, in the matter of *Sharbern Holding Inc.* v. *Vancouver Airport Centre Ltd.*[16], on appeal from the Court of Appeal for British Columbia, states that materiality, being a question of mixed fact and law, "is determined objectively, from the perspective of a reasonable investor", with the Court adding that "the subjective views of the issuer do not come into play when assessing materiality".

[52] A similar view was expressed by Justice Binnie of the Supreme Court of Canada in *Kerr* v. *Danier Leather Inc.*[17].

[53] Both of these references were cited with authority by the Quebec Court of Appeal in *Air Canada* v. *Québec (Procureure générale)*[18].

[54] In other words, the business judgment rule applicable in certain business disputes is not available to a materiality assessment in relation to information disclosures to investors[19] at the time they are making a decision to invest or divest. An objective approach is required.

[55] The fact that IFRS rules arguably require the company to make its own business assessments for accounting purposes does not modify the court's determination of materiality under the Act or an objective basis.

[56] In the Court's view, this is in keeping with the definition of a material fact, which entails a reasonable expectation of a significant effect on market price or share value. That speaks to adopting an objective approach from the perspective of an innocent shareholder as opposed to the subjective view of the issuer or even of the plaintiff-shareholder.

[57] That said, and as mentioned above, should a plaintiff-shareholder succeed in having the action authorized, he will benefit from a reduced burden of proof on the merits.

[58] It is by reason of the advantages relating to a plaintiff's burden of proof on the merits of such actions that he or she has the more demanding burden at the authorization phase of demonstrating the good faith of the action and its reasonable possibility of success.

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16 [2011] 2 S.C.R. 175, paras. 51 and 54.
17 [2007] 3 S.C.R. 331, para. 54.
18 2015 QCCA 1789, paras. 215-216.
19 *Idem*, para. 59.

[59] The historical origins and purpose of this secondary market continuous and timely disclosure regime is described as follows by the Supreme Court of Canada, through the opinion of Madam Justice Abella, in the matter of *Theratechnologies Inc.* v. *121851 Canada Inc.*[20]:

> [22] Like its counterparts elsewhere in Canada, Quebec's *Securities Act* requires companies whose shares are traded in the secondary market to regularly disclose certain information to their security holders and the provincial securities regulator: s. 73; *Securities Act*, R.S.B.C. 1996, c. 418, s. 85; *Securities Act*, R.S.A. 2000, c. S-4, s. 147; *Securities Act*, R.S.O. 1990, c. S.5, s. 75; *Securities Act*, R.S.N.S. 1989, c. 418, s. 81; *Securities Act*, S.N.B. 2004, c. S-5.5, s. 89(1).
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> [23] Continuous disclosure obligations fall into two categories: periodic disclosure and timely disclosure. Periodic disclosure must be made at regular intervals, typically through the regular provision of documents such as proxy circulars, financial statements and insider trading reports. In these regularly issued documents, companies must disclose all material *facts* — that is, anything "that may reasonably be expected to have a significant effect on the market price or value of securities issued": *Securities Act* (Quebec), s. 5 "material fact".
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> [24] Timely disclosure obligations, on the other hand, are imposed only when there has been a material *change* in the issuer's affairs. Material changes, which arise from changes in the issuers' business, operations or capital, must be disclosed at the time they occur: *Securities Act* (Quebec), s. 5.3; Mark R. Gillen, *Securities Regulation in Canada* (3rd ed. 2007), at p. 211; David Johnston, Kathleen Doyle Rockwell and Cristie Ford: *Canadian Securities Regulation* (5th ed. 2014), at p. 249.
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> [25] Both periodic and timely disclosure obligations are designed to increase fairness in the secondary market:
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> > [Continuous disclosure] . . . 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. Of course, investors may still value securities differently, depending on how they interpret that information. Different investors have different goals, typically balanced between risk and return. Riskier investments generally yield higher returns, and vice versa. Securities regulation does not tell investors what to do, nor steer them toward or away from particular investments. It should, however, ensure that they have enough information to assess properly the risks involved and make fully informed decisions. [Footnote omitted; Johnston, Rockwell and Ford, at p. 249.]
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> As a result, the policy of ensuring this "level playing field" reified in statutory continuous disclosure obligations has been called "the most fundamental principle of securities regulation": *Cartaway Resources Corp. (Re)*, [2000] B.C.S.C.D. No.

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20 [2015] 2 S.C.R. 106, paras. 22 to 34.

92 (QL), at para. 216; *Cornish v. Ontario Securities Commission* (2013), 306 O.A.C. 107 (S.C.J.), at para. 40.

[26] Disclosure also supports capital market efficiency by helping investors target the most deserving securities and enhancing the accountability of corporate management: *Cornish*, at para. 40. As investors realize that they have the necessary information, they become more confident in the securities market, and their consequent increased participation leads to more efficient markets: Johnston, Rockwell and Ford, at p. 249.

[27] Section 225.4 emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors. Historically, Canadian investors in the secondary trading market did not have access to a statutory cause of action when they suffered losses as a result of breaches of legislated continuous disclosure obligations. In common law jurisdictions, investors had to rely on the tort of negligent misrepresentation, which required, among other things, that investors prove that they had relied on the misinformation or omission of information to their detriment: A. C. Pritchard and Janis P. Sarra, "Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada" (2010), 47 *Alta. L. Rev.* 881, at p. 885. Because it was extremely difficult to prove such reliance when securities were purchased in the secondary market, this requirement put meaningful redress out of reach for many who were harmed by dubious disclosure practices: Joseph Groia and Pamela Hardie, *Securities Litigation and Enforcement* (2nd ed. 2012), at p. 352.

[28] In Quebec, investors faced a similarly heavy burden under the *Civil Code*. To establish civil liability, claimants were required to prove a fault, such as the publication of misinformation or the failure to meet a statutory disclosure obligation; that they suffered prejudice; *and* that there was a causal link between the fault and the prejudice — that is, that they had relied on the misinformation in making the trade: arts. 1457 and 1607 of the *Civil Code of Québec.* Demonstrating the requisite causal link proved to be particularly onerous in the securities context: Quebec, National Assembly, Committee on Public Finance, "Étude détaillée du projet de loi n° 19 — Loi modifiant la Loi sur les valeurs mobilières et d'autres dispositions législatives", *Journal des débats de la Commission permanente des finances publiques*, vol. 40, No. 10, 1st Sess., 38th Leg., October 25, 2007 ("Étude detaillée"), at p. 2.

[29] During the 1990s, following a series of high profile misrepresentations and incidents of questionable disclosure practices among publicly traded companies in Canada, the Toronto Stock Exchange created the Allen Committee to re-examine the regime governing disclosure in the secondary market. The Allen Committee concluded that the "current sanctions and funding available to regulators . . . are inadequate" and "the remedies available to investors in secondary trading markets who are injured by misleading disclosure are so difficult to pursue that they are, as a practical matter, largely hypothetical": Committee on Corporate Disclosure, *Final Report — Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange, 1997), at p. 5. It recommended the creation of a statutory civil liability

regime that would help investors sue issuers, directors, and officers who violated their statutory disclosure obligations.

[30] The Canadian Securities Administrators, an umbrella organization of Canada's provincial and territorial securities regulators, adopted most of the Committee's recommendations and began developing proposals to implement them across Canada: "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383. Despite the fact that the Allen Committee had not recommended it, and in order to discourage the kind of strike suits that had become common in the United States under more investor-friendly regimes, the Canadian Securities Administrators recommended that in addition to reducing the burden of proof on investors, the new liability regime should include a "screening mechanism" to ensure that only claims with a reasonable chance of success would be brought:

> This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit. [Emphasis added; *ibid.*, at p. 7390.]

[31] In 2002, Ontario became the first province to implement the Canadian Securities Administrators' recommendations by inserting a new liability regime into its *Securities Act*. The legislation included a screening mechanism that limited actions against public companies for breaches of continuous disclosure obligations to those actions instituted in good faith with "a reasonable possibility" of being resolved at trial in favour of the plaintiff: s. 138.8(1).

[32] Quebec implemented the recommendations of the Canadian Securities Administrators through Bill 19, *An Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15, which received assent on November 9, 2007. When Bill 19 was before the legislature, Monique Jérôme-Forget, the Minister of Finance at the time, said:

> [translation] The recourse proposed in Bill 19 is highly harmonized with that in place in Ontario, which is recourse that strongly inspired the other provinces and territories. Only the necessary adjustments were made to reflect civil law notions and vocabulary, and to ensure its harmonious integration into the Québec legislative corpus, including the Securities Act, into which it will be incorporated.

("Étude détaillee", at p. 1)

[33] Under this regime, when a security is acquired or transferred at the time of a false declaration or omission of information that should have been disclosed, the

> fluctuation in the value of the security is presumed to be attributable to that fault. Investors were thereby released from the heavy burden of demonstrating that the variation in the market price of the security was linked to the misinformation or omission, and from demonstrating that they personally relied on that information or omission in buying or transferring the security.
>
> [34] The scheme also establishes an authorization mechanism to permit only actions in good faith with a "reasonable possibility of success". As the Court of Appeal noted, Quebec's new regime therefore reflected an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations.

[60] By requiring that a plaintiff satisfy the screening mechanism of establishing both good faith and a reasonable possibility of success, the Supreme Court of Canada[21] and the Quebec Court of Appeal[22] have noted that the QSA has thereby established a means of protecting public issuers and their shareholders from frivolous or bad faith actions, which are often referred to as "strike suits".

[61] In other words, the QSA provides a balance between the interests of both innocent shareholders and public issuers, as well as "the market and the courts"[23].

[62] However, in the words of Justice Kasirer, then of the Quebec Court of Appeal, the QSA does not have a "dual purpose of protecting the interests of both the plaintiff-shareholder and the issuer"[24]. To protect a plaintiff-shareholder at the authorization stage by creating a level playing field prior to the action being authorized would seriously compromise the screening mechanism.

[63] Accordingly, there is a distinction to be made between the purpose of the statutory regime *per se* and that of the more-narrow screening mechanism[25] at the authorization phase, which creates an increased burden on a plaintiff-shareholder.

[64] That increased burden on plaintiffs under the QSA regime at the authorization stage stands in stark contrast to the burden applicable to Quebec class actions authorizations.

[65] As Madam Justice Abella notes, the burden of demonstration at the Quebec class action authorization phase is to show a "good colour of right"[26], which burden the courts have also described in terms of demonstrating an arguable case or filtering out frivolous claims.

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21 *Idem*, paras. 38-39; *Amaya inc.* v. *Derome*, 2018 QCCA 120, para. 8.
22 *Amaya inc.*, *supra*, note 21, para. 83.
23 *Ibid.*
24 *Idem*, paras. 83 and 95.
25 *Idem*, para. 85.
26 *Theratechnologies Inc.*, *supra*, note 20, para. 35.

[66] As a result, and as was observed by Justice Chatelain of this Court in *Valeant*[27], the reasonable possibility of success threshold under the QSA is higher than the rather low one for class actions, although it is less stringent than the balance of probabilities applicable at the merits stage. The QSA authorization hearing involves a heightened burden but it is not a mini-trial, and the authorization judge does not decide the merits of the claim.

[67] What a plaintiff-shareholder must demonstrate to the court at authorization of an action pursuant to s. 225.4 QSA is both a "plausible analysis"[28] of the applicable legislative provisions and sufficient "credible"[29] and "meaningful"[30] evidence in support of the possible success of the claim.

[68] Claims based on speculation or suspicion and on plaintiff guessing and hoping[31] will obviously not be authorized for failure to provide sufficient credible and meaningful evidence.

[69] The authorization court must undertake a "reasoned consideration of the evidence to ensure that the action has some merit"[32], but "a full analysis of the evidence"[33] is unnecessary if not inappropriate since the authorization stage is not a mini-trial.

[70] Plaintiffs have recently advised the Court that the Ontario Court of Appeal rendered, in late September past, its decision in *Badesha* v. *Cronos Group Inc.*[34].

[71] Firstly, the Court of Appeal observed that the authorization stage is not only not meant to constitute a mini-trial, it is also not meant to simply be a *de minimus* assessment of the evidence such that evidence offered by both parties should be scrutinized and weighed by the court[35].

[72] This is in keeping with the foregoing. The authorization judge is challenged to seek the appropriate balance between a *de minimus* assessment and a more full analysis fit for a mini-trial, that in-between zone being generally described as a "reasoned consideration". The boundaries are not well-defined and, at times, may be unwittingly crossed.

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27 *Catucci* v. *Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, para. 137.
28 *Theratechnologies Inc.*, *supra*, note 20, para. 39.
29 *Ibid.*
30 *Amaya inc.*, *supra*, note 21, para. 84.
31 See: *Fund Trustees of Millwright Regional Council of Ontario Pension Trust* v. *Celestica Inc.*, 2014 ONSC 1057, para. 140; *Bayens* v. *Kinross Gold Corp.*, 2013 ONSC 6864, para. 180; *Gould* v. *Western Coal Corporation*, 2012 ONSC 5184, para. 262.
32 *Theratechnologies Inc.*, *supra*, note 20, para. 38.
33 *Idem*, para. 39.
34 2022 ONCA 663.
35 *Idem*, para. 64.

[73] Secondly, the Ontario Court of Appeal concluded that allegations of misrepresentations, corrections and related price changes should be read "generously"[36]. It should be kept in mind that the authorization judge had concluded that there were 7,449 individual misrepresentations and that there was insufficient evidence to support each of them. The Court of Appeal concluded that the judge in first instance had mischaracterized the claim and had conducted an analysis thereof more in keeping with a mini-trial.

[74] That appeal decision is interesting of course but is not determinant in the present matter.

[75] This is particularly so as regards the issue of authorizing a class action. The Court referred the matter back to the court of first instance to assess certification anew taking into account the authorization judge's error in having concluded that the claim failed to disclose any cause of action. That said, the appeal judgment does not address other class action certification issues of relevance to the present matter.

[76] Returning to the court's duty to assess evidence, although a defendant issuer is not obliged to provide documents or any other form of evidence at this stage, should it do so, the court should also consider it[37]. Also, the court, in weighing the evidence for authorization, should consider that a plaintiff does not have the benefit of evidence that would come from discovery[38]. The Court understands that these rules are intended to assist the Court in assessing plaintiff's evidence without constituting a negative inference against the defendant.

[77] That said, it is not simply a matter of the parties, notably plaintiffs, filing an abundance of proof, leaving it to the court to do a page-turn of anything and everything that has been put into the court record without discussion or reference by the parties. The Court agrees with Justice Davis in *Nseir* v. *Barrick Gold Corporation*[39] that it is up to the parties to indicate to the court the evidence they principally rely on in support of their respective positions and that the reasoned consideration to be undertaken by the court will largely be of that evidence. To do otherwise would not be in keeping with the principles of proportionality and access to justice for all litigants or with the view that authorization is not a mini-trial.

[78] The Court will proceed to the analysis and discussions of the parties' proof and arguments in light of these principles.

[79] Before doing so, however, it is necessary to decide an objection made by SNC regarding the filing of affidavits to which Plaintiffs' expert Bryce Jones refers and on which he relies.

