SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000693-149

DATE: March 12, 2020

PRESIDING: THE HONOURABLE THOMAS M. DAVIS, J.S.C.

ANAS NSEIR
Petitioner
v.
BARRICK GOLD CORPORATION
and
AARON REGENT
and
JAMIE SOKALSKY
and
AMMAR AL-JOUNDI
and
PETER KINVER
Respondents

JUDGMENT

OVERVIEW

[1] The Petitioner, Anas Nseir (**Mr. Nseir**), wishes to institute a class action on behalf of persons forming the class hereinafter described:

JD2836

> All natural persons and legal persons who reside in Quebec and acquired securities of Barrick Gold Corporation from May 7, 2009 to November 1, 2013, except the Respondents, all officers and directors of Barrick Gold Corporation during the class period, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which the excluded persons have a controlling interest now or during the class period;
>
> Toutes les personnes physiques et les personnes morales qui résident au Québec et qui ont acquis des valeurs mobilières de Barrick Gold Corporation entre le 7 mai 2009 et le 1er novembre 2013, sauf les Intimés, tout administrateur ou dirigeant de Barrick Gold Corporation durant la période visée par le Recours, ainsi que leurs représentants légaux et ayants droit, ou toute entité liée ou contrôlée par une personne exclue ou dans laquelle une personne exclue est un initié;

[2] His application seeks authorization to institute proceedings, both under the Quebec *Securities Act*[1] (**the "QSA"**) and the *Code of Civil Procedure*.

[3] Essentially, Mr. Nseir alleges that Respondent Barrick Gold Corporation (**Barrick**) and certain of its former officers violated their reporting obligations under the QSA in respect of both the primary and secondary markets.

[4] Faced with this application, the Court has a number of questions to consider.

[5] What is the Court's role when the provisions of the QSA allowing shareholders to seek authorization to institute proceedings are pleaded in conjunction with the class action provisions of the C.C.P.?

[6] Given that the authorization proceeding is not a mini-trial, to what degree must the Court review the evidence that has been submitted?

[7] Can an independent fault exist under section 1457 of the *Civil Code of Québec* if the Court concludes that the issuer did not breach its obligations under the QSA?

[8] Can Mr. Nseir institute a primary market claim even though he only purchased shares on the secondary market?

[9] What is the proper time frame for the action, in the event that it is authorized? Is there an issue of prescription? The parties have agreed that any secondary market claims under the QSA flowing from statements made prior to April 30, 2011 (based on the date of the initial proceedings) would be prescribed.

[10] Their agreement is summarized in the letter of Barrick's counsel dated July 12, 2018[2] which states:

---

1 CQLR, c. V-1.1.

> The parties therefore understand and agree that any secondary market claims under the QSA flowing from statements made prior to April 30, 2011 (based on the date of the initial proceedings) would therefore be prescribed. Moreover, nothing herein is to be construed as the respondent's acceptance that, in Ontario, the issuance of the Statement of Claim tolled the applicable limitation period in that province, or that it was suspended or interrupted in Quebec from April 30, 2011 to August 15, 2012.

[11] Any claim under section 1457 C.C.Q. may not be so prescribed.

1. THE ACTION IN ONTARIO

[12] During the time that the matter was under advisement, Justice Belobaba rendered his judgment in *DALI Local 675 Pension Fund (Trustees)* v. *Barrick Gold*[3] (**DALI**) a parallel or similar matter being heard in Ontario under the provisions of the Ontario *Securities Act*.[4] He authorized the action, essentially in relation to one alleged misrepresentation, which is also put forward before this Court. It is the statement made in Barrick's Second Quarter Report issued on July 26, 2012, which reads:

> "During the second quarter, the project achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities." [...][5]

[13] Justice Belobaba held that this was a material misrepresentation:

> [105] ***Materiality.*** I am satisfied that the July 26, 2012 assertion that a "critical milestone" had been achieved - the WMS had been completed and thus pre-stripping could begin – was a material public announcement. As earlier disclosures indicated, pre-stripping had already been postponed several times because the WMS was not yet complete. Every delay in pre-stripping resulted in a costly delay in revenue-generation and an ever-increasing pressure to get to "first gold" production as quickly as possible. The announcement of July 26, 2012 that a "critical milestone" had been achieved was, to put it bluntly, a big deal.[6]

[14] He then held that it was the object of a material public correction on June 28, 2013:

> ***June 28, 2013 (Press Release)*** "Schedule Re-sequencing and Reduction of 2013-2014 Capital Spending ... <u>The company has submitted a plan, subject to</u>

---

2 Letter from Nick Rodrigo to Jean-Marc Lacourcière dated July 12, 2018 (Respondents documents compendium, tab 79 - BPL01803943).
3 2019 ONSC 4160.
4 R.S.O. 1990, c. S.5.
5 July 26, 2012 press release, interim financial statements and MD&A for Q2 2012, Exhibit P-4VV (Petitioner's compendium, tab 13, p. 6).
6 *Supra* note 3.