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36 *Idem*, para. 59.
37 *Amaya inc.*, *supra*, note 21, para. 109.
38 *Idem*, para. 108.
39 2020 QCCS 1697, para. 192.

4. SNC OBJECTIONS TO THE FILING OF TWO AFFIDAVITS BY MADAM JUAN GALAZ PALMA

[80] Plaintiffs seek to file affidavits by Madam Juan Galaz Palma[40] (the "Palma Affidavits").

[81] SNC objected to the filing of the first Palma Affidavit, allegedly signed February 1, 2021, arguing in part that the alleged electronic signature, being in the form of a QR code, cannot be read or verified and, secondly, that the Chilean lawyer who affirms that the solemn declaration was made before him, is not qualified to act in that capacity in relation to an affidavit being filed as proof before a Quebec court.

[82] In view of SNC's position regarding the signature and the oath, Plaintiffs sought to file a second affidavit by the same affiant, confirming that she had signed the first one electronically before the Chilean lawyer, and this after having made a solemn declaration.

[83] In it, she also "confirms" that her prior affidavit was true and correct at the time she swore it and that it remains so as at the time of the second affidavit.

[84] The Second Palma Affidavit was signed by hand in Santiago, Chile on April 18, 2022 and was taken by a Commissioner for Oaths in Quebec, who declares having verified the affiant's identity with her driver's licence and seen her sign it by videoconference.

[85] In addition to the foregoing, SNC argues that the affiant is not presented as an expert but that she nonetheless expresses opinions. It further argues that the affidavit is being submitted to make factual proof on which Plaintiffs' experts rely, yet it is made up entirely of hearsay from unidentified sources and of opinions.

[86] Before addressing the merits of SNC's objections, it is useful to understand the context of the Palma Affidavits.

[87] Madame Galaz Palma claims to be a mining engineer in Chile, who has held positions in both the public and private sectors, has been a part-time professor and has founded a consulting firm[41].

[88] She confirms having been retained by Ontario counsel, who are acting jointly with local counsel on behalf of Quebec Plaintiffs, and this in relation to class actions and securities actions in both Ontario and Quebec.

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40 Exhibits P-82 and P-82A.

41 First Palma Affidavit, paras. 3-4.

[89] She acknowledges having also filed a "report"[42] in the Ontario proceedings, which SNC qualifies as an expert report. This is not contradicted. So, the Court understands that the affiant is an expert who opposes SNC's position in related Ontario proceedings.

[90] As regards her mandate, she states that she was retained "to investigate certain matters in Chile"[43].

[91] Those specific matters are later identified in her affidavit at paragraphs 6 and 7, which are reproduced here given the importance of what she has been mandated to investigate:

> 6. I have been directed to review paragraphs 17-19, 89 and 98-102 in the affidavit of Mr. Sylvain Girard sworn December 21, 2020, filed in this proceeding. I understand that, in his affidavit, Mr. Girard responds, among others, to the expert opinion of Bryce Jones dated October 31, 2019. I was directed to review the Summary of Opinions section of Mr. Jones' report, in which Mr. Jones provided the following opinions, among others:
>
> a. "SNC encountered problems in nearly all risk exposures [...] and its project management did not control its problems to an industry-accepted standard. [...] SNC's operational problems at a corporate level included failure to adequately equip itself for a complex and high-risk EPC contract and then to provide the necessary support and governance to control the project."
>
> b. "The project outcomes included unreported delay (approximately 8 months late) and costs that are well above its fixed price causing a SNC business loss of $346 million. At a project execution level, my opinion is that these outcomes were directly caused by SNC's engineering delays, design changes, equipment delays and SNC's failures to adequately manage its contracts, all having serious negative impacts on construction productivity, progress and costs."
>
> c. "SNC was awarded the Codelco contract in October 2016 and it appears the engineering problems commenced in early 2017. [...] There were clear indications of serious delays and associated cost impacts arising by October 2017. By June 2018, it was inevitable that SNC would suffer substantial completion delay and cost over-runs on the contract of a magnitude that actually occurred."
>
> d. "[...] SNC failed to apply adequate industry-accepted practices in project management, including in the areas of project planning, design management, project controls and contracts management [...]"

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42 *Idem*, para. 5.
43 *Idem*, para. 1.

> 7. I note that, at paragraph 17 of his affidavit, Mr. Girard disputes "incorrect information and unfounded hypotheses" to the effect "that SNC knew or ought to have known by October 2017, that it would not meet the forecasted completion date provided for in the Codelco Contract [...] and that significant cost over-runs would occur as a result." I also note that Mr. Girard states, at paragraph 102, that "[i]t was a surprise to SNC when, on March 25, 2019, Codelco terminated the Chilean Contract shortly before project completion."

[92] In other words, she was hired, as the Court understands it, to "investigate" and contradict statements expressed in an affidavit by proposed defendant Sylvain Girard, ("Defendant Girard"), who was Executive Vice-President and Chief Financial Officer of SNC from April 2016 to April 2020, because those statements contradict the opinions of Plaintiffs' expert Bryce Jones.

[93] Another way of putting it, expert Palma was hired with a view to finding facts supporting expert Jones's opinions by neutralizing statements by Defendant Girard.

[94] For the reasons expressed below, the Court will maintain SNC's objections and will refuse to allow the filing of the two Palma Affidavits.

[95] The Court is quick to point out that its conclusion is not related to the technical procedural issues initially raised by SNC since, in its view, those have been appropriately dealt with by Plaintiffs by the filing of the supporting Second Palma Affidavit. SNC's argument to the effect that it is being taken by surprise is insufficient and unconvincing for the purposes of refusing that second affidavit on that basis.

[96] The reasons for refusing the Palma Affidavits are more substantive than technical in nature.

[97] Madam Galaz Palma, after conducting her investigation, then arrived at certain conclusions which she describes in her affidavit as follows, which the Court considers as her personal opinions:

> 1. Where I make statements in this declaration that are based on information that is not within my personal knowledge, I believe such information to be true[44];
>
> 2. I believe all of the individuals I interviewed to be trustworthy[45];
>
> 3. These facts, which are directly relevant to and contradict Mr. Girard's evidence above, are described below[46].

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44 *Idem*, paras. 2 and 13.
45 *Idem*, para. 10.
46 *Idem*, para. 8.

[98] Who are the "individuals" to whom the affiant spoke and that she considers trustworthy? The Court does not know.

[99] Madam Galaz Palma states that she spoke to three (3) individuals, one of whom she says that she has known since college, for approximately 40 years, and the other two she says to have known for approximately 10 years[47]. Their conversations were conducted over the phone[48].

[100] Two (2) of those people are said to be professionals at Codelco who were personally involved in what has been described as the Codelco Project, and who are also said to occupy senior positions, at the Vice President/Project Manager level[49].

[101] The third (3) person is said to be a senior employee of the *Empressa Nacional de Mineria* ("ENAMI"), the Chilean state minerals company, who supposedly has "significant experience in smelter engineering projects". It is not indicated what role, if any, that person had in relation to SNC and the Codelco Project and, accordingly, it cannot be determined by the Court whether he or she provided the affiant with purely personal knowledge or obtained all or part of the information from other unidentified individuals, which would amount to double-hearsay.

[102] Essentially, the Court does not know who provided what information. Nor has SNC been advised of the identity of the three (3) sources of information. However, the evidence establishes that these three unidentified people worked for companies that had, and perhaps may still have, an adversarial position against SNC.

[103] According to Madam Galaz Palma, she "cannot identity the names of the individuals I interviewed as part of my investigation because they continue to work for CODELCO or in the Chilean mining industry"[50].

[104] The Court understands from that statement that those three individuals do not want to be identified, which may explain one of a number of possible reasons why none of them have personally signed an affidavit.

[105] This gives rise to a serious evidentiary and procedural equity problem. If those who provided information to the affiant do not want to be identified, how will SNC ever be able to cross-examine them in relation to the validity of the facts they are purported to have told the affiant?

[106] So long as they continue to work in the Chilean mining industry, the Court is essentially being told that they will not accept to testify or be subjected to a cross-examination, not even at a trial on the merits.

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47 *Idem*, para. 10.
48 *Idem*, para. 9.
49 *Ibid.*
50 *Idem*, para. 10.

[107] The so-called facts to which affiant refers are indeed based on hearsay.

[108] The common law concept of hearsay does not have a specific statutory definition applicable to the present matter. That said, the Supreme Court of Canada, in *R.* v. *Khelawon*[51], reminds us that the evidentiary rule against hearsay is focused on the difficulty of testing the reliability of a declarant's assertions.

[109] Although the Court is in the search for the truth, the hearsay evidence exclusionary rule, whereby it is "presumptively inadmissible"[52], recognizes the difficulty that a trier of fact faces in assessing whether the hearsay is "trustworthy"[53] and what weight, if any, is to be given to a statement of fact made by someone who has not appeared before the court and has not been subjected to a cross-examination or, alternatively, has not directly submitted evidence by signing an affidavit at a preliminary phase such as at authorization.

[110] Accordingly, the Supreme Court, through the opinion of Justice Charron on behalf of the majority in *Khelawon*, identifies the two "essential defining features" of hearsay as follows[54]:

> (1) the fact that the statement is adduced to prove the truth of its contents, and
>
> (2) the absence of a contemporaneous opportunity to cross-examine the declarant.

[111] As suggested above, those two features exist contextually in relation to the two Palma Affidavits.

[112] In *Bradshaw*, the Supreme Court of Canada confirms anew that taking hearsay into consideration can "compromise trial fairness and the trial's truth seeking process"[55].

[113] Accordingly, with a view to protecting such fairness and process, exceptions to the hearsay rule have been developed based on certain statements being "necessary and reliable"[56], such as in the case of dying declarations. With time, a "more flexible approach"[57] to hearsay has developed such that, as stated in *Bradshaw*:

> [...] hearsay can exceptionally be admitted into evidence when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities.[58]

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51 [2006] 2 S.C.R. 787, paras. 34-35.
52 *Idem*, para. 42a); see also *R.* v. *Bradshaw*, [2017] 1 S.C.R. 865, para. 21.
53 *Bradshaw*, *supra*, note 52, para. 20.
54 *Khelawon*, *supra*, note 51, para. 35.
55 *Bradshaw*, *supra*, note 52, para. 20.
56 *Idem*, para. 22.
57 *Idem*, para. 23.
58 *Ibid.*

[114] And even in cases where a trial judge is satisfied that the criteria of necessity and reliability are met, that judge has the discretion to exclude the evidence if its prejudicial effect outweighs its probative value[59].

[115] Accordingly, in its assessment of whether hearsay evidence should be admissible, and even if it is shown to be necessary and reliable, the Court must continue to exercise its discretion with a view to protecting fairness and process.

[116] In the present matter, the Court does not consider that Plaintiffs have demonstrated threshold reliability.

[117] Firstly, the Palma Affidavits provide no explanation as to why the three unidentified sources are concerned about their identity becoming known. The facts do not appear to be unfavourable to their current employers, which if they did, could put their employment at risk. The reason for the use of a cone of secrecy is vague. It is not consistent with reliability.

[118] Secondly, the Court is provided little in the way of information and proof with a view to enabling it to assess the trustworthiness of the sources and the veracity of what they apparently have said, even at the authorization stage.

[119] Madam Galaz Palma is not in a position to affirm or deny the veracity of the facts. It is therefore surprising that she attempts to do so, based on her belief, meaning her personal opinion, that they are all "trustworthy", because in doing so, she usurps the role of the Court who is left unable, now and in the foreseeable future, to evaluate and conclude as to the credibility or trustworthiness of those unidentified individuals or the veracity of their so-called factual statements. The choice of the word "trustworthy" was likely not a mere coincidence, given that the Supreme Court of Canada in *Bradshaw*, as cited above, used that word to describe one of the elements to be assessed by a trier of fact.

[120] The affiant also attempts to support the veracity of the hearsay evidence by saying that she "learned" of all the facts from a) to j) at paragraph 11, not simply that she was told those facts.

[121] Simply being told something is more passive. But by using the verb to "learn", it is a choice intended to be more active, as it denotes actually gaining knowledge. This is in keeping with Madam Galaz Palma then using such knowledge to conclude that she believes the information is true and that it contradicts Defendant Girard's evidence. Drawing such conclusions, for the purposes of the proceedings, is yet another form of usurping the Court's role. Even experts reports are at times prohibited from being filed for that reason.

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[59] *Idem*, para. 24.

[122] Moreover, the Court cannot ignore the fact that the affiant's personal assessment of the trustworthiness and veracity of her three sources must be viewed from the perspective that she has been retained as an expert against SNC in the related Ontario proceedings being conducted by the same legal counsel.

[123] So, this is not a case involving an entirely independent investigator.

[124] In the Court's view, in the foregoing circumstances, not only does the hearsay evidence not satisfy either the necessity or reliability factors but, as well, the Court cannot allow the affiant to openly usurp its role.

[125] Accordingly, the Court will not admit the evidence. To do so at this stage would risk putting the search-for-truth process in disrepute.

[126] Moreover, in exercising its discretion, even if the Court were to consider that the necessity and reliability factors had been met, it would still not allow the filing of the Palma Affidavits at this stage because, for the reasons expressed above, it would be unable to attribute any probative value of note to the stated facts. The prejudice of filing the affidavits in such circumstances would outweigh the potential value resulting from their production.

[127] And, contrary to what Plaintiffs seem to be arguing, the Court does not agree that hearsay evidence should automatically be admissible at the authorization stage, as opposed to at trials on the merits. As previously stated, a plaintiff is required to satisfy his authorization burden with some "credible evidence". In the Court's view, the Palma Affidavits do not satisfy that criteria.

[128] That is not to say that in the absence of an objection, or some other debate relating to the production of evidence at the authorization phase, the Court is routinely required to assess whether plaintiff's evidence is credible prior to it being filed.

[129] However, in cases such as this one, where the Court has already analyzed the proposed proof by reason of an objection, it would not constitute an efficient process in keeping with the proper administration of justice to authorize the filing of the Palma Affidavits and then simply set them aside for lack of probative value and for not constituting credible evidence.

5. ANALYSIS AND DISCUSSION

[130] For the purposes of analysis and discussion, one need keep in mind that the 17-month Class Period extends from February 22, 2018 to July 22, 2019, inclusive, being the period during which the Impugned Documents, listed at Schedule I hereto, were released, the end date being, as stated above, "SNC's new release" on July 22, 2019.

[131] Accordingly, the primary focus of the proposed securities and class action are SNC's financial representation relating to Q1, Q2 and Q3 2018, with some consideration

of Q4 2017 and the four alleged public corrections by SNC, described above, in January, February, May and July 2019.

[132] The Court will structure its analysis using Plaintiffs' overview of the various alleged misrepresentations, and this with a view to determining whether they have demonstrated that there exists a reasonable possibility of success should their securities action be authorized.

[133] Prior to doing so, however, the Court will comment on the criteria of good faith.

[134] The parties spent little time on this issue.

[135] In the Court's view, what has been filed and argued at this stage leads it to consider that, regardless of the outcome as to the reasonable possibility of success criteria, Plaintiffs have brought forward their proceedings in the honest belief that they have an arguable case for reasons consistent with the purposes behind the QSA statutory remedy and not as a strike-suit or some other oblique or collateral reason and, further, that they have the intention and capacity to prosecute the action if so authorized.

[136] There is another issue the Court considers useful to address at this point.

[137] Generally, Plaintiffs argue that Defendants have failed to provide them with information and documents which they have requested and which they contend could resolve certain issues in their favour. They invite the Court to draw negative inferences from Defendants lack of collaboration. In support thereof, Plaintiffs cite the decision of the Ontario Court of Appeal in *Rahimi* v. *SouthGobi Resources Ltd.*[60].

[138] Although that court does state that authorizing judges must consider and be cognizant of the fact that not all relevant evidence has yet been produced at the authorization stage, including documentation possessed by a defendant, this Court does not understand that to mean that it should draw negative inferences or presumptions against Defendants or, as also suggested by Plaintiffs, that Defendants "cannot foreclose the Plaintiffs' reasonable possibility of success" because they have failed to collaborate.

[139] The Defendants have no burden of proof at the authorization stage. There is also no reversal of burden. And as indicated by Justice Kasirer, then of the Quebec Court of Appeal, in *Amaya*, Defendants are not obliged to assist Plaintiffs at this stage as there is no statutory objective, as mentioned above, of creating a level playing field for authorization purposes.

[140] So, if a plaintiff is not in a position to file a document that he unsuccessfully attempted, in a serious and timely manner, to obtain from a defendant, the court can take that into consideration at the authorization stage and decline to draw any negative inference from plaintiff's failure to file same. As well, the court can even grant more

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60 2017 ONCA 719, paras. 48-49.

probative value to other sources of proof, including oral testimony and affidavit evidence, as regards the existence and content of the document in question.

[141] That said, however, the absence of collaboration by a defendant in providing documentary evidence does not *per se*, as suggested by Plaintiffs, result in it being foreclosed from contesting authorization of an action pursuant to the QSA. In the Court's view, that would constitute an affront to the statutory screening mechanism envisaged by the QSA.

[142] Also, in the absence of evidence, authorization is not to be granted by the court with a view to allowing a plaintiff to keep searching for proof and to thereby retroactively justify authorization[61].

5A. MISREPRESENTATIONS REGARDING THE CODELCO PROJECT

[143] On November 3, 2016, SNC-Lavalin Chile S.A., forming part of SNC, and Chile's state owned National Copper Corporation ("Codelco") signed an EPC contract[62] for the engineering, procurement and construction of two (2) double contact/double absorption sulfuric acid plants in the location of the owner's existing copper foundry in Chile, referred to above as SNC's Codelco Project.

[144] The contract was for a fixed price of $232 million.

[145] According to Plaintiffs, the Codelco Project contract required mechanical completion by July 31, 2018, start-up and commissioning by September 2018 and performance testing by October 2018, and this so as to enable Codelco to meet Chile's new stricter environmental emission standards which were to come into effect on December 13, 2018. It is further alleged that if Codelco could not meet those standards, then its entire smelting operation at the existing foundry would have to shut down, which would negatively impact the local copper mine.

[146] In January 2017, SNC as contractor retained Echeverria Izquierdo Montajes Industriales S.A. ("EIMISA") as the exclusive subcontractor for the execution of all the construction and assembly work required for the Codelco Project[63].

[147] As regards the Codelco Project, Plaintiffs allege that SNC overstated its revenue in contravention of applicable accounting standards and, as well, understated its losses resulting from execution problems and cost overruns encountered at the project. Material misrepresentations are said to have accordingly been made in its core documents.

[148] Ultimately, they argue that SNC suffered a $346 million loss on the Codelco Project, which it knew would occur and which it should have disclosed earlier.

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61 *Celestica Inc.*, *supra*, note 31, paras. 141-145.
62 Exhibit P-23.
63 Exhibit P-25.

5A.1 SNC Improperly Recognized $65 Million in Variable Revenue in its Q3 Financial Statement and Accompanying MD&A, Released November 1, 2018

[149] The essence of this allegation relates to SNC overstating revenue simply because it was hoping that Codelco would reimburse it for a substantial portion of its $102 million cost overrun encountered in Q3 2018, and accordingly, it recognized $65 million in "variable revenue" as part of its total revenue recognized in its M&M division for that quarter, which it should not have done.

[150] Plaintiffs' accounting expert Cyrus Khory ("Khory") opines that the "highly probable" standard established by IFRS 15 for recognizing revenue was not met and that, accordingly, the $65 million variable revenue was improperly recognized in SNC's Q3 2018 financial disclosures[64].

[151] According to the evidence, IFRS 15 dictates that revenue is variable if dependent on "the occurrence or non-occurrence of a future event"[65], such as contract claims and unpriced charge orders. SNC's position is that there was no reason to expect Codelco to pay the $65 million.

[152] During his examination in the Ontario proceedings, Defendant Girard acknowledged that SNC's internal test for "highly probable" was 90 % certainty[66]. He also confirmed that the recognition of the variable revenue was based on negotiations between SNC and Codelco, and that SNC had hoped that the negotiations would lead to the owner agreeing to reimburse SNC $65 million of the cost overruns[67].

[153] However, prior to releasing its Q3 2018 financials, an amendment to the Codelco contract was concluded on October 29, 2018[68] whereby SNC would be responsible for cost overruns, rendering illusory, according to Plaintiffs, SNC's position that it was highly probable that Codelco would pay the $65 million amount.

[154] SNC fully acknowledges the contract modification and, in fact, filed it as evidence. The agreement was signed by Codelco on October 29, 2018.

[155] The modification provides for all costs incurred prior to October to be paid by SNC, although impacts for August and September 2018 resulting from the owner's insistence that EIMISA continue as SNC's subcontractor[69] would be the subject of "further discussions".

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64 Exhibit P-33a, para. 5.17; Exhibit P-33b, paras. 4.14, 4.16, 4.18-4.19, 4.21, 4.25, 4.37-4.38.
65 Exhibit P-33a, First Khory Report, para. 5.14.
66 Exhibit P-83, Girard Ontario Transcript, questions 458 and 491.
67 *Idem*, questions 448-500 and 566.
68 Exhibit R-55. Defendant Girard had admitted such an amendment to the contract at para. 105 of his December 21, 2020 Affidavit, Exhibit R-42.
69 Exhibit R-54, p. 3, item 3.

[156] Prior to that modification, SNC states that it was of the view that Codelco would be responsible for costs incurred by EIMISA[70] during that period.

[157] Expert Khory accordingly considers the recognition of the $65 million in variable revenue as a material misrepresentation.

[158] In his view, the "highly probable" threshold was not met because the negotiations were not complete by the end of Q3 2018 and that the actual amount of $65 million had not been discussed, such that there was no certainty that Codelco would agree to pay it to SNC[71]. So, he opines, SNC should never have recognized that revenue.

[159] Moreover, according to expert Khory, should an adjusting event occur after the end of a quarter but before the financial statements are finalized, IFRS standard IAS 10 requires the statements to be adjusted.

[160] For this reason, he opines that even though Q3 2018 had ended as at September 30, 2018, the October 29, 2018 agreement whereby SNC would be responsible for cost overruns, having occurred prior to the release of the financial statements on October 31, 2018, those statements should have been adjusted to reflect it[72], including as regards the variable revenue[73]. The Q3 2018 statements, in his view, should have been adjusted and the $65 million in variable revenue reversed. Failure to do so, he opines, amounts to a material misrepresentation, requiring a restatement[74].

[161] In his Affidavit dated December 21, 2020[75], Defendant Girard admits that the October 29, 2018 amendment to the Codelco Project contract, occurring just two days prior to release of the Q3 2018 financial statement, "was not properly reported", and this as determined by SNC's own subsequent event sub-certification process.

[162] This determination, according to Girard, was not made before the release of the Q3 financial statements but only subsequent thereto. He states that there was an in-depth analysis performed later validated by their auditors at Deloitte, that led Defendants Bruce and Girard to later conclude that the subsequent event had not been properly reported, constituting "deficiencies amounting to a material weakness".

[163] However, given that the material weakness was limited to operational deficiencies in subsequent-event reporting between October 29 and October 31, 2018 in relation to one single project in its M&M segment, it concluded after consultation with its auditors

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70 *Idem*, p. 1.
71 Exhibit P-33b, paras. 4.18-4.19 and 4.21.
72 *Idem*, paras. 4.22 and 4.31-4.32; Exhibit P-83, Girard Ontario Transcript, questions 500-503.
73 Exhibit P-33b, para. 4.33 (1).
74 *Idem*, para. 4.43.
75 Exhibit R-42, para. 105.

Deloitte that it was an isolated event and that it "did not result in a material misstatement of SNC's financial statements in prior periods"[76].

[164] In fact, fully knowledgeable of the situation according to Girard's statement, Deloitte never restated those Q3 2018 financial statements.

[165] Although correct in arguing that the absence of a restatement by auditors favours the absence of a misrepresentation, it does not preclude it[77]. It is only a factor to be considered at this stage.

[166] That said, in a January 28, 2019 press release[78], and in keeping with Defendant Girard's statement that SNC had recognized deficiencies regarding the variable revenue recognition, SNC stated that its earnings before interest and taxes ("EBIT") would be lower in 2018 than expected due in part to their inability to meet IFRS standards for revenue recognition.

[167] But even if Plaintiffs were correct regarding material misrepresentation and public correction in Q3 2018, does that mean that they have satisfied the criteria of demonstrating a reasonable possibility of success in relation to an alleged misrepresentation?

[168] The Court is of the view that it does not.

[169] The proof establishes that Plaintiff Graaf acquired 3,000 shares in SNC on May 7 and 15, 2018[79], of which he currently holds 2,800. He sold 200 shares on October 5, 2018[80].

[170] Plaintiff Lafrenière acquired, with his spouse, all of his for a total of 150 shares on October 10, 2018. He continues to hold all of them.

[171] In other words, both Plaintiffs transacted all their shares in SNC before both the issuance of the Q3 2018 financial statements containing an alleged material misrepresentation and the publication of an alleged public correction.

[172] Accordingly, in the Court's view, they have failed to demonstrate a reasonable possibility of success regarding the Q3 2018 variable revenue recognition.

[173] Nor does the Court consider it in keeping with Plaintiffs' burden pursuant to the QSA for it to apply the same presumption as applies in Quebec class actions to the effect

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76 *Idem*, paras. 106-107.
77 *Paniccia* v. *MDC Partners Inc.*, 2018 ONSC 3470, para. 97.
78 Exhibit P-3.
79 Exhibit P-20, Sworn Declaration, para. 10.
80 *Idem*, para. 11.

that there must be someone else out there who would have a claim for Q3 2018. The QSA recourse is not a class action and nothing in the Act justifies such a presumption.

[174] Plaintiffs also argue that all of the misrepresentations to which they refer should be treated as one (1), and this in view of s. 225.16 QSA, which Defendants oppose.

[175] In keeping with that section, the court seized of an action "may" decide to treat certain multiple misrepresentations as a simple misrepresentation. It is a matter of the court's discretion.

[176] It is perplexing that Plaintiffs seek to treat their various alleged misrepresentations as one, given that some are so clearly distinct from others as per their own allegations; for example, the KSA contracts as opposed to the Codelco Project and as further opposed to the Samuel De Champlain Bridge project.

[177] As regard the Codelco Project, the fact pattern is quite different in each quarter such that not even their own allegations give rise to an analysis based solely on a single misrepresentation covering all quarters. It would only be if Plaintiffs were successful in relation to each quarter that one could then speak of a single misrepresentation.

[178] The Ontario Court of Appeal in its recent decision in *Badesha*[81] criticized the characterization and analysis by the first instance judge of over seven thousand so-called misrepresentations, insisting on a more generous interpretation, the whole as mentioned above.

[179] That said, however, the Court does not understand that to mean that at the authorization phase an authorization judge is obliged to treat all alleged misrepresentations as one, absent a statutory stipulation to that effect, especially given the discretion identified at s. 225.16 QSA. Doing so would be decided on a case by case basis.

[180] In the present matter, the Court will not exercise its discretion at the authorization stage so as to keep as a "live issue" a portion of the claim that clearly fails to present a reasonably possibility of success as that would contradict the letter and spirit of such a QSA action.

5A.2 Q1, Q2 and Q3 2018 Financial Disclosures and the Failure to Record a Loss Provision on the Codelco Project in the Magnitude of $346 Million

[181] This issue involves the delays and increased costs encountered by SNC at the Codelco Project, which according to Plaintiffs, underscore the risks of EPC fixed-price contracts.

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81 *Badesha*, *supra*, note 34.

[182] As mentioned above, the fixed price of the Codelco Project contract was $232 million.

[183] Time was of the essence, as the Codelco Project had to be completed in time to enable Codelco to meet the December 13, 2018 compliance deadline for Chile's new emissions standards for copper smelters and thereby avoid stopping its omitting operations.

[184] Accordingly, SNC and its sub-contractor EIMISA had to deal with the risk of incurring additional costs associated with making up for any delays and liquidated penalty damages in the event the contract deadline is not met.

[185] According to Plaintiffs, SNC was unsuccessful in this regard. They allege that SNC suffered massive cost overruns causing a $346 million loss, was fired by Codelco in March 2019 before completing the project and faced a multi-million dollar liquidated damages claim as a result of delays. The two senior executives responsible for the project, Jose Suarez and William Harroun, were fired and both Defendants later left SNC.

[186] As a result of the delays and overruns, they allege with the support of Expert Khory that SNC should have recorded a loss provision by Q1 2018 and Q2 2018 in the magnitude of $346 million for the Codelco Project in accordance with IAS 37 concerning onerous contracts, and, as well, an impairment loss in Q2 2018 in respect of its capitalized Codelco Project cost assets to comply with IFRS 15, none of which SNC did[82].

[187] As well, Plaintiffs allege that SNC should have restated its interim financial statements for Q2 2018 in compliance with IAS 8[83], which they failed to do.

[188] SNC contests these allegations.

[189] It should be noted that it was only for Q4 2018 that SNC reported a $349 million loss in its M&M division and a $1.2 billion goodwill impairment charge for its O&G division.

[190] So, essentially, this part of the legal debate at this stage relates to whether Plaintiffs can now demonstrate a reasonable possibility of success to establish on the merits that given the facts, and in accordance with accounting standards, an impairment loss and a provision should have been taken at some point prior to Q4 2018, and that failure to have done so constitutes a material misrepresentation for which a public correction was subsequently made.

[191] It is important to keep in mind once again that Plaintiff Graaf acquired all and sold some of his shares in May 2018 and that Plaintiff Lafrenière acquired his on October 10,

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82 Exhibit P-33b, Supplemental Khory Report, pp. 6-7, paras. 2.4 (2) (a)-(c), and p. 54, paras. 4.83 (1)-(2).

83 *Ibid.*

2018, thus both prior to the publication of SNC's Q3 and Q4 2018 financial statements and related documents.

[192] Accordingly, in order to have any hope of demonstrating a reasonable possibility of success, it is absolutely essential that they demonstrate a material misrepresentation no later than Q1 2018 for Plaintiff Graaf and Q2 2018 for Plaintiff Lafrenière. Published core documents for Q3 and Q4 2018 offer them no comfort under the QSA, save from the perspective of a correction.

[193] In this context, the timing of underlying factual events pertaining to the Codelco Project is crucial for the parties.