> review by Chilean regulatory authorities, to construct the project's water management system in compliance with permit conditions for completion by the end of 2014, after which Barrick expects to complete remaining construction works in Chile, including pre-stripping. Under this scenario, ore from Chile is expected to be available for processing by mid-2016. In line with this timeframe, and in light of challenging market conditions and materially lower metal prices, the company intends to re-sequence construction of the process plant and other facilities in Argentina in order to target first production by mid-2016 (compared to the previous schedule of the second half of 2014)."[7]
>
> [The Court's underlining]

[15] Following its review of this judgment, the Court reconvened the parties to hear further submissions. The Court will comment on Justice Belobaba's finding at various times in the present judgment. For the moment, it is important to underline that the body of evidence presented to the Ontario Court was far from identical to that presented here.

2. THE QUEBEC SECURITIES ACT (QSA)

[16] By way of introduction, it is useful at the outset to set out certain provisions of the QSA.

[17] The general obligation of issuers in respect of disclosure is described at section 73:

> **73.** A reporting issuer shall provide periodic disclosure about its business and internal affairs, including its governance practices, timely disclosure of a material change and any other disclosure prescribed by regulation in accordance with the conditions determined by regulation.

[18] Section 225.4 determines the test to be used by the Court to assess whether the action should be authorized in respect of the secondary market:

> **225.4.** No action for damages may be brought under this division without the prior authorization of the court.
>
> 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.
>
> 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.

---

[7] *Ibid*.

> The request for authorization and, if applicable, the application for authorization to institute a class action required under section 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.

[19] The principal misrepresentation provisions are found in sections 225.8, 225.9 and 225.11, which read in part as follows:

> **225.8.** A person that acquires or disposes of an issuer's security during the period between the time when the issuer or a mandatary or other representative of the issuer released a document containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against
>
> (1) the issuer, each director of the issuer at the time the document was released, and each officer of the issuer who authorized, permitted or acquiesced in the release of the document; [...]
>
> **225.9.** A person that acquires or disposes of an issuer's security during the period between the time when a mandatary or other representative of the issuer made a public oral statement relating to the issuer's business or affairs and containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against
>
> (1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the making of the public oral statement; [and]
>
> (2) the person who made the public oral statement; [...]
>
> **225.11.** A person that acquires or disposes of an issuer's security during the period between the time when the issuer failed to make timely disclosure of a material change and the time when the material change was disclosed in the manner required under this Act or the regulations may bring an action against
>
> (1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; [...]

[20] Section 225.13 deals with the degree of knowledge that the representatives of the issuer must possess about the material fact, which is alleged to contain a misrepresentation, as well as the burden of proof. It reads as follows:

> **225.13.** For the purposes of sections 225.8 to 225.10, unless the defendant is an expert or the misrepresentation was contained in a core document, the plaintiff must prove that the defendant
>
> (1) knew, at the time that the document was released or the public oral statement was made, that the document or public oral statement contained a misrepresentation or deliberately avoided acquiring such knowledge at or before that time; or

> (2) was guilty of a gross fault in connection with the release of the document or the making of the public oral statement.

[21] One sees numerous concepts in these sections and several are defined. Perhaps the two that are most important for the purposes of the present matter are "misrepresentation" and "material change".

[22] Misrepresentation is defined at section 5:

> "misrepresentation" means any misleading information on a material fact as well as any pure and simple omission of a material fact; [...]

[23] The meaning of misrepresentation, therefore, turns on the definition of "material fact", also set out in section 5 of the Act:

> "material fact" 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; [...]

[24] What is "timely disclosure of a material change"? Material change is found at section 5.3 of the Act:

> **5.3.** When used in relation to an issuer other than an investment fund, "material change" means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or a decision to implement such a change made by the directors or by senior management of the issuer who believe that confirmation of the decision by the directors is probable. [...]

[25] "Timely disclosure" is not defined.

[26] The notion of core document is also important, as it has significant implications on a petitioner's burden of proof. It is defined at section 225.3:

> [...] "core document" means a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, a proxy solicitation circular, the issuer's annual and interim financial statements and any other document determined by regulation, and a material change report, but only where used in relation to the issuer or the investment fund manager and their officers;

[27] This definition can be contrasted with the definition of "document", found at the same section:

> "document" means any writing that is filed or required to be filed with the Authority, with a government or an agency of a government under applicable securities or corporate law, or with a stock exchange or quotation and trade reporting system under its by-laws, or the content of which would reasonably be expected to affect the market price or value of a security of the issuer;

[28] Finally, "public correction" is an important concept, but is not defined in the QSA.