[194] Before proceeding further, it is useful to understand what is meant by IAS 37 for onerous contracts, IFRS 15 for impairment losses and IAS 8 allegedly requiring a restatement of the Q2 2018 interim financial statements, given that they are relied upon by Expert Khory for his opinions.

(a) IAS 37

[195] IAS refers to International Accounting Standards. The Court understands from the parties that IAS 37 relates to provisions, contingent liabilities and contingent assets, and that it is included in the CPA Handbook for Canada.

[196] IAS 37, according to Plaintiffs, specifically addresses revenue from onerous contracts, which IFRS 15, to be discussed below, does not. It also deals with recognition of provisions.

[197] Expert Khory, citing the CPA Handbook, IAS 37, paragraph 68, describes the "onerous contract" issue as being when the unavoidable costs of meeting the obligations under a contract exceed the total economic benefits expected to be received from a contract, such that the contract is deemed onerous, from an accounting perspective, requiring the recognition of the present obligation as a loss provision in the financial statements[84].

[198] In Q4 2018, SNC recognized a $346 million project loss but, according to Expert Khory, a loss provision in that same amount should have been recognized in Q2 2018 based on so-called industry-accepted forecasting standards, and this in accordance with IAS 37. His reasoning is to the effect that Expert Jones has opined that the contract costs corresponding to the eventual loss of $346 million in Q4 2018 "reasonably ought to have been forecasted by SNC in early Q2 2018", which Khory decides must mean that such a loss should have been forecasted and recognized no later than early April 2018. In fact, he argues that it may have been reasonable to do it in Q1 2018.

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[84] *Idem*, paras. 4.72 to 4.73.

(b) IFRS 15

[199] IFRS refers to International Financial Reporting Standards.

[200] As regards IFRS 15, the objective is to establish the principles that reporting entities are to apply so as to report useful information to users of their financial statements about the nature, amount, timing and uncertainty of revenue and cash flow arising from a contract with a customer.

[201] Costs incurred to fulfil a contract are recognized as an asset, in other words capitalized, on its financial statements[85], but only if:

(a) the costs relate directly to a contract or certain anticipated contracts;

(b) the costs generate or enhance resources of the entity that will be used in satisfying (or continuing to satisfy) performance obligations in the future; and

(c) the costs are expected to be recovered.

[202] However, an entity shall recognize an impairment loss in profit or loss to the extent that the carrying amount of a capitalized asset exceeds:

(a) the remaining amount of consideration that the entity expects to receive in exchange for the goods or services to which the asset relates; less

(b) the costs that relate directly to providing those goods and services that have not been capitalized.

[203] According to Expert Khory, SNC should have recorded an impairment loss in Q2 2018 given that according to Expert Jones, it "reasonably ought to have forecast the magnitude of its final cost outcome" by then[86].

(c) IAS 8

[204] International Accounting Standard 8, according to Plaintiffs, shall be applied in selecting and applying accounting policies, and in accounting for changes in accounting policies, changes in accounting estimates and corrections of prior period errors.

[205] The definition of "prior period errors", identified at s. 5 thereof, is as follows:

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85 According to Exhibit P-33b, Supplemental Khory Report, para. 4.77, it is not known how much capitalized contract costs pertain to the Codelco Project.

86 Exhibit P-33b, p. 53, para. 4.79.

> [...] are omissions from, and misstatements in, the entity's financial statements for one or more periods from a failure to use, or misuse of, reliable information that:
>
> (a) was available when financial statements for those periods were authorised for issue; and
>
> (b) could reasonably be expected to have been obtained and taken into account in the preparation and presentation of those financial statements.
>
> Such errors include the effects of mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, and fraud.

[206] Expert Khory adds that Canadian Auditing Standard, CAS 450, regarding the evaluation of misstatements identified by an auditor during an audit, states that errors include the use of incorrect accounting estimates arising from overlooking or misinterpreting facts[87].

[207] Khory concludes that SNC's Q2 2018 interim financial statements were required to be restated in accordance with CAS 450 given that the amount of $346 million is material to those financials because the reported quarterly EBIT, and the reported earnings before taxes, were seriously overstated.

[208] These are the accounting standards on which Expert Khory basis his opinion. It should also be noted that in so doing, he explains the importance of Expert Jones's opinions and the interplay between the two.

[209] The Court will now analyze the situation regarding the different annual quarters as discussed by Plaintiffs' experts.

5A.2 (i) Q3-Q4 2017

[210] As regards 2017, Expert Khory had initially opined that SNC had not complied with IFRS 15 and, further, he criticized SNC's material ICFR and significant DC&P weaknesses, all as regards SNC's year-ended December 31, 2017[88].

[211] However, he specifically dropped that position in his supplementary report, after having reviewed the Girard Affidavit and transcript[89].

[212] There is, therefore, no credible evidence that any material misrepresentation or failure to disclose occurred in 2017.

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87 *Idem*, pp. 53-54, paras. 4.80 to 4.82.
88 *Idem*, para. 4.25.
89 *Idem*, para. 4.6 (4).

5A.2 (ii) Q1 2018

[213] As for Q1 2018, SNC's financial statements were published on SEDAR on May 3, 2018[90].

[214] According to Expert Khory, "there is insufficient information to determine whether the material ICFR and significant DC&P weaknesses in Q1 2018 led to material misrepresentations reported in the Company's Q1 2018 financial statements"[91].

[215] However, he does not stop there. He then refers to the Supplemental Jones Report, where he finds indications of so-called "material financial statement errors"[92].

[216] He cites Expert Jones, including the latter's opinion that SNC's position is implausible and that it reasonably ought to have forecast the full magnitude, in other words 100 % of its final cost outcome "early in Q2 2018"[93]. What is perplexing, however, is that Khory purports to be identifying Expert Jones's conclusions, indicating that "early in Q2 2018" specifically means "i.e. April". But Jones did not state that. Khory adds it on his own.

[217] Expert Khory then concludes that it is "reasonably possible" that SNC should have forecasted an amount of project costs for an amount "less than 100 % of the Codelco project final cost outcome" prior to April 2018, thus in Q1 2018[94], and, "if so", then a loss recognition pursuant to IAS 37 and a write-off pursuant to IFRS 15 would have been required in Q1 2018. Absent these, a material misstatement "would have existed"[95] or "that potential material misstatements were reported"[96], as early as Q1 2018.

[218] So, Expert Khory not only relies on Expert Jones regarding Q2, but he specifies the month, and then takes what Expert Jones said would have been "reasonable" in Q2, so as to arrive at the conclusion that it is "reasonably possible" that a material misrepresentation was made in Q1 2018. He does this without stating what the industry accepted forecasting practices were that SNC should have applied for that purpose, and in fact, nor does Jones state them in any detail.

[219] So both of Plaintiffs' experts in their supplemental reports make efforts to push the misrepresentations as early as possible in 2018, which could of course have the effect of making a misrepresentation relevant to Graaf's acquisition of shares in May 2018. In this

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90 Exhibit P-12.
91 Exhibit P-33b, para. 4.99.
92 *Ibid.*
93 *Ibid.*
94 *Idem*, para. 4.100.
95 *Idem*, para. 4.101.
96 *Idem*, para. 4.102.

regard, in the initial Jones Report, the date by which SNC should have forecast the magnitude of its final cost outcome was "by June" 2018[97].

[220] But those efforts do not appear to be conclusive.

[221] Neither one of these experts actually opines that there was a material misrepresentation in Q1 2018. They raise the spectre that maybe it was the case by using essentially the words that form part of the legal test of authorization, being "reasonable possibility".

[222] In addition, the amount of the misrepresentation is also not conclusive. What should the amount have been as regards forecasted costs that maybe should have been included in the Q1 2018 financial statement?

[223] Expert Jones did not give any amount for Q1. He only spoke of Q2. Expert Khory states that it should have been "at least 44 % to 45 % of the total project cost outcome"[98].

[224] He arrives at that by means of a theoretical calculation, simply stating that 44 % to 45 % amounts to C$260 to C$266 million of the mid-point (C$592 million) of the total cost range of C$578 million to C$606 million, which in turn corresponds to a loss rang from C$14 million to C$20 million[99]. He then states that Defendant Girard had testified that SNC did not consider C$20 million to be material, although thresholds can be lower[100].

[225] The Court understands that what Expert Khory is doing is to conclude that the amount should be 100 % by Q2 then there should be some lesser amount by end Q1, and to quantify it he makes a reverse calculation of "at least 44 % to 45 %" so as to achieve an amount that even SNC would consider "material".

[226] In the Court's view, this approach, which seems to be akin to reverse mathematics, is far too hypothetical and unreliable to constitute credible evidence of a misrepresentation giving rise to a claim of "reasonable possibility of success" based on it in relation to Q1 2018.

[227] That leaves Q2 2018.

5A.2 (iii) <u>Q2 2018</u>

[228] It is worthwhile to recall that the determination as to the existence of a material misrepresentation and correction involves the application of accounting standards to a set of given facts. The underlying analysis is fact driven. In the present matter, Plaintiffs rely to a great extent on Expert Jones to set the facts and provide opinions on which

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97 Exhibit P-28a, para. 99.
98 Exhibit P-33b, para. 4.101.
99 *Idem*, footnote 197.
100 *Ibid.*

accounting Expert Khory rests his opinion regarding the application of accounting standards.

[229] As mentioned above, according to Plaintiffs, Expert Jones in his Supplemental Jones Report[101], by "early" Q2 2018, SNC reasonably ought to have forecast the full magnitude of its ultimate final cost outcome and not only by June 2018, as he had stated in his First Jones Report[102].

[230] Also as mentioned, this change is of some importance to Plaintiff Graaf, as he acquired all of and sold some of his shares in May 2018, such that moving the alleged knowledge to "early" in Q2 2018 could open wider the door to argue that at least some form of misrepresentation must have been made in Q1 2018 by failing to record by then a good portion of the projected loss.

[231] What made Expert Jones advance that point of forecasting from the end of Q2, in June, to "early" Q2 2018?

[232] And before discussing the response to that question, it is important to comment further on the different Q2 2108 dates being used by Plaintiffs' experts.

[233] Expert Jones, who is said to have construction project experience pertinent to the present matter, changes the "reasonably ought to have been able to forecast the magnitude of the ultimate cost increase" date from June 2018 to a prior period, being "early in Q2 2018". He does not say whether that is early April, end of April, early May, mid-May or end of May. Nor does he explain why he cannot be more precise. That leaves everyone guessing as to what he really means.

[234] That lack of precision from an expert stating in his supplemental report that he has "more confidence" to move back in time from June 2018, is perplexing.

[235] This is even more so given that Expert Khory then concludes that "early" Q2 means April[103], and this without any discussion. Expert Khory does not explain how he concluded it was by April 2018 and not sometime in May. He seems to be saying that he is relying on Expert Jones but the latter was not as precise. Khory's need to try and make Jones's statement more precise without explanation is also perplexing.

[236] That said, what made Expert Jones advance the forecasting date?

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101 Exhibit P-28a, p. 8, para. 30.

102 Exhibit P-28b, p. 8, para. 30 and p. 30, para. 99.

103 Exhibit P-33b, p. 64, para. 4.99 (3), where he states "in early Q2 2018" (i.e., April 2018) with a footnote to paragraph 30 of the Supplemental Jones Report.

[237] According to his own footnotes[104], it is the information contained in what he calls "new evidence", being the SNC letter to EIMISA, dated May 29, 2018[105], and the Palma Affidavit that he had seen, which the Court has already excluded as evidence.

[238] Expert Jones describes the importance of that "new" information as follows[106]:

> Information in the new evidence I have been given provides me with more confidence regarding the time at which SNC reasonably ought to have been able to forecast the magnitude of the ultimate cost increase. This time was early in Q2 2018.

[239] His opinion, so stated, and on which Expert Khory relies, is fatally damaged even at this stage by his reliance on the excluded first Palma Affidavit unless he can find support in other evidentiary sources, as for example, by his reference to the May SNC letter to EIMISA. So, it is important to understand what "new" information he claims to have learned from that letter.

[240] The problem is that Expert Jones provides no explanations or details that provide clear insight into what new facts he learned through that SNC letter.

[241] In other words, even had he not seen the SNC letter before his First Jones Report, if it did not subsequently provide him with material new facts, then how can Jones state that he has the confidence to change his opinion based on new evidence as opposed to some other reason.

[242] In an earlier section of his supplemental report, Jones already refers to that letter[107] in relation to EIMISA's program revisions 1.1 and 1.2 in Q1 and Q2 2018, confirming for him "the project's established course to an inevitable delay in the mechanical completion date"[108].

[243] But Expert Jones would have already known, prior to seeing that SNC letter, that such a letter had been sent by SNC in May and that there were issues in relation to revisions 1.1 and 1.2. This he would have learned from EIMISA's own claim, which refers to that SNC letter and to those specific revisions, all of which he analyzed and cited in the First Jones Report[109].

[244] In addition, at paragraph 10 and 17 of his Supplemental Jones Report, he cites the May SNC letter to also confirm that it was changing EIMISA's sub contract from established pricing[110] to one of time and materials, which for him meant that SNC was

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104 Exhibit P-28b, footnotes 43 and 44.
105 Exhibit P-83.
106 Exhibit P-28b, para. 30.
107 *Idem*, para. 15 and footnotes 20 and 21.
108 *Ibid.*
109 Exhibit P-28a.
110 Exhibit P-29, EIMISA claim, para. 1.2 describes the pricing.

assuming almost all construction performance risks for the works, and, further, that SNC had implemented night shift work for EIMISA.

[245] But again, Jones would have already had such information in the EIMISA claim, at least regarding implementation of a night shift[111].

[246] As for the change in EIMISA's contract and the issue of SNC assuming "almost all" of the construction risks, the Court is unconvinced of that view from a legal perspective, as that would be decided between SNC and the owner. And from a factual perspective, in First Jones Report, he had already essentially expressed the view that SNC was already taking a "high risk"[112] in awarding work to EIMISA before obtaining the owner's agreement as to additional costs and that overall, it was a high risk project to start with.

[247] In any event, it is not clear how SNC's letter at the end of May 2018, even if it does demonstrate that SNC may be responsible for "almost all" performance risk, motivates Expert Jones to make the important change to his forecast opinion from June 2018 to "early" Q2 2018, which is the point of the exercise. In the Court's view, that connexity is not made clear.

[248] At this stage, the Court of course is not to decide the merits or which expertise is to be preferred, but it can observe and take into consideration that Expert Jones has not provided a comprehensible explanation for changing his opinion regarding the departure point when SNC should have reasonably forecast the entire magnitude of its eventual loss, which is important because Expert Khory has relied on it for his opinion to include Q1 in his supplementary report[113].

[249] The Court again mentions Q1 2018 here because as mentioned earlier, it is perplexed by the changes of opinion made by Plaintiffs' experts that would result in giving life to Mr. Graaf's claim.

[250] One need keep in mind certain comments expressed in caselaw[114] to the effect that there may exist "plaintiff-friendly experts" who write in a cooperative manner with the specific intent of assisting plaintiff clients obtain authorization.

[251] The Court cannot conclude on the evidence to date in the present matter that that is what Plaintiffs' two experts have actually done. But the Court, perplexed by their change of opinions for the reasons expressed by them, is also not obliged to simply accept their reformulated opinions as credible evidence.

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111 *Idem*, p. 20.
112 Exhibit P-28a, para. 116.
113 Exhibit P-33b, paras. 4.98-4.103.
114 See for example *DALI Local 675 Pension Fund (Trustees)* v. *Barrick Gold*, 2019 ONSC 4160, para. 23.

[252] The Court considers that it forms part of its role to analyse and weigh the credibility of evidence even at this stage, not in the same manner as it would on the merits, but sufficiently nonetheless so as to determine whether a claimant has satisfied its burden of demonstrating a reasonable possibility of success. That is precisely why plaintiffs carry a burden to establish such success by credible evidence. Neither the push-back to April 2018, nor the one to Q1 2018 are credible or are based on credible evidence.

[253] In addition to the foregoing issue pertaining to Q1 and "early" Q2, Plaintiffs' experts address numerous other elements in support of their position. Expert Khory has not abandoned his earlier opinion that a material misrepresentation also occurred in the second quarter of 2018, basing himself greatly on Expert Jones.

[254] The Court will continue its analysis and discussion of Q2 2018 in that regard.

[255] After reviewing the additional information obtained after his First Khory Report, his opinion in relation to Q2, as stated in his Supplemental Khory Report[115], is that SNC's financial statements for the quarter ended June 30, 2018, "were materially misstated and did not comply with IFRS" because[116]:

a) SNC did not recognize the approximate $346 million "onerous contract" loss provision on the Codelco Project as required by IAS 37;

b) SNC did not report an impairment loss in respect of its capitalized Codelco Project cost assets pursuant to IFRS 15; and

c) SNC did not comply with IAS 8, which required it to restate its interim financial statements for Q2 2018.

[256] Essentially what Plaintiffs argue is that very serious problems emerged through the first half of 2018 that had a material impact on SNC's business and should have been disclosed by it in accordance with reporting standards. Those problems for the purposes of the present section, and at the risk of repetition, are the delays and cost overruns incurred at the Codelco Project.

[257] As referenced above, Plaintiffs' primary source of information in this regard is: (1) the expertise of Bryce Jones ("Expert Jones"), including both his first report dated October 31, 2019[117] and his supplemental report dated February 3, 2021[118], (2) a contract price adjustment claim for delays by the subcontractor EIMISA, dated August 23, 2018[119] and (3) the Palma Affidavit, which the Court has already decided is not to be filed as evidence for the reasons stated above.

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115 Exhibit P-33b.
116 *Idem*, pp. 6-7, paras. 2.4 (2) (a)-(c).
117 Exhibit P-28a.
118 Exhibit P-28b.
119 Exhibit P-29.

[258] Expert Jones, as indicated above for another issue, appears to give much consideration to the EIMISA claim for his factual assessment and opinions relating to Q2 2018. Khory refers to Jones in this regard, and at times directly to the EIMISA claim. So, that claim is an essential factual element for both of Plaintiffs' experts.

[259] Although the Court has already mentioned the claim, it is useful nonetheless to consider its content in more detail.

[260] The EIMISA claim seeks contract readjustments for direct and indirect costs in the total amount of 520,066.29 UF[120], which for the sole purposes of context would be a substantial amount, somewhere perhaps in excess of US$19 million[121].

[261] The basis of that claim by the local subcontractor is that SNC did not meet contractual conditions, thereby causing "a direct impact on the construction process" and hence on productivity and on EIMISA's budget[122]. The latter identifies the purposed causes as follows[123]:

- Significant delays in project engineering;
- Significant delays in the supply of equipment and materials;
- Significant deviations from the construction sequence caused mainly by the delays in the delivery of supplies of equipment and materials;
- Congestion in work areas as a result of changes in construction sequences and delays in supplies of equipment and materials;
- Site conditions;
- Other deviations from the contractual conditions (as itemized in Schedule II thereof).

[262] In its claim, EIMISA refers to negotiations resulting from a May 29, "2017" letter sent to it by SNC[124] regarding delays in the delivery of equipment and its impact on the construction sequence.

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120 UF, or Unidad de Fomento, is the Chilean currency unit.

121 The Court has used the conversion rate used by Expert Jones, Exhibit P-28a, p. 17, footnote 25, in order to calculate the value of the claim. What is important is not the precise amount but the fact that the claim is for a substantial amount.

122 Exhibit P-29, p. 6, item 2.

123 *Ibid.*

124 Exhibit P-83 (in part), which is dated May 29, 2018 and not 2017, being an error recognized by the parties in this matter.

[263] Such delays are said to have led to Revision 1[125] of its contract on September 14, 2017, which it alleges increased its work volume by 21.6 %, including work for its subcontractors and, further, moved the mechanical completion milestone No. 9 from July 31, 2018 to October 10, 2018.

[264] EIMISA also alleges that due to further delays caused by SNC, the Rev. 1 program became obsolete and resulted, on February 23, 2018, in Revision 1.1, in shifting the mechanical completion milestone to January 13, 2019[126]. According to EIMISA, this gave rise to change orders 9 and 10, dated February 21, 2018 and April 16, 2018.

[265] That completion date, according to EIMISA, was then extended by Revision 1.2 and change order No. 12, dated May 9, 2018, to January 18, 2019[127].

[266] A review of the SNC letter[128] of May 2018, not 2017 as referred to by EIMISA, illustrates that SNC only temporarily approved the Rev. 1.2 program until July 31, 2018, the original mechanical completion date. SNC also refused EIMISA's acceleration options. EIMISA was told to respect the 71 % of "construction progress" shown in the Rev. 1.2 program, and it was to use the approved night shift in order to do so.

[267] SNC's letter also stated that as of July 31, 2018, EIMISA's contract would be converted assay from a fixed price and from then on it will need provide necessary resources but on a non-exclusive basis and that SNC would assume the risk of the construction works with the right to hire other subcontractors to execute other parts of the then remaining work.

[268] It was this SNC letter that gave rise to the EIMISA claim.

[269] A review of Expert Jones's first report[129], particularly section 3 entitled "SNC's Execution Problems", demonstrates that he uses the EIMISA claim as an important data source leading to his conclusion that as early as October 2017 the "trend" was indicating "a significant cost-over-run would occur"[130], and that even though in April and May 2018 progress trends improved and "may have given rise to 'false hopes' in SNC that its cost over-run may be contained", by June 2018 "it was clearly inevitable that the ultimate cost over-run would occur"[131] and that by then "it reasonably ought to have forecast the magnitude of its final cost outcome"[132].

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125 *Idem*, pp. 16-17.
126 *Idem*, p. 17.
127 *Idem*, pp. 17-18.
128 *Idem.*
129 Exhibit P-28a.
130 *Idem*, p. 29, para. 94.
131 *Idem*, para. 95.
132 *Idem*, p. 30, para. 99.

[270] As an aside, it is interesting that Expert Jones acknowledged that there were performance improvements in April and May 2018 but, as discussed earlier, he nevertheless moved the should-have forecast date to early Q2.

[271] In any event, his reliance on the EIMISA claim continues throughout his Supplemental Jones Report[133], dated just two (2) days after the Palma Affidavit, to which he also refers, but which references are to be ignored by the Court for the reasons expressed above.

[272] What is striking from a reading of Expert Jones's reports is that they have the tone of an expertise prepared in relation to a construction claim for extras, with numerous criticisms aimed at SNC, such as highlighting complaints about SNC's engineering, the "uncommon" inability of SNC to resolve disputes with the owner, the latter's dissatisfaction with SNC[134], SNC's errors[135] and ultimately "the corporation itself had laid the foundation for its failure on this project and, following its realisation of this, SNC effectively admitted that it could not successfully manage EPC projects"[136].

[273] One need keep in mind that the essence of the QSA secondary-market securities claim is not to establish contractual fault for what has transpired but rather to demonstrate a material misrepresentation and public correction.

[274] This comment also holds true as regards the evidence submitted by SNC intended to underscore the poor workmanship and lack of respect for standards and best practices by EIMISA[137].

[275] In other words, the Court needs to focus not on all the noise surrounding possible fault and incompetence of the contracting parties, but rather on the critical issue of what relevant information, germane to the allegations of material misrepresentations and public corrections, seems at this stage to have been known by whom and when.

[276] Moreover, the conclusion arrived at by Expert Jones to the effect that SNC "could not successfully manage EPC projects" and that it publicly "admitted" that, represents in the Court's view a dubious interpretation of the July 22, 2019 press release to which he refers[138]. The Court will address the issue of EPC contracts generally in a subsequent section of the present judgment.

[277] In addition, it is rather surprising that Expert Jones appears to take as proven all of EIMISA's comments and claims, without any apparent hesitation or question, especially considering that EIMISA was losing its role as exclusive subcontractor and was claiming

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133 Exhibit P-28b.
134 Exhibit P-28a, pp. 19-20, para. 64.
135 *Idem*, p. 25, para. 69.
136 *Idem*, p. 31, para. 105, and P-6.
137 As for example the Affidavit of Andrew Skinner.
138 Exhibit P-6.

a substantial amount of money from SNC, and accepts as support the Palma Affidavit without knowing the real source of the information contained therein.

[278] In the Courts' view, absent other supporting evidence, Expert Jones is putting far too great deal a reliance on a letter of demand from a third party as an important pillar on which to base his factual conclusions and opinions which form an important part of Plaintiffs' overall position that they have a reasonable possibility of success against SNC for material misrepresentations and failure to disclose.

[279] With respect, the Court does not consider such a third party letter of demand or claim to be, unto itself, such a solid foundation for Plaintiffs' "reasonable possibility of success" position. It is certainly an element to consider, but such a document does not emanate from an independent party, and the Court cannot at this stage exclude the possibility of it being purely self-serving in support of its multi-million dollar claim against SNC.

[280] SNC is not admitting all of the EIMISA allegations; quite the contrary[139]. Had Plaintiffs submitted an affidavit from a well-informed representative of the third party in support of the factual elements, that might have produced a different result. But they did not do so, and this supposedly because, as the Court mentioned above in relation to the Palma Affidavits, employees of the third party were worried about being identified. Accordingly, the evidence is not sufficiently credible for the desired purposes.

[281] It is important to remember that at this stage, the Court is not to decide who is right and who is wrong, and it certainly is not to decide EIMISA's claim. That is not the current issue.

[282] However, Expert Jones appears to blindly rely on EIMISA and that weakens Plaintiffs' position in the Court's view.

[283] Be that as it may, Plaintiffs are correct to argue that Jones does not solely rely on EIMISA and the Palma Affidavit. He uses other document sources as well, including contract documents, SNC position papers[140], SNC's Q3 financials, Q4 2108 MD&A[141] and the transcript from the Ontario examination out of Court of Defendant Girard conducted on September 18, 2020[142], and this also with a view to establishing delay and cost overruns that were known or should have been known by or foreseeable to SNC.

[284] SNC argues that the Jones reports should simply be set aside for numerous reasons.

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139 For example, the Skinner Affidavit, Exhibit R-46.
140 Exhibits R-52 to R-54.
141 Exhibit P-41.
142 Exhibit P-83 (part).

[285] Jones comments on the importance of project delays, but, according to SNC, he has not demonstrated that he looked at any of the project schedules and timelines, consulted any plans, engineering designs or any documentation relating to the purchase of equipment for the project. He does not appear to be aware of the project's critical path, nor of its various stages and sequencing. He makes no observations or comments as to the applicable contingencies relating thereto.

[286] SNC has filed the affidavit of engineer Andrew Skinner, sworn on July 2, 2021 (the "Skinner Affidavit")[143], along with its exhibits[144]. Engineer Skinner purports to have been a Senior Project Planner involved in the implementation of the master schedule for the project and the development of alternative means to achieve scheduled completions[145]. He worked on EIMISA's Revision 1.

[287] Essentially, the Skinner Affidavit is a response to the two Jones reports.

[288] As regards the original scheduling, he states that it was in fact prepared and submitted by EIMISA, which also calculated the original labour hours[146].

[289] According to Skinner, it is incorrect to suggest, as Jones has, that any delays in engineering or in the delivery of equipment will necessarily equate to delays at the end of a project[147].

[290] He states that each occurrence "must be evaluated as a function of the critical path". Built-in contingencies and acceleration measures can reduce or negate impact[148]. The evidence at this stage does not demonstrate that Jones has done such an evaluation. That seriously weakens his opinion as regards delays and resulting cost overruns.

[291] The Court understands from the Skinner Affidavit that even if there were ultimate delays and cost overruns, one cannot simply walk that back in time, retroactively, and declare "when" they became foreseeable without evaluating the critical path and the existing contingencies and acceleration methods on a forward-thinking basis.

[292] Skinner contest Jones's conclusion that it was possible to predict in Q1 and Q2 2018 that a "substantial delay to the project", and hence penalties, would likely occur. In his view, the delays and costs resulting from EIMISA and the environmental conditions "remained manageable" until the second half of 2018.

[293] By the end of June 2018, according to Skinner, Codelco had reached out to SNC once the latter had told it of the revised construction plan "insisting that SNC keep EIMISA as subcontractor… [and] in exchange, Codelco assured SNC that any additional costs

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143 Exhibit R-46.
144 Exhibits R-47 to R-49.
145 Exhibit R-46, p. 2, para. 7.
146 *Idem*, para. 8.
147 *Idem*, para. 9.
148 *Idem*, para. 24.

incurred as a result of EIMISA would be covered by Codelco"[149]. This is in keeping with SNC's accounting position paper for Q2 2018[150].

[294] More specifically, in its July 9, 2018 accounting positon paper as regards the Q2 2018 results, SNC stated that "Codelco verbally committed to pay SNC for all costs increased, not enforce penalties or LDs, as long as the project meet the November 30 completion date"[151].

[295] It appears from the evidence, therefore, that by the end of Q2 2018, the owner had verbally committed to pay for all the cost increases and to not enforce penalties as long as the project was completed five (5) months later.

[296] The Court is unaware of any evidence at this stage that puts into question the veracity of that statement. It is credible.

[297] Expert Jones suggests that people at SNC were either not reporting or were hiding the reality of the situation as regards delays and cost overruns. That is pure speculation and is of no assistance to the Court. And in fact, as mentioned above, he recognized that in April and May 2018, the situation on site showed signs of improvement as to construction progress, which could have given hope to SNC that there would not be large overrun costs.

[298] As for Codelco's commitment to pay cost increases and to not charge for delays, clearly Codelco knew the then existing delays and cost overruns, otherwise it would make no sense for it to commit to pay those increases and to waive any penalties for delays.

[299] The June 30, 2018 deadline had not been met. The owner was fully aware. Also, EIMISA's subcontract was being modified around then from a unit-price structure to time and materials[152]. As well, night shifts were to be enforced and an increased number of employees were working the day shifts, and a new management team was in place[153].

[300] As for SNC, its M&M division, and not only the site management, had reviewed the situation anew as of May 15, 2018, and concluded that the project schedule could be met[154].

[301] So, given these circumstances involving both Codelco and SNC, what would render objectively unreasonable SNC's position at Q2 2018 not to then treat the project as an onerous contract or recognize the need for an impairment loss?