[29] It is also relevant to note at this stage that a defendant benefits from certain statutory defences, the most relevant of which are set out at sections 225.17 and 225.18 of the QSA:

> **225.17.** A defendant may defeat an action by proving that, at the time of the transaction, the plaintiff knew that the document or public oral statement contained a misrepresentation or was aware of the material change that should have been disclosed.
>
> An action may also be defeated by proving that the defendant conducted or caused to be conducted a reasonable investigation and had no reasonable grounds to believe that the document or public oral statement would contain a misrepresentation or that the failure to make timely disclosure would occur.
>
> **225.18.** In determining whether an investigation was reasonable under the second paragraph of section 225.17, the court must consider all relevant circumstances, including those listed in paragraphs 1 to 11 of section 225.15.
>
> [The Court's underlining]

[30] The most relevant paragraphs of section 225.15 read as follows:

> (5) the existence and the nature of any system designed to ensure that the issuer meets its continuous disclosure obligations, and the reasonableness of reliance by the defendant on that system;
>
> (6) the reasonableness of reliance by the defendant on the issuer's officers and employees and on others whose duties would in the ordinary course have given them knowledge of the relevant facts;

[31] In taking stock of all of these sections, in respect of the secondary market claim, the Court must answer the question of whether there is a reasonable possibility that the action will be resolved in favour of the plaintiff. This notion, and the role of the Court in deciding what it means, has received only limited analysis in the courts of Quebec, but significant consideration in Ontario. It has also been considered by the Supreme Court of Canada in *Theratechnologies Inc.* v. *121851 Canada Inc.*,[8] a Quebec case.

---

[8] 2015 SCC 18.

[32] Mr. Nseir has also raised the specter of a primary market claim under section 217, which reads as follows:

> **217.** A person who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation may apply to have the contract rescinded or the price revised, without prejudice to his claim for damages.
>
> The defendant may defeat the application only if it is proved that the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

3. CONTEXT

[33] The back-story takes place high in the Andes Mountains straddling Chile and Argentina. Barrick undertook to develop an open pit mine there, some of it at an altitude in excess of 5,200 meters. Mr. Nseir describes the project as follows:

> Pascua-Lama is an open-pit mine site located at an altitude of 4,800 meters which covers a total area of 45,550 hectares (455.5 km^2). It was supposed to process 45,000 tonnes of mineral ore per day over a mine life of 25 years. Barrick stated that the mine had proven reserves of 17.8 million ounces of gold and 718 million ounces of silver;[9]
>
> [References omitted]

[34] There were several challenges to the project, many of them environmental. The elevation was a particular challenge. The topography was steep and rugged, with natural slopes of 20 to 40 degrees. The climate and weather were characterized by high winds, sometimes in excess of 120 kilometers per hour, arid summers and extremely cold and humid winters. Given its binational nature, the project was subject to federal, provincial and local laws and regulations, as well as political and other country-specific risks (including risks associated with local economies) in two countries.[10]

[35] It was also surrounded by glaciers, the melt from which flowed into the Estrecho River. A Water Management System (**WMS**) was conceived to ensure that the river was not contaminated.

[36] Care had to be taken to avoid damage to the glaciers. Dust had to be managed so that it would not cover the glaciers.

[37] The scope of the project required many employees, outside contractors, and specialized consultants. One of the most important of these consultants was a company called Golder, who designed the WMS which was ultimately found to be deficient. The

---

9 Motion for Permission to Amend the Re-amended Consolidated Motion for Authorization (May 17, 2019) par. 2.12.1.

10 Respondents' plan of argument, par. 48.

failure of this system was perhaps the tipping point in the chain of events that ultimately led to the indefinite suspension of the project.

[38] It was the object of intense environmental scrutiny. Mr. Nseir summarizes Barrick's environmental obligations as follows:

> In February 2006, Chile's Regional Commission for the Environment, Atacama Region, adopted Environmental Qualification Resolution No. 24/2006 (hereinafter the "RCA", from the Spanish acronym for *Resolución de Calificación Ambiental*) approving the Pascua-Lama project. The RCA imposed several major conditions on the project, such as:
>
> - A prohibition against destroying, displacing or altering the glaciers adjacent to the mine in any way;
>
> - An obligation to put in place several dust suppression measures such as keeping the mine's access roads wet at all times;
>
> - An obligation to monitor the Estrecho River for indicators of acidification, and the obligation to activate "emergency plans" if such indicators were detected;
>
> - An obligation to monitor melting rates, variations in *albedo*, dust accumulation, and other indicators of project impact on nearby glaciers;
>
> - An obligation to have an operational system for management of water in the project area and in its vicinity before the "pre-stripping" activities of the construction phase commenced. Pre-stripping is the process during which waste rock is excavated and removed in order to access the mineral ore body below.[11]
>
> [References omitted]

[39] This summary of the environmental obligations is not really called into question by Barrick, although as we shall see later, the parties do not agree on the precise elements of the WMS that were required to be up and running for it to be deemed operational.

[40] In the end, it was largely concerns over environmental issues that led to the project being suspended by the Copiapó Appeals Court in April of 2013.[12] In a further ruling, issued on July 15, 2013, that Court found that Barrick had committed numerous environmental infractions and maintained the suspension of the project.[13]

---

11 Petitioner's plan of argument, par. 25.

12 Barrick to suspend construction on Chilean side of Pascua-Lama, press release dated April 10, 2013 (Respondents' documents compendium, tab 59 - BPL00233106).