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149 *Idem*, para. 18.
150 Exhibit R-53.
151 *Idem*, item 4a).
152 Exhibits R-52, p. 5, and R-53, p. 2, item 1 (a).
153 Exhibit R-53, p. 5.
154 *Idem*, pp. 4-5.

[302] Plaintiffs argue that SNC's Q2 2018 accounting position paper conceded that as of Q2 "the forecast cannot be reliably measured, considering the above uncertainties", and accordingly maintained the Q1 forecasted loss of $2M at project completion[155].

[303] The section on uncertainties[156] recognizes that there were a "significant number of assumptions, uncertainties and variations in the project completion strategy, costing and revenues". These are disclosed.

[304] SNC then reviews and analyzes approximately 30 issues pertaining to scheduling, EIMISA, other subcontractors and Codelco.

[305] Overall, after assessing all the information, both favourable and unfavourable, it concludes that scheduling will be met and provides the reasons for same[157].

[306] Clearly SNC was aware of all the issues. And the preponderance of the evidence at this stage demonstrates that so too was Codelco. And yet, the latter still undertook to pay all cost increases and to not impose delay penalties if the project were to be completed within the next five (5) months. No proof demonstrates the contrary and as mentioned, it is credible evidence. Codelco's undertaking speaks objectively against the existence of a misrepresentation.

[307] And the fact that the forecast could not be reliably measured at that time does not, in the Court's view, support Plaintiffs' view that it should have then forecasted a loss of $346 million as if Codelco's financial commitment had no meaning whatsoever. That is not a plausible case and it is not based on credible evidence.

[308] Moreover, the existing evidence, including the expertise, does not successfully demonstrate that a reasonable turnkey project contractor in similar circumstances would have objectively forecasted the ultimate loss of $346 million as early as Q2 2018.

[309] The fact that subsequently, at the end of October 2018, in Q4, Codelco then refused to pay all the prior increased costs, which led SNC to recognize an impairment loss in the amount of $346 million in Q4 2018, cannot be used by working backwards to justify the presence of a misrepresentation in Q2. The owner's position changed impacting revenue and hence, the forecasting changed.

[310] Nor does the fact that certain SNC announcements were followed by declines in share value mean that there were either failures to disclose material changes or material misrepresentations.

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155 *Idem*, p. 5, Conclusion.
156 *Idem*, pp. 2-4.
157 *Idem*, p. 4, item 7.

[311] In the matter of *Peters* v. *SNC-Lavalin Group Inc.*[158], Perrell J. cites the *Theratechnologies inc.* case as a good example of it being "a mistake to reason backwards", as the expert was doing in the case before him by concluding that the share value decline led to the conclusion that there had been a material misrepresentation.

[312] In other words, the adage that "where there is smoke, there is fire" is not necessarily a successful strategy to adopt for the authorization of an action pursuant to s. 225.4 QSA.

5A.3 Failure to Disclose a Material Weakness in ICFR and Significant Weakness in DC&P in Q1, Q2 and Q3 2018

[313] Expert Khory refers to another issue that he opines impacted the financial statements throughout 2018, being that SNC had a material weakness in its internal controls over financial reporting ("ICFR") and a significant weakness in its DC&P[159]. In other words, there were ineffective controls over the reporting of forecasted costs, particularly as regards the Codelco Project.

[314] For the reasons mentioned above, the Court will not deal with Q3 2018 in relation to the Plaintiffs' authorization application pursuant to the QSA.

[315] In the First Khory Report, his introductory paragraph in relation to internal controls states that SNC had disclosed the existence of both a material weakness in its ICFR and a significant weakness in its DC&P as at December 31, 2018.

[316] In its 2018 MD&A dated February 21, 2019, SNC did in fact conclude, based on an evaluation of the effectiveness of its disclosure controls and procedures and its internal controls over financial reporting, that as at December 31, 2018 its "controls over the reporting of estimated costs and related assessment of variable consideration were not operating effectively"[160]. The reason, it said, was "because project management did not appropriately consider the terms and conditions of the project contract and their impact on the overall project forecast"[161].

[317] In addition, the CEO and CFO of SNC noted that "there was no compensating control that detected the control deficiencies on a timely basis"[162].

[318] That said, they concluded however that "the control deficiencies did not result in any material adjustment to the 2017 annual or 2018 interim consolidated financial statements".

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158 2021 ONSC 5021, para. 195.
159 Disclosure Controls and Procedures.
160 Exhibit P-41, p. 124, section 17.1, second paragraph.
161 *Ibid.*
162 *Ibid.*

[319] However, because they could have resulted in a misrepresentation as to the estimated costs to complete that could give rise to a material misstatement in the financial statements that "would not be prevented or detected", SNC management determined that these control deficiencies constitute a "material weakness" relating to the "operational effectiveness" of its internal controls over financial reporting as at December 31, 2018[163].

[320] Considering National Instrument 52-109, and its definition of "material weakness", SNC management also concluded that there was a significant weakness in the company's disclosure controls and procedures, such that management could not conclude that such "disclosure controls and procedures were effective as at December 31, 2018"[164].

[321] Expert Khory criticizes SNC's position that this "material weakness" was simply a one-time "operational deficiency" with no wider implications, and that the disclosure only refers to year end.

[322] Expert Khory opines that material weaknesses in ICFR related to forecasted costs on the Codelco Project, and accompanying significant weaknesses in DC&P, existed even before Q4 2018[165]. According to Plaintiffs, the material weakness was not only limited to Q4 but existed earlier in 2018, from Q1.

[323] And instead of disclosing the material weakness, Plaintiffs argue that SNC represented in its MD&A that it had effective ICFR and DC&P [166].

[324] According to Expert Jones, throughout the Codelco Project SNC did not have industry standard project reporting and control mechanisms in place, including insufficient frequency of project financial reporting and performance monitoring and, as well, effective oversight and governance as regards costs and scheduling[167].

[325] Plaintiffs' experts dispute SNC's contention that there were not material weaknesses in SNC's ICFR or significant weaknesses in its DC&P in Q1 and Q2 2018.

[326] In the Court's view, Plaintiffs' position essentially means that by no later than end of June 2018, SNC's forecasting and control weaknesses caused it to issue, or contributed to it issuing, financial statements containing material misstatements.

[327] The difficulty with this position, as discussed above, is that Plaintiffs do not give any serious consideration to, or simply just ignore the fact that the owner had declared in June 2018 that it would pay the cost overruns and not impose penalties if SNC were to

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163 *Ibid.*
164 *Idem*, third paragraph.
165 Exhibit P-33b, pp. 45 ff., para. 4.60 and pp. 55-63.
166 Exhibit P-11, May 2, 2018, p. 79; Exhibit P-15, August 1, 2018, p. 65; Exhibit P-17, October 31, 2018, p. 69.
167 Exhibit P-28a, p. 5 and Exhibit P-28b, paras. 11, 32, 37-39 and 44.

meet the November deadline. That undertaking pushes the serious cost overruns and penalties issue into Q4.

[328] To succeed at the authorization phase in this regard, the Court is of the view that Plaintiffs would need demonstrate the reasonable possibility of succeeding to establish on the merits that by no later than the end of June, SNC should have known not only that it could not meet the November deadline that formed part of Codelco's June undertaking to pay the cost overruns and to not impose penalties for delays but also, in keeping with its overall position, that SNC should have disclosed the entirety of the eventual impairment loss of $346 million.

[329] Respectfully, and as already mentioned, Plaintiffs appear to have given excessively more importance to the third-party EIMISA claim and the Palma Affidavit than to Codelco's June undertaking. The Court does not share their view at this stage. The evidence as to the owner's undertaking is far more credible and convincing as to the possibility of success at this stage.

[330] In fact, it would not be unreasonable to consider the Palma Affidavit as an attempt to counter SNC's evidence regarding Codelco's June 2018 undertaking, and this in the absence of anyone from Codelco willing to sign an affidavit or to provide other direct and transparent evidence.

[331] In any event, for the reasons expressed above, the Palma Affidavit does not form part of the court record, and this for the reasons stated above. Codelco's undertaking does.

[332] It is useful to note that the outcome might possibly be different as to Q3 2018. Plaintiffs might have a greater possibility of successfully demonstrating that proper forecasting should have led to SNC adopting a position by the end of September 2018 similar to what it eventually took at the end of Q4 2018. This is, in no small part, due to the fact that Codelco did not wait until the end of November to retract its undertaking. The October 29, 2018 agreement signed by the parties confirms that.

[333] Clearly, the situation at the project had changed between the end of June and that of October which led the parties to modify their arrangements. But the fact that it subsequently happened does not mean SNC should have known in advance. The Court does not consider that the current evidence allows it to reasonably conclude that Plaintiffs could possibly succeed in establishing that SNC knew in Q1 or Q2 2018 that it could not meet the November deadline and that Codelco would withdraw its commitment.

[334] And, in any event, as already stated above, the Court does not consider Q3 2018 to be relevant to the claim of either of the Plaintiffs, given the timing of their acquisition and partial divesting of their shares in SNC.

[335] The Court arrives at the same conclusions in relation to the various other related arguments raised by Plaintiffs and their experts as regards the alleged material

misrepresentations flowing from forecasting deficiencies pertaining to the Codelco Project.

[336] As argued by Plaintiffs, the demonstration of misrepresentations does the heavy lifting at the authorization phase. Failure to demonstrate the existence of a relevant misrepresentation is fatal.

5B. MISREPRESENTATIONS REGARDING NEW BUSINESS IN THE KINGDOM OF SAUDI ARABIA

5B.1 Q3 2018: Misrepresentations as to SNC's ability to obtain new business in the KSA

[337] The issue relates to the inability of SNC to secure new business in the KSA as a result of an August 6, 2018 Royal Decree Ban resulting from a diplomatic incident between it and Canada regarding the detention of so-called social activists[168]. The KSA recalled its Ambassador and put on hold all new business and investment transactions with Canada[169].

[338] In the years and months prior to the Royal Ban, SNC's business in the KSA represented approximately 10 % of the company's overall business, which made the KSA one of only four countries in which SNC conducted such a large percentage of its overall business[170].

[339] On January 28, 2019, during a Corporate Call with investment analysts to discuss the lower than expected Q4 2018 results, Defendant Bruce responded to a question as to whether SNC had been receiving its fair share of work from oil and gas customers in the Middle East by saying "I think we were, up until – round about October-November time"[171], which would be Q4 2018.

[340] That same day in an SNC Press Release[172], it confirmed that since its August disclosure in a press release, relations between Canada and Saudi Arabia had deteriorated, adding that over 15 % of its global workforce is employed on work in KSA, which had been "an important source of revenue growth for our Company in recent years"[173].

[341] The August 8, 2018 press release to which it referred, dated two days after the Ban, stated that SNC was "studying the possible implications of this situation on current and proposed transactions"[174], but that it could not yet fully assess the effect the Royal

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168 Exhibits R-30 to R-33.
169 Exhibit R-33.
170 Exhibits P-10, P-16 and P-3, p. 1.
171 Exhibit P-37, p. 7.
172 Exhibit P-3, p. 1.
173 *Ibid.*
174 Exhibit R-29, p. 1.

Ban will have, adding that if it were to be implemented on a prolonged basis, "there will be an impact on our future financial performance"[175].

[342] According to the Affidavit of Pierre Crisantha (Cris) Dedigama[176], CEO for the Middle East and Africa region for WS Atkins plc, an SNC subsidiary, who resides in Dubai, as of October 31, 2018 SNC "was continuing to secure new work in the KSA and was continuing to be invited to bid on new contracts"[177]. The August Royal Ban in his view had not had an immediate impact on SNC or most other entities working in KSA[178].

[343] Moreover, according to the Dedigama Affidavit, in October 2018, he and Defendant Bruce had been told by their largest clients in KSA, each government owned, that despite the Ban, SNC would continue to be considered for new work[179]. And as at the end of October 2018, not only was SNC continuing to work on existing projects, but it was also "continuing to win new contracts"[180].

[344] However, at the end of November 2018, Canada was reported as having imposed sanctions on 17 Saudi Arabian nationals linked to the assassination of journalist Jamal Khashogi[181].

[345] Also, according to the Dedigama Affidavit, it was around that time that SNC was told by its largest clients there that "they may have difficulties awarding SNC new contracts and that SNC may in fact be affected" by the Royal Ban[182], although they in fact continued to receive additional work on existing contracts[183].

[346] Then, on January 28, 2019, SNC received the first written confirmation from one of its main clients in KSA that it was not invited to bid on new projects[184].

[347] Nonetheless, even in early February 2019, SNC was awarded an infrastructure contract in the KSA for the Riyadh Metro[185], albeit not a project in the O&G sector.

[348] In May 2019, during a Q1 2019 earnings call with investment analysts, Defendant Bruce confirmed that in its Oil & Gas sector, SNC was having "disappointing results around our bidding activities on new – completely new work"[186].

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175 *Ibid.*
176 Exhibit R-43.
177 *Idem*, paras. 8 and 39-41.
178 *Idem*, para. 29.
179 *Idem*, paras. 32-34.
180 *Idem*, paras. 35 and 40-41.
181 Exhibit R-37.
182 *Idem*, para. 46.
183 *Idem*, para. 47.
184 *Idem*, para. 51.
185 *Idem*, para. 55.
186 Exhibit P-49, p. 8.

[349] It is in this context that Plaintiffs argue that SNC's Oil & Gas sector goodwill had been impaired as of October 31, 2018, representing a material decline in new business being awarded in the KSA, such that in Q3 2018:

(i) There was a "pure and simple omission of material fact" in failing to disclose this in SNC's Q3 2018 MD&A, released on November 1, 2018[187]; and

(ii) Defendant Bruce made misrepresentations during the Q3 2018 earnings conference call on November 1, 2018 when he stated[188]:

(a) "... what we're winning is contracts that are real and there today... So from that perspective, the prospects, the additional work that we're getting, completion of the existing work we've got, is going very much according to plan", and

(b) "And our clients are really happy, our employees are continuing and deliver, and it's basically all on track. So no effect there."

[350] As is clear from Plaintiffs' position, all of the issues raised in this regard impact Q3 2018. There is no issue here of backward seepage to either Q1 or Q2 2018.

[351] Once again, this is of no relevance to the individual claims of the Plaintiffs.

5B.2 Failure to disclose a material change related to SNC's ability to obtain new business in the KSA by mid-November 2018

[352] This issue continues with the impact into Q4 2018 of the KSA Royal Ban.

[353] The essence of Plaintiffs' position is that by no later than mid-November 2018, the deterioration of SNC's ability to secure new business was abundantly clear[189] and constituted a "material change to its business, operations or business that ought to have been disclosed".

[354] For the same reasons as expressed above, the issue is not relevant to the claim of the Plaintiffs, and provides them no reasonable possibility of success.

5C. MATERIAL EXECUTION AND OPERATIONAL PROBLEMS IN OTHER EPC FIXED-PRICE CONTRACTS

[355] Plaintiffs allege that apart from the Codelco Project and the KSA Royal Ban, SNC also failed to disclose material changes in that it experienced ongoing operational and execution problems with its fixed-price EPC contracts in North America and the Middle

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187 Exhibit P-17.
188 Exhibit P-19, pp. 15 and 7, respectively.
189 Exhibit R-43, Dedigama Affidavit, paras. 45-46; Exhibit R-38, SNC application for waiver to the Royal Ban.

East, including in relation to the Samuel De Champlain Bridge contract[190], the Ottawa LRT contract[191] and "two oil and gas projects in the Middle East and one mining and metallurgy project in the Middle East", without naming them[192].

[356] They argue that SNC belatedly acknowledged that the underperformance of its EPC contracts was the "root cause" of its financial performance issues due to increased costs or material risk. This rendered "SNC's positive statements about its execution and operational capabilities during the Class Period materially misleading".

[357] Alleged examples of such positive statements are identified as being:

- SNC's Annual Report for 2017 stated that its "effective execution strategies allow us to expertly manage project risk and ensure our clients' return on investment"[193];

- SNC's Annual Information Form dated February 21, 2018, wherein it is stated that it derives its competitive strength from "its ability to execute projects of varying sizes calling for a wide range of services and technologies"[194].

[358] Plaintiffs also argue that the "existence of the operational and execution risks, problems and/or failures" on these EPC contracts rendered "materially false and misleading the statements in the Impugned Documents", adding other similar broad alternative allegations.

[359] Although this broad-stroke approach, without even providing details as to the identity of certain projects, is sometimes referred to as a "shot-gun" approach, but Defendants prefer to describe it as a "cluster bomb".

[360] Insofar as the Samuel De Champlain Bridge project is concerned, Plaintiffs argue that the four-year project was to be completed by December 2018 but only finished in the summer of 2019 at an alleged cost of $235 million over the original $4.2 billion budget[195].

[361] As for the Ottawa LRT project, it is alleged to have been delayed for 15 months beyond the original delivery date[196].

[362] SNC's Q1 2019 financial results, released May 2, 2019, revealed significant loss due to reforecasts on projects in both its O&G and M&M sectors[197].

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190 Exhibit P-31, Globe & Mail article.
191 Exhibit P-54, Global News.
192 Application, paras. 15.27 to 15.32.
193 Exhibit P-10, p. 1.
194 Exhibit P-9, p. 14.
195 Exhibit P-31, Globe & Mail article.
196 Exhibit P-32, Global News.
197 Exhibit P-11, p. 29, SNC MD&A.

[363] During an earnings call with industry analysts, Defendant Bruce responded to a question stating that the unfavourable impact from reforecast on certain O&G and M&M projects were generally an extension of what "we had over the last few quarters"[198]. He described them as falling "into 3 buckets", one of which where SNC had performed badly, and others where "it's the delay in terms of ongoing long-term discussions with customers on large contracts where we had large scope increases" and they are trying to achieve a conclusion and recognize revenue, and still others where it is a bit more of "a legal claim perspective", all of which is "not something that is new" and has been "a phenomenon for quite a while, and generally we've had a reasonable degree of success historically in being able to resolve some of these"[199].

[364] Its Q2 2019 results were described in a July 22, 2019 news release[200] as significantly lower than anticipated, and SNC had decided to reorganize so as to de-risk its business by exiting from its lump-sum turnkey contracting, which projects have been "the root cause of the Company's performance issues", with a view to focusing on providing engineering services that deliver more consistent earnings and cash flow.

[365] It is in this news release that SNC announced its additional non-cash pre-tax goodwill impairment charge and an intangible assets impairment charge in O&G business, totalling approximately $1.9 billion, largely attributable to its decision to cease bidding on lump-sum turnkey-contract projects.

[366] A fair reading of that news release, including the chart of the preliminary revised segment disclosure, demonstrates that the major decrease in earnings before income tax was in relation to resource projects, with a total projected loss at $257 million on $3 billion contract revenue, versus a $19 million EBIT on $1.3 billion revenue in relation to EPC infrastructure projects, like the Samuel De Champlain Bridge and the Ottawa LRT.

[367] The reality is that Plaintiffs' allegations in this particular section, which does not specifically include the Codelco Project, are rather vague as to what was being "materially" misrepresented.

[368] Moreover, it is perplexing that Plaintiffs allege that the mere "existence of operational and execution risks and problems/failures" could render materially false and misleading the statements in the Impugned Documents, unless of course the statement is to the effect that there are no risks, problems or failures of any kind in SNC's lump-sum turnkey projects, which the Court certainly does not understand to be the nature of the statements in the present matter.

[369] For SNC to say that it had the ability to execute projects is not demonstrated to be a misrepresentation in relation to all EPC contracts. Plaintiffs have not demonstrated that

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198 Exhibit P-49, p. 15.
199 *Ibid.*
200 Exhibit P-6.

SNC could not generally execute its projects. Nor is it shown to be a misrepresentation to say they can ensure their clients return on investment.

[370] And as stated previously, the Court does not understand from the evidence that SNC, as suggested by Expert Jones, admitted it could not manage EPC contracts.

[371] The evidence at this stage tends to demonstrate that SNC, like other of its competitors on an industry-wide basis, had over time begun to realize that a lower-risk business profile required a reduction in fixed-price turnkey projects[201].

[372] In the Court's view, that is not evidence of an admission of failure, incompetence or of poor management. Nor does it constitute a material misrepresentation.

[373] Plaintiffs have failed to demonstrate that there exists a reasonable possibility of success, particularly as regards Q1 and Q2 2018, in relation to both the failure to disclose material change and alleged material misrepresentations pertaining to these other EPC fixed-price contracts.

5D. CONCLUSION AS TO A CLAIM PURSUANT TO THE QSA

[374] Given the foregoing, the Court considers that neither of the Plaintiffs has demonstrated the existence of material misrepresntations or a failure to disclose that would give rise to as a reasonable possibility of success pursuant to the QSA. Accordingly, their claim under the Act will be dismissed.

[375] Although not specifically stated above, Plaintiffs have provided little insight into what specifically should have been disclosed and stated in relation to the alleged failures to disclose and the material misrepresentations outside of the Codelco project.

[376] Moreover, the economic consultants retained by the parties[202] disagree essentially as to whether the alleged misrepresentations were economically material and whether share price declines were caused by corrective disclosures.

[377] However, given that the QSA claim will be dismissed for the reasons described above, the Court need not analyze the issue pertaining to either the existence of corrective disclosures or the economic materiality of the alleged misrepresentations and the related evidence as to whether the price of SNC common shares had been artificially inflated.

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201 Exhibit R-12.

202 Plaintiffs retained Michael L. Hartzmark, President of Hartzmark Economics Litigation Practice, LLC, Exhibits P-34a) and P-34b); Defendants retained Robert Patton of NERA Economic Consulting, Exhibit R-41.

6. ANALYSIS AS TO AUTHORIZATION OF A CLASS ACTION PURSUANT TO ARTICLE 575 C.C.P.

[378] In order for the Court to authorize a class action pursuant to Art. 575 *Code of Civil Procedure* (C.C.P.), a court must be of the opinion that:

575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that	**575.** Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:
(1) the claims of the members of the class raise identical, similar or related issues of law or fact;	1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;
(2) the facts alleged appear to justify the conclusions sought;	2° les faits allégués paraissent justifier les conclusions recherchées;
(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and	3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance;
(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.	4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

[379] In the context of a claim for misrepresentation in relation to the acquisition or disposal of securities in the secondary market, 225.4 QSA, fourth paragraph, requires that the application for authorization to institute a class action be made to the court concomitantly with the application to authorize an action pursuant to the QSA, as has been done in the present matter.

[380] Much ink has been written as to the application of the threshold criteria stipulated at Art. 575 C.C.P., and the Court does not intend to repeat the evolution of all of the principles established over the recent years by the courts in this regard.

[381] Suffice it to say that authorization in Quebec is only intended to be a filtering process and so, the proponent to a class action only need demonstrate at this stage an "arguable" or "defendable" case[203]. Otherwise, the court is to filter out proposed actions that are frivolous, untenable or clearly unfounded[204].

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[203] *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 S.C.R. 600, paras. 61-65; *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35, para. 61.

[204] *Fortier* v. *Meubles Léon ltée*, 2014 QCCA 195, para. 70.

[382] In order to establish that he has an arguable case, an applicant at this stage only has a burden of demonstration and the facts alleged are held to be true[205]. Accordingly, the authorization stage is generally not the time for a contestation as to alleged facts, which is more appropriate post-authorization. In other words, the Court is not to analyse grounds of defence based on contested alleged facts.

[383] That said, in order to constitute a fact that is worthy of being held to be true, the allegation cannot be vague, general and imprecise, nor can it simply be an inference, a conclusion, an unverified hypothesis, an opinion or a legal argument[206]. If the allegation of fact is not sufficiently precise *per se*, then essential allegations need generally be supported by proof so as to qualify as being arguable[207].

[384] Moreover, the individual who seeks to act a class representative must be in a position to ensure an adequate representation of the members. This is generally not a difficult criteria to satisfy.

[385] As often confirmed through prior case law, the objective of class actions generally is to facilitate access to justice for class members so as to avoid each of them having to bring their own separate action. Therefore, the proposed class action must actually constitute an action at law, such that the putative member who seeks to be the designated representative is required to demonstrate that he or she personally has an arguable action against a defendant[208]. The questions of law or fact raised in that particular action must essentially be "identical, similar or related" to those of all the other putative class members. That said, even one such question has been held to suffice so long as it significantly advances the litigation[209].

[386] In the context of a proposed class action related to a securities action, as stated above, the two applications for authorization must be presented concomitantly, although the court is to first address the QSA authorization, prior to the one for a class action. In the event that the Court authorizes the securities action pursuant to the QSA criteria, it then proceeds to consider authorization pursuant to Art. 575 C.C.P.[210].

[387] This is germane to the threshold question as to whether a class action can be authorized in the event the court refuses to authorize the QSA securities action. If not, Plaintiffs could not satisfy the appearance of right criteria stipulated at Art. 575(2) C.C.P.

[388] SNC argues that the Quebec Court of Appeal in *Amaya* gives credence to the principle that if the application for authorization of an action under securities legislation

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205 *Infineon*, *supra*, note 203, para. 67; *L'Oratoire Saint-Joseph*, *supra*, note 203, para. 109.

206 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201, para. 38; *Harmegnies* v. *Toyota Canada inc.*, 2008 QCCA 380, para. 44.

207 *L'Oratoire Saint-Joseph*, *supra*, note 203, para. 59.

208 *Idem*, para. 44; *D'Amico* v. *Procureure générale du Québec*, 2019 QCCA 1922.

209 *Desjardins Financial Services Firm Inc.* v. *Asselin*, 2020 SCC 30, para. 27; *L'Oratoire Saint-Joseph*, *supra*, note 203, paras. 6, 8, 44.

210 *Amaya inc.*, *supra*, note 21, para. 54.

fails, the class action should not be authorized. It refers to the following statement, as penned by Justice Kasirer of the Court of Appeal, as he then was, which states that only after an action has been authorized under the QSA that the court proceeds to the second step of analysis:

> [...] In other words, in a hybrid application, the question relating to the authorization of the class character of the action generally comes second. The very text of section 225.4 of the *Act* is highly suggestive of this temporal ordering. Thus, even if it is asked for at the same time as authorization for the class action, the request for leave for an action in damages arises logically prior to the issue whether the proposed action meets the requirement of a class action.[211]
>
> [Underlining added for emphasis. Reference omitted.]

[389] One must acknowledge on a reasonable reading of that citation that the Court of Appeal was not directly answering the question raised herein by SNC as to whether the refusal of an action under Quebec securities legislation automatically renders moot the question of a related class action, although there is a strong inference to that effect.

[390] However, what the Court understands from that statement is that a proposed class action related to the same facts as the proposed action pursuant to section 225.4 QSA is in its essence and nature simply a procedural means to expand an authorized personal action under the QSA into a class so that others who are in the same situation can form a class, and this so as to avoid multiplicity of law suits.

[391] In the Court's view, this would be in keeping with the stipulated requirement in the QSA that the class action authorization application be presented concomitantly. In other words, it is directly related to the proposed QSA action and should not be treated as an entirely separate proceeding.

[392] Clearly, the Legislator intended to establish a connexity between the two actions.

[393] Moreover, the Court understands this to not only mean a practical procedural connexity but also a substantive one. If only a practical procedural connexity was intended, that could have been expressed otherwise, as for example by stipulating that the judge who hears the QSA authorization should also hear any related class action authorization on application.

[394] In *Amaya*, Justice Kasirer, after citing the reference by Justice Gascon of the Quebec Court of Appeal, as he then was, in *Theratechnologies*, to the proceedings of the *Commission permanente des finances publiques* of the National Assembly, concludes as follows[212]:

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211 *Ibid.*

212 *Idem*, para. 97.

> [97] It is plain that the Quebec rules were designed to be harmonized with the provincial securities legislation elsewhere as a matter of substantive law – not surprising considering the nature of secondary markets for securities in Canada. Commenting the legislative policy underpinning changes to the Quebec statute in 2007, Professor Stéphane Rousseau wrote that the law was strongly inspired by the proposal from the national CSA: "le recours [québécois] témoigne de la volonté du législateur d'assurer l'harmonisation – voire l'uniformisation – des règles régissant la responsabilité civile sur le marché secondaire".
>
> [Reference omitted.]

[395] What the Legislator appears to have intended was to create a new action in civil liability with a reduced merits burden of proof that did not already exist under the general regime of liability stipulated in the *Civil Code of Quebec*. That is precisely what was stated by the Minister of Finance during the debates before the National Assembly:

> Le recours en responsabilité civile sur le marché secondaire vise donc à simplifier le fardeau de la preuve des investisseurs et à maintenir un équilibre entre l'investisseur et l'émetteur [...]
>
> M. le Président, en plus d'introduire un nouveau recours en responsabilité civile, le projet de loi n° 19 prévoit des modifications à différentes lois.

[396] Accordingly, once the court decides not to authorize the proposed action pursuant to s. 225.4 QSA, the related application to authorize a class action must then fail, at least to the extent that it would constitute a claim in civil liability in the secondary markets.

[397] One need only consider Plaintiffs' allegations of fault as set forth at paragraphs 51 to 57.3 of the Application, as well as the proposed common questions at paragraphs 57.4 (a) to (c)[213], to understand that the proposed class action is almost entirely connected to issues pertaining to the QSA and the "Other Securities Legislation" adopted by provinces and territories across Canada.

[398] Plaintiffs argue, however, that they also raise a separate cause of action, based on the general extracontractual civil liability rules pertaining to negligence set forth at Art. 1457 C.C.Q., which reads as follows:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.	**1457.** Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is liable for any	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir,

[213] All of these paragraphs, both as regards fault and common questions, are reproduced at Schedule II.

injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.	responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.	Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

[399] They cite the second paragraph of section 213.1 QSA, which states that the rules resulting from the subscription, acquisition or disposition of securities "do no prevent an action from being brought under the ordinary civil liability rules".

[400] What specifically is the nature of Plaintiffs' proposed class action based on Art. 1457 C.C.Q.? Very little is stated or alleged in that regard.