13 English translation of the July 15, 2013 decision of the Copiapó Appeals Court, Exhibit P-17B (Petitioner's compendium, tab 7 - BPL00235898).

[41] During the life of the project, Mr. Nseir purchased shares, which lost significant value in April 2013 and which also declined to a lesser extent in October 2013 when Barrick announced that it was suspending construction on the project, save for environmental protection and regulatory compliance.[14]

4. MR. NSEIR'S POSITION

4.1 His Characterization of the Misrepresentations

[42] For Mr. Nseir, Barrick made misrepresentations related to its environmental compliance (or lack thereof) throughout the life of the project, thereby violating its obligations under the QSA. He has identified several principal ones that belie the fact that Barrick led the markets to believe that it was always in substantial compliance with its environmental obligations.

[43] He characterizes Barrick's environmental violations as having occurred at three levels. There were violations related to commencing pre-stripping operations at Pascua-Lama prior to the WMS being fully operational. Other violations related to the content of acid mine drainage in the water body that flowed through the project and the monitoring of the glaciers.

[44] For the first two sets of violations, Barrick questions the validity of decisions of the Chilean authorities finding it to have failed to respect its obligations.

[45] For the third violation, related to its failure to protect the glaciers that were nearby the project, Mr. Nseir posits that Barrick does not deny it.

[46] He also believes that Barrick foresaw that its environmental non-compliance would put the project in jeopardy. It mislead investors by failing to inform them of same. The oft repeated blanket statement by Barrick, made in various corporate documents, that it could not guarantee that it would always be in compliance with applicable laws and regulations, does not suffice as a defense.

[47] In his written argument, he gives the following examples of misrepresentations made by Barrick:

- Barrick's press release announcing the beginning of construction at Pascua-Lama boasted of its "Fully compliant environmental management and monitoring plans developed and being implemented."

- In its Annual Information Form for the year ending December 31, 2008, Barrick stated "the Company believes that it is in substantial compliance with all material current government controls and regulations at each of its properties."

---

[14] Third Quarter Report 2013 (Respondents' documents compendium, tab 72 - BPL00249013).

- In its Annual Report for 2009, Barrick stated the following: « Responsible environmental management is central to our success as a leading gold mining company. In order to accomplish this goal across our 26 mines and four regions, we have an Environmental Management System which guides all of our sites. »

- In its Annual Information Form for the year ending December 31, 2009, Barrick repeated that it "[believed] that it [was] in substantial compliance with all current government controls and regulations at each of its material properties."

- In its report on its results for the Fourth Quarter of 2010, Barrick stated the following in the context of comments on new legislation aiming at the protection of glaciers passed in Argentina:

  "On the legislative front, Argentina recently passed a federal glacier protection law that restricts mining in areas on or near the nation's glaciers. Our activities do not take place on glaciers, and are undertaken pursuant to existing environmental approvals issued on the basis of comprehensive environmental impact studies that fully considered potential impacts on water resources, glaciers and other sensitive environmental areas around Veladero and Pascua-Lama. We have a comprehensive range of measures in place to protect such areas and resources."

- Barrick repeated in its Annual Information Form for the year ending December 31, 2010 that it "[believed] that it [was] in substantial compliance with all current government controls and regulations at each of its material properties."

- Barrick made the following statement in its March 31, 2011 Technical Report for Pascua-Lama:

  « Barrick has received substantially all of the necessary environmental approvals in both Chile and Argentina for development of Pascua-Lama, and is on schedule for submitting the remaining environmental documentation during the first quarter of 2011. This includes the tails, waste rock and plant facilities. Barrick has implemented plans to comply with the conditions of the environmental approvals and has obtained the key permits and authorizations for project construction. Monitoring against the environmental baseline, public consultation and the development and implementation of environmental management plans are ongoing as project construction activities ramp up. »

- Barrick repeated the following statement on October 27th, 2011:

  "On the legislative front, Argentina passed a federal glacier protection law in October 2010 that restricts mining in areas on or near the nation's glaciers. Our activities do not take place on glaciers, and are undertaken

pursuant to existing environmental approvals issued on the basis of comprehensive environmental impact studies that fully considered potential impacts on water resources, glaciers and other sensitive environmental areas around Veladero and Pascua-Lama. We have a comprehensive range of measures in place to protect such areas and resources."

- In December 2011, Barrick published a press release purporting to respond to alleged falsehoods contained in a report published by Argentinean environmental NGO CEDHA. It made the following statements in this report:

  "In addition to this, the company has implemented a glacier monitoring program for the entire Pascua - Lama project area, along with additional requirements associated with glacier protection as mandated in the project's environmental approval by Chilean authorities after extensive public input."

  "CEDHA also wrongly claims that the project's dust emissions have not been considered with respect to impact on glaciers. In reality, the company has put in place a range of measures to mitigate the potential impact of dust emissions on glaciers. All of those measures have been incorporated into the project's Environmental Impact Statement (EIA), which was approved by environmental authorities. During the EIA revision process, it was determined that the Pascua-Lama project will not generate damaging dust accumulation in areas where glaciers are present. The project will put in place a set of dust abatement and control measures such as road watering and proper road planning."