[401] At paragraph 52 of their Application, they allege the following:

> 52. Additionally, SNC and the Individual Defendants owed SNC's shareholders duties under article 1457 CCQ. These duties were informed by the *QSA*, the Other Securities Legislation, subsidiary instruments including National Instrument 51-102, National Instrument NI 52-109, National Instrument NI 52-110 and their related rules and policies and SNC's own stated policies, including the charter of its Board's Audit Committee;

[402] And at paragraph 57.3 thereof, they allege:

> 57.3 The Defendants owe a duty of diligence to the Class, which they failed to fulfill and, as a result, committed a fault against the Plaintiffs and Class under article 1457 CCQ. The Plaintiffs and the other members of the Class sustained damages as a result;

[403] To the extent that Plaintiffs are simply repeating the misrepresentation and failure to disclose issues raised in the QSA, and any other securities legislation, and, as well, all the relevant subsidiary financial standards applicable to claims thereunder, the Court considers that such an application must fail given that the application to authorize an action pursuant to the QSA is being refused.

[404] However, even if a separate action based on extracontractual fault not covered by the QSA could arguably be said to exist, that would not provide Plaintiffs with a recourse in the present matter. To start with, the allegations in this regard are too vague.

[405] Moreover, nowhere do Plaintiffs allege that they relied on whatever information issued from Defendants, whether individually or collectively.

[406] They argue that "reliance" is not applicable.

[407] The Court respectively disagrees with that view.

[408] The need to establish reliance in relation to any secondary market claim against an issuer and its officers and employees under Quebec civil law outside the QSA has been confirmed by three different sources.

[409] To start with, the burden of proof in an action pursuant to section 225.2 and following QSA is stated, at section 225.12 thereof, to exclude the following:

225.12. The plaintiff is not required to prove that the plaintiff relied on the document or public oral statement containing a misrepresentation or on the issuer having complied with its timely disclosure obligations when the plaintiff acquired or disposed of the issuer's security.	**225.12.** Le demandeur n'a pas à établir qu'il a acquis ou cédé un titre en se fiant au document ou à la déclaration publique contenant une information fausse ou trompeuse ou en tenant pour acquis que l'émetteur a respecté ses obligations d'information occasionnelle.

[410] It is a long standing principle that Legislators are presumed not to speak for no reason.

[411] As well, during the debates before the National Assembly, the then Minister of Finance, Madam Monique Jérôme-Forget, presented the draft legislation and stated the following as to the underlying reason for creating a new recourse in civil responsibility by describing the existing recourse as follows[214]:

> Présentement, les investisseurs québécois peuvent se prévaloir du recours en responsabilité civile prévu au Code civil du Québec pour faire valoir leurs droits sur le marché secondaire. Dans ce cadre, l'investisseur doit faire la preuve de trois éléments: premièrement, la faute: il y a eu, par exemple, information fausse ou trompeuse; deuxièmement, le préjudice: j'ai acheté un titre dont la valeur a chuté suite à une rectification publiée au sujet de l'information fausse ou trompeuse; et, troisièmement, le lien de causalité entre la faute et le préjudice: j'ai acheté le titre suite à une diffusion de l'information fausse et trompeuse. Ainsi, en vertu du régime général prévu au Code civil, l'investisseur se doit de démontrer, d'une part, qu'il s'est fie à l'information fausse ou trompeuse pour acheter le titre et, d'autre part, que la variation du prix du titre est le résultat de l'information fausse ou trompeuse.
>
> M. le Président, dans le contexte des marches financiers, faire ces démonstrations rend très difficile ce type de poursuite. Le recours a donc la particularité d'établir une présomption en faveur des investisseurs, à savoir que la fluctuation de la valeur du titre, lorsque celui-ci est acquis ou cédé à l'occasion d'une publication ou déclaration d'information fausse ou trompeuse ou d'une

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[214] Journal des débats de la Commission permanente des finances publiques, le 25 octobre 2007, vol. 40, nº 10, p. 2.

> contravention à une obligation d'information occasionnelle, est présumée être attribuable à cette faute. De plus, il libère le requérant du fardeau de prouver qu'il s'est fié a l'information fausse ou trompeuse ou au fait que l'émetteur ne s'était pas conforme à ses obligations d'information occasionnelle lorsqu'il a acquis ou cédé ses titres.
>
> Ces avantages offerts aux investisseurs n'existent pas sous le régime général de responsabilité civile prévu au Code civil du Québec, c'est pourquoi il faut considérer le recours en responsabilité civile sur le marché secondaire comme un régime particulier qui se veut complémentaire au régime général. Puisque le fardeau de preuve de l'investisseur est grandement allégé, le recours prévoit en contrepartie un ensemble de moyens que peuvent faire valoir les défendeurs ainsi qu'un ensemble de circonstances où ils ne peuvent être tenus responsables.

[412] This need for claimants to establish reliance was also confirmed by Justice Abella of the Supreme Court of Canada in *Theratechnologies Inc.*[215], at paragraph 28:

> [28] In Quebec, investors faced a similarly heavy burden under the *Civil Code*. To establish civil liability, claimants were required to prove a fault, such as the publication of misinformation or the failure to meet a statutory disclosure obligation; that they suffered prejudice; *and* that there was a causal link between the fault and the prejudice — that is, that they had relied on the misinformation in making the trade: arts. 1457 and 1607 of the *Civil Code of Québec*. Demonstrating the requisite causal link proved to be particularly onerous in the securities context: Quebec, National Assembly, Committee on Public Finance, "Étude détaillée du projet de loi n° 19 — Loi modifiant la Loi sur les valeurs mobilières et d'autres dispositions législatives", *Journal des débats de la Commission permanente des finances publiques*, vol. 40, No. 10, 1st Sess., 38th Leg., October 25, 2007 ("Étude detaillée"), at p. 2.

[413] Plaintiffs argue that in any event reliance can be presumed. The fact that reliance may be inferred based on a presumption of fact does not mean that reliance is not necessary; to the contrary. Inferences and presumptions only address the means of establishing the alleged reliance.

[414] This distinction was made in the decision of Justice Soldevila in the matter of *Comité syndical national de retraite Bâtirente inc.* v. *Société financière Manuvie*[216] where she confirmed the necessity to establish reliance but added that it could possibly be inferred from the facts by the Judge on the merits.

[415] That decision was cited with authority by Justice Kasirer in the Supreme Court of Canada decision in *Desjardins Financial Services*[217] as regards the issue of the use of presumptions to satisfy the burden of proof in class actions.

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215 *Theratechnologies Inc.*, *supra*, note 20, para. 28.
216 2011 QCCS 3446, para. 98.
217 *Desjardins Financial Services*, *supra*, note 209, para. 12.

[416] In the Court's view, and this said with respect to those who may not share this opinion, if there exists no burden of establishing reliance in such cases under Quebec's common law, why then did the Quebec Legislator create a special civil responsibility regime for the stated purpose of reducing the burden of demonstrating reliance? Why state that a plaintiff need not establish reliance if it is not otherwise required under Quebec civil law? And why would claimants bother to take on the more difficult burden of demonstrating a reasonable possibility of success at the authorization stage of a QSA action if there was no substantial benefit to doing so?

[417] Reliance, in the Court's view, is an essential component of a claim in Quebec civil law against an issuer and its officers and employees related to disclosures and failures to disclose in the secondary securities market, even when the action is framed under Art. 1457 C.C.Q.

[418] Given that the Plaintiffs have not even alleged reliance, whether that be a strategic choice or not, their personal actions at the heart of the proposed class action cannot succeed. Accordingly, their failure to allege reliance is fatal.

[419] For these reasons, the Court concludes that Plaintiffs have not demonstrated that the facts alleged appear to justify the conclusions sought, being the criteria of Art. 575(2) and, as a result, that either of the Plaintiffs could be appointed as representative plaintiff as per Art. 575(4).

[420] Although the Court would accept that both Art. 575(1) and (3) have been met, the criteria are cumulative, and the failure to satisfy any one of them is fatal.

[421] Plaintiffs' application to authorize a class action shall accordingly be dismissed.

FOR THESE REASONS, THE COURT:

[422] **DISMISSES** Plaintiffs' Amended Motion for Authorization of a Class Action and for Authorization to Bring an Action Pursuant to Section 225.4 of the *Quebec Securities Act*;

[423] **THE WHOLE** with judicial costs.

Gary D.D. Morrison, J.S.C.

Mtre. Peter Jervis
Mtre. Douglas M. Worndl
Mtre. Joel Rochon
ROCHON GENOVA LLP

Mtre. Karim Diallo
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For the Defendants

Dates of Hearing: April 12, 13, 14 and 26, 2022

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SCHEDULE I

The Impugned Documents

(Amended Application, pp. 4-5, para. 1w.)

[...]

w. **"Impugned Documents"** [...] means, collectively:

i. the **MD&A** for the quarter ended December 31, 2017 and year ended December 31, 2017 dated February 21, 2018 and filed on **SEDAR** on February 22, 2018, communicated herewith as Exhibit P-7;

ii. the audited annual financial statements for the quarter ended December 31, 2017 and year ended December 31, 2017 dated February 21, 2018 and filed on **SEDAR** on February 22, 2018, communicated herewith as Exhibit P-8;

iii. the **AIF** for the year ended December 31, 2017 dated February 21, 2018 and filed on **SEDAR** on February 22, 2018, communicated herewith as Exhibit P-9;

iv. the **Annual CEO Certification** for the year ended December 31, 2017 dated February 21, 2018 and filed on **SEDAR** on February 22, 2018, communicated herewith as Exhibit P-1;

v. the **Annual CFO Certification** for the year ended December 31, 2017 dated February 21, 2018 and filed on **SEDAR** on February 22, 2018, communicated herewith as Exhibit P-2;

vi. [...] **SNC**'s annual report for 2017 filed on **SEDAR** on [...] April 3, 2018, communicated herewith as Exhibit P-10;

vii. [...];

vii. the **MD&A** for the quarter ended March 31, 2018 dated May 2, 2018 and filed on **SEDAR** on May 3, 2018, communicated herewith as Exhibit P-11;

viii. the interim financial statements for the quarter ended March 31, 2018 dated May 2, 2018 and filed on **SEDAR** on May 3, 2018, communicated herewith as Exhibit P-12;

ix. the **Interim CEO Certification** for the quarter ended March 31, 2018 dated May 2, 2018 and filed on **SEDAR** on May 3, 2018, communicated herewith as Exhibit P-13 *en liasse*;

x. the **Interim CFO Certification** for the quarter ended March 31, 2018 dated May 2, 2018 and filed on **SEDAR** on May 3, [...] 2018, communicated herewith as Exhibit P-14 *en liasse*;

xi. the **MD&A** for the quarter ended June 30, 2018 dated August 1, 2018 and filed on **SEDAR** on August 2, 2018, communicated herewith as Exhibit P-15;

xii. the interim financial statements for the quarter ended June 30, 2018 dated August 1, 2018 and filed on **SEDAR** on August 2, 2018, communicated herewith as Exhibit P-16;

xiii. the **Interim CEO Certification** for the quarter ended June 30, 2018 dated August 1, 2018 and filed on **SEDAR** on August 2, 2018, communicated herewith as Exhibit P-13 *en liasse*;

xiv. the **Interim CFO Certification** for the quarter ended June 30, 2018 dated August 1, 2018 and filed on **SEDAR** on August 2, [...] 2018, communicated herewith as Exhibit P-14 *en liasse*;

xv. the **MD&A** for the quarter ended September 30, 2018 dated October 31, 2018 and filed on **SEDAR** on November 1, 2018, communicated herewith as Exhibit P-17;

xvi. the interim financial statements for the quarter ended September 30, 2018 dated October 31, 2018 and filed on **SEDAR** on November 1, 2018, communicated herewith as Exhibit P-18;

xvii. the **Interim CEO Certification** for the quarter ended September 30, 2018 dated October 31, 2018 and filed on **SEDAR** on November 1, 2018, communicated herewith as Exhibit P-13 *en liasse*; and

xviii. the **Interim CFO Certification** for the quarter ended September 30, 2018 dated October 31, 2018 and filed on **SEDAR** on November 1, [...] 2018, communicated herewith as Exhibit P-14 *en liasse*;

in each case, where applicable, including all documents incorporated by reference therein;

[...]

[Highlighted by counsel in the Amended Motion.]

SCHEDULE II

Amended Application, pp. 40-41

[...]

51. During the Class Period, SNC and the Individual Defendants had legal obligations of periodic and timely disclosure of material facts and changes, under the *QSA* and the Other Securities Legislation. They violated those legal obligations;

52. Additionally, SNC and the Individual Defendants owed SNC's shareholders duties under article 1457 *CCQ*. These duties were informed by the *QSA*, the Other Securities Legislation, subsidiary instruments including National Instrument 51-102, National Instrument NI 52-109, National Instrument NI 52-110 and their related rules and policies and SNC's own stated policies, including the charter of its Board's Audit Committee;

53. During the Class Period, the Defendants committed a fault in respect of the Class by failing to comply with their duties and responsibilities and by making the misrepresentations pleaded herein;

54. The Individual Defendants oversaw the preparation and reporting of SNC's disclosures to the market and knew or should have known of the misleading statements and the omissions of material facts they contained;

55. The Individual Defendants authorized, permitted or acquiesced to the release of SNC's public disclosure documents during the Class Period by SNC which contained the omissions of material facts and the misrepresentations;

56. In addition to its direct liability, SNC is liable for the faults committed by the Individual Defendants and its other officers, directors, partners and/or employees;

57. As a result of the Defendants' conduct and their misrepresentations in the Impugned Documents and the Impugned Public Oral Statements, SNC's securities traded at artificially inflated prices during the Class Period and the Class acquired those securities at prices that were inflated and did not reflect their true value. When the truth emerged through a series of corrective disclosures, the market price or value of SNC's shares plummeted, causing significant losses and damages to the Plaintiffs and the Class;

57.1 The Defendants are liable to the Class under Title VIII, Chapter II, Division II of the *QSA* and, if necessary, the concordant provisions of the Other Securities Legislation because:

a. the Impugned Documents and/or the Impugned Public Oral Statements contained one or more misrepresentations within the meaning of the *QSA* and, if necessary, the Other Securities Legislation; and

b. SNC failed to make timely disclosure of a material change or material changes within the meaning of the *QSA* and, if necessary, the Other Securities Legislation;

57.2 The Plaintiffs and the other members of the Class sustained damages as a result of the breaches of the *QSA* and, if necessary, concordant provisions of Other Securities Legislation;

57.3 The Defendants owe a duty of diligence to the Class, which they failed to fulfill and, as a result, committed a fault against the Plaintiffs and Class under article 1457 *CCQ*. The Plaintiffs and the other members of the Class sustained damages as a result;

[...]

57.4 The principal questions of fact and law to be dealt with collectively are the following:

a. did the Impugned Documents and/or the Impugned Public Oral Statements contain one or more misrepresentations within the meaning of the *QSA* and, if necessary, the Other Securities Legislation? If so, what documents contained what misrepresentations and what public oral statements contained what misrepresentations?

b. did SNC fail to make timely disclosure of a material change or material changes within the meaning of the *QSA* and, if necessary, the Other Securities Legislation? If so, when did that failure or failures occur?

c. are any of the Defendants liable to the Class, or any of them, under Title VIII, Chapter II, Division II of the *QSA* and, if necessary, the concordant provisions of the Other Securities Legislation? If so, what Defendant is liable and to whom?

[...]