  "Barrick monitors water at 73 stations located in Chile and Argentina and communities have participated in water monitoring activities on both sides of the Pascua-Lama project. Thirty monitoring stations will be equipped to transmit real-time measurements of water quantity and quality to the relevant authorities."

- In its Annual Report for 2011, Barrick again vaunted its "Environmental Stewardship" in the following way:

  "Barrick is committed to protecting the environment for present and future generations. From exploration to mine closure, responsible environmental management is the basis of our operational approach. (...) We comply with government regulations in these areas and have also developed stringent internal performance standards for water conservation, biodiversity, climate change, closure and incident reporting, as a preventative measure and to meet our goal of consistent performance at all locations."

- In April 2012 Barrick repeated the claim that its "activities at the Pascua-Lama Project do not take place on glaciers, and are undertaken pursuant to existing environmental approvals issued on the basis of comprehensive

environmental impact studies that fully considered potential impacts on water resources, glaciers and other sensitive environmental areas around the project." It also described its "environmental audit policy" as follows:

> *"Barrick has a policy of conducting environmental audits of its business activities, on a regular and scheduled basis, in order to evaluate compliance with: applicable laws and regulations; permit and license requirements; company policies and management standards including guidelines and procedures; and adopted codes of practice. All operating mines and selected project sites are subject to triennial audits, with certain sites being audited more frequently."*

- Barrick again stated that its activities at Pascua-Lama were "undertaken pursuant to existing environmental approvals" in its July 26, 2012 report for the Second Quarter of 2012. It also announced that pre-stripping had commenced at Pascua-Lama, falsely claiming that it had completed the project's water management system in order to be able to do so:

  > *"During the second quarter, the project achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities."*

- In November, 2012, Barrick disclosed the actions filed before the Copiapó Court of Appeals (which ultimately resulted in orders for the project's suspension) – Barrick commented only that "no amounts [had] been accrued for any potential losses related to these actions" and that it intended to "vigorously defend" them.

- In its February 2013 Quarterly Report, Barrick minimized the ongoing investigation by the Environmental Superintendent (which eventually resulted in an order suspending construction) in the following way:

  > *"Restrictions may also be placed on the project due to the need to repair and improve certain aspects of the water management system in Chile."*

- In its Annual Information report for 2012, published in March 2013, Barrick repeated that it ""[believed] that it [was] in substantial compliance with all current government controls and regulations at each of its material properties."[15]

[References omitted]

[48] These were underlined, and some others were raised, during oral argument.

[49] Mr. Nseir points to a Preliminary Short Form Prospectus issued on September 8, 2009 for a proposed new issue, where it is stated:

---

[15] *Supra* note 11, par. 29.

> Barrick has a policy of conducting environmental audits of its business activities on a regular and scheduled basis, in order to evaluate: compliance with applicable laws and regulations; permit and license requirements; company policies and management standards including guidelines and procedures; and adopted codes of practice. [...][16]

[50] And later in the same report:

> The Company believes that it is in substantial compliance with all material current government controls and regulations at each of its properties.[17]

[51] He then points to the same statement about substantial compliance in the 2012 Annual Information Form,[18] issued shortly before the decision to plead guilty to certain charges that were made by the Chilean authorities.

[52] Mr. Nseir places great emphasis on this decision, particularly given the findings of the Chilean court. Its opinion was that Barrick failed to respect certain of the environmental standards set out in the *Resolución de Calificación Ambiental* (**RCA**) established by the Chilean authority in 2006.[19]

[53] The first of these relates to the failure to properly monitor the acid mine drainage levels in the water run-off from the mine construction which were above the levels permitted under the RCA. The Court found:

> Eighty-ninth: That according to the information in Charts No. 1, 2 and 3 above, it is clear that during the Construction Phase, the Early Warning Levels of the RCA at the measurement points were repeatedly exceeded. As such, the Project Holder should have activated the response plans more than once, but there are no records that the holder did so. We can assume that this is because the Project Holder applied the methodological adjustment and the subsequent less strict Early Warning Levels, which, as it has been already mentioned, were not applicable during the Construction Phase; the marker values under the RCA are the ones that should have been applied. It follows from the above that the Holder failed to comply with the RCA in these subjects and the SMA should have issued a decision in this respect in the resolution hereby challenged.[20]

[54] The "subsequent less strict Early Warning Levels" give rise to an important matter of contention between the parties. Essentially, Barrick believed that the acceptable levels established in the RCA were not realistic, since in the years following

---

16 September 8, 2009, Preliminary Short Form Prospectus, Exhibit P-4G (Petitioner's compendium, tab 4).

17 *Ibid*.

18 March 28, 2013, Annual Information Form, Exhibit P-4CCC (Petitioner's compendium, tab 5).

19 2006 RCA Chilean Environmental Qualification Resolution (Petitioner's compendium, tab 12 - BPL01799927).

20 English translation of the March 3, 2014 decision of the Second Environmental Court, Exhibit P-12A (Petitioner's compendium, tab 8).

its adoption there was a natural rise in the acid levels, in no way caused by the construction work carried out by Barrick, such that from the outset of construction it was impossible for Barrick to meet the RCA levels. Therefore, working with the Chilean water management authority (**DGA**), it thought that is had authorization to use higher levels before implementing any early warning protocol.

[55] According to Mr. Nseir, however, this was an unreasonable assumption given the letters received from the Environmental Assessment Service (**SEA**) in June 2012[21] and June 2013.[22] While these letters both conclude that the proposed change to the method of measurement was not material, they also do not supersede Barrick's obligations under the RCA. This can be gleaned from the following words:

> However, it should be noted that in accordance with the decision of the Comptroller General of the Republic in legal opinions 20,477 of 2003 and 76,260 of 2012, an administrative act that decides on the environmental screening inquiry (*consulta de pertenencia*) **cannot modify, clarify, restrict or expand the respective RCA of a given project**, nor does it have the merit of deciding on the environmental assessment of a modification to the original project, **but rather, prior to the start of an environmental screening inquiry, can only serve the purpose of determining that certain changes to it, because they are not materially considerable, are found not to be subject to such a process**.
>
> Consistent with the foregoing, it is clarified for the Project Owner that the items noted in point 3 above, as well as those resolved in the partial response issued by this Executive Division in the letter of June 7, 2012 do not imply modifications to the RCA, nor do they empower it to breach the requirements currently in force in the same, which may only be modified by the means permitted by the Law in this regard.[23]
>
> [Emphasis in original]

[56] He also points to the letter sent to the SEA in December 2011, where the following request was made:

> Regardless of whether or not the claim made by the company that I represent, that the modification need not be submitted to the SEIA, is accepted or not, and the necessary procedure for reviewing the methodological adaptation proposal that is to be established with the SEA and with whichever State environmental regulatory bodies this authority deems applicable, I hereby request for legal certainty that the Atacama Region SEA issue a judgment regarding whether or

---

21 June 2012 SEA Response to CMN Screening Inquiry, Westhoff Exhibit 29A (Petitioner's compendium, tab 29 – BPL01801562).

22 June 2013 SEA Response to CMN Screening Inquiry, Westhoff Exhibit 29B (Petitioner's compendium, tab 30 – BPL01801561).

23 *Ibid.*

> not the Alert Level calculation method modification constitutes a "*modification to the project or activity*", as specified in applicable legal and regulatory provisions.[24]

[57] The second violation relates to Barrick's failure to apply adequate dust suppression measures to protect the glaciers. Mr. Nseir refers to a May 2011 inspection and initial finding from the DGA that Barrick was in violation of its permit in relation to dust suppression,[25] and that this finding was later relied on in July 2013 by the Copiapó Appeals Court when it ordered the suspension of the construction phase of the project.

[58] In the same vein, there appears to have been a failure to follow the Glacier Monitoring Plan,[26] noted by the DGA in September 2012, following a visit in March 2012. Mr. Nseir further argues that Barrick failed to advise the markets that it had a Glacier Monitoring Plan to follow and that it was unable to meet the conditions set out in the plan. Moreover, it was aware of the need to update the plan as early as July 2011, as set out in the project's monthly progress report.[27] An update to the plan was presented to the DGA in August of 2012,[28] but as late as April 2012, the DGA's position on same had not been received.[29] Finally, in his examination, Mr. Ivan Mullany (**Mr. Mullany**) confessed that it was impossible to adhere to the plan given the climatic conditions.[30]

[59] Given that glacier monitoring was an important element of the RCA, the inability of Barrick to meet its obligations posed a serious risk to the project, which should have been disclosed. In fact, Mr. Nseir, relying on the project monthly progress report for December 2012, notes that Barrick knew that sanctioning was in progress and could lead to a stoppage of the project.[31]

[60] He posits further that the decision of the Copiapó Appeals Court demonstrates that it is not a trivial issue, as the Court ordered Barrick:

> **3. -** To submit all information before the Environmental Superintendency related to the plan for tracking and monitoring glaciers and glaciarettes so that

---

[24] CMN Screening Inquiry, December 2011, Westhoff Exhibit 28 (Petitioner's compendium, tab 35 – BPL018032780).

[25] DGA Ordinance No. 433, Exhibit P-24 (Petitioner's compendium, tab 37 – BPL01803720).

[26] French translation of DGA Notice "Avis" n° 770, Exhibit P-15A (Petitioner's compendium, tab 36).

[27] Pascua-Lama Project Monthly Progress Report for July 2011, Mullany Exhibit 57 (Petitioner's compendium, tab 17 – BPL00244386).

[28] Pascua-Lama Project Monthly Progress Report for February 2012, Mullany Exhibit 64 (Petitioner's compendium, tab 20 – BPL00243013).

[29] Pascua-Lama Project Monthly Progress Report for April 2012, Mullany Exhibit 73 (Petitioner's compendium, tab 21 – BPL00235944).

[30] Cross-examination of Mr. Mullany (February 26, 2019) question 237 (Petitioner's compendium, tab 48).

[31] Pascua-Lama Project Monthly Progress Report for December 2012 (Petitioner's compendium, tab 22 BPL00235947/61).

> the latter may oversee and monitor thorough compliance with environmental law, without prejudice to the corresponding administrative proceedings.[32]

[61] Mr. Nseir affirms that pre-stripping of the surface rock, a step necessary to access the ore, illegally began prior to the WMS being fully operational. The May 24, 2013 report of the SEA refers to these violations, more specifically the failure to build certain installations.[33] The RCA stated that pre-stripping "activity will be initiated after the construction of the sterile deposit's acid drainage handling and treatment system."[34]

[62] It described the WMS installations as follows:

> The construction of works and facilities for management and treatment of acid drainage from the Nevada Norte waste dump will be carried out in such a manner that they are operational before starting the pit pre-stripping, which will involve disposal in the dump. This ensures that the Project will not affect water quality of the Rio Estrecho at any stage, including the construction phase.
>
> The acid drainage handling and treatment works and installations, comprise four main systems: interception and deviation channels for non-contact waters around the sterile deposit to prevent possible filtrations and the consequent acidification; ditches and wells to capture drainages at the foot of the sterile deposit and collection of both, shallow and underground water flows; pipelines and pools to collect drainages and a drainage treatment plant. [...][35]

[63] The WMS system is actually better described in the part of the RCA dealing with the operations phase of the project:

> **i) Estrecho River Acid Water Management System**
>
> **i.1) Contact waters handling system**
>
> The shallow contact water collection systems of the sterile deposits, have been designed to collect runoff and filtration flows from the Nevada Norte sterile deposit and drainages from the mine area including the pit and low-grade ore stockpiles.
>
> The works in connection with the sterile deposit are as follows:
>
> - A set of operational pumping wells constitute by two lines, one active and one passive or support. Each line, formed by three deep wells and three shallow wells, is located upstream the cutoff wall.

---

32 English translation of July 15, 2013 Decision of the Copiapó Appeals Court (Exhibit P-17.1 - BPL 00235898), *supra* note 13.

33 English translation of the SMA's Sanctioning Resolution, May 24, 2013, Exhibit P-11A (Petitioner's compendium, tab 6).

34 2006 RCA, Chilean Environmental Qualification Resolution, p. 110 – Westhoff Exhibit 6 (Petitioner's compendium, tab 12 – BPL01799927).

35 *Ibid*, p. 112.

- A waterproof cutoff wall built downstream the final position of the foot of the deposit and situated on the cutoff ditch excavated down to the low-permeability glacier till. A geomembrane coats its downstream face.

- Contingency pumping wells situated downstream the cutoff wall to monitor and retain acidic waters. This is a set of water verification and control wells that generate cones to abate water tables and attract drainage flows.

- Three shallow collection ditches composed of a low-depth trench excavated through the bottom of the valley, one perforated HDPE intake pipeline to collect contact water and a berm downstream the ditch to protect the downstream wells lines.

- Two drainage pools of 400,000-m3 capacity. These pools are capable of containing one-year average affluent waters. No reutilization and/or discharge in the river are necessary. The design is intended for a 50-year return period.

- A water transport system from the acid drainage handling and treatment system to the mine facilities.

- An acid drainage treatment plant of a proved, simple, high-efficiency (HSD, High Density Sludge) technology for a simple and automated operation. It comprises the following main units or components:

  o Peroxide (H202) oxidation unit to facilitate the conversion from ferrous iron to ferric iron.

  o Lime leach neutralization unit to raise the pH solution and generate metal precipitation.

  o Clarification unit for the application of flocculants to expedite solids sedimentation.

- An effluent regulation (or polishing) pool to be located downstream the water treatment plant. In consequence, its design volume is 50,000 m3 measuring 100m x 100m, with a maximum depth of 7.5 meters and 0.5 freeboards.

- A Reverse osmosis treatment plant.[36]

[64] The position of Mr. Nseir is that the acid drainage treatment plant, actually involving several installations, was not fully completed prior to pre-stripping and this is certainly now acknowledged by Barrick.

[65] Barrick's communication in July 2012 that critical milestones had been achieved was, therefore, a material misrepresentation.

---

36 *Ibid.*, pp. 125-126.

[66] Pre-stripping did in fact begin in the late spring of 2012, following an e-mail from Mr. Urrutia, an employee of the project addressed to Barrick's management, which reads:

> FYI. As of yesterday we are finally OK to start pre-stripping at PL. 2 weeks ago, we got informal approval from DGA to start as long as the non contact water system is fully connected. As per yesterday visit the system is "conected" so we can start. Aleluya!! We still need to finish construction of the defintive interconection points, art works and lining.[37]

[67] For Mr. Nseir, this decision to begin pre-stripping ran contrary to the RCA, which required the WMS to be fully operational before its commencement.

[68] He points to several internal reports that emphasised the importance of the WMS.

[69] He also views as untenable the position taken by many Barrick executives, and argued in Court, that Barrick reasonably believed it had the right to begin to pre-strip when it did, pointing to the Flash Report of March 2011, filed with the affidavits of Mr. Michael Nicholas Luciano and Mr. Mullany, both Barrick representatives.[38] Among the risks cited, one reads:

> There is a significant risk to schedule in Chile related to pre-stripping. Under the terms of our environmental approval we are obligated to have the entire Estrecho dump water management system in place and ready to operate prior to pre-stripping. The current schedule indicates that the water treatment plant will not be completed until later in the 4th quarter 2011 which is a number of months after we intend to start pre-stripping. Efforts are underway to look for a solution to this misalignment.

[70] The report of May 2011 says the same thing.[39]

[71] Both, Mr. Luciano and Mr. Mullany, qualified their understanding of what fully operational met when cross-examined on their affidavits.

[72] Then, in July 2011, the Monthly Progress Report stated:

> Project management is working closely with RBU to develop a strategy that provides for pre-stripping in Q4 2011 without water management being completed 100%. The strategy involves engagement with authorities and use of

---

37 May 6, 2012, e-mail from JA Urrutia to K Dushnisky, Exhibit 30 (Petitioner's compendium, tab 34 – BPL00560299).

38 Pascua-Lama Flash Report for March 2011, Luciano Exhibit 6/Mullany Exhibit 33 (Petitioner's compendium, tab 15 –BPL00163773).

39 Pascua-Lam Flash Report for May 2011, Mullany Exhibit 35 (Petitioner's compendium, tab 16 – BPL01541458).

> alternative design to expedite the execution while maintaining the optimum result.[40]

[73] The risk to the project was further discussed in the body of this monthly progress report:

> a) **Risk of not meeting the commitment to have the water management system fully operational before the start of prestripping**: This is a key commitment emphatically stated in the project's environmental approval. The Authority polls indicate that there is no possibility of postponing its execution. If it begins to overload and sterile removal of the mine, the project will be in grave danger of being paralyzed.[41]

[74] How, therefore, can Barrick argue that only partial completion of the WMS was required prior to the start of pre-stripping? Moreover, the risk should have been disclosed and was not. For Mr. Nseir, this passage alone is enough to move the case past the authorization stage.

[75] Finally, Barrick's reliance on a report of the DGA, dated April 24, 2012 as an authorisation to begin pre-stripping was not reasonable. It concluded as follows:

> According to the information gathered in the field and presented by the owner, it can be concluded that the works have been executed according to the standards envisaged in the approved project, including various improvements to their execution. The works associated with the contacted water management system are fully complete with no apparent construction details pending. Furthermore, their proper operation has been verified on the last two inspections. On the most recent inspection, a system for control, monitoring and transmission of information on both quality and quantity of the effluent flows of this system was detected in the Restoration Chamber. With regard to the works associated with the non-contacted water management system are mostly finalized, with approximately 25% still underway. We observe a degree of delay in the works on this latter system due to, among other things, an extreme weather event during the month of April prior to the latest inspection. [...][42]

[76] Mr. Nseir believes that there was significant pressure on Barrick to move along with the pre-stripping as quickly as possible, because once the ore body was reached, costs would be considered operational costs as opposed to capital costs. In other words, there was an intentional decision to begin pre-stripping, despite non conformity with the RCA, because of the pressing need to move to the operational phase and to reduce the construction or capital costs.

---

40 Pascua-Lama Project Monthly Progress Report for July 2011, Mullany Exhibit 57 (Petitioner's compendium, tab 17 – BPL00244386).

41 *Ibid.*, pp. 80-81.

42 DGA Technical Report, April 24, 2012, Exhibit 43 (Petitioner's compendium, tab 25 – BPL01800550).

[77] The early pre-stripping and the other violations to its environmental obligations led to a preliminary injunction being issued by the Copiapó Appeals Court on April 9, 2013, halting construction,[43] which Barrick immediately reported to the markets.[44] However, the stock price took a tumble, falling significantly from its highs earlier in the month.[45]

[78] Around the same time, the Superintendency of the Environment (**SMA**) issued charges citing Barrick's failure to respect certain of its environmental obligations. It is important to note that these charges followed two major problems with the WMS caused by higher than expected spring run-off in December 2012 and January 2013, which Barrick reported to the SMA.

[79] Following the issuance of these charges, Barrick responded by accepting some of them, and setting out the extensive corrective measures that it proposed.[46] It reported this in a press release dated June 28, 2013:

> The company has submitted a plan, subject to review by Chilean regulatory authorities, to construct the project's water management system in compliance with permit conditions for completion by the end of 2014, after which Barrick expects to complete remaining construction works in Chile, including pre-stripping. Under this scenario, ore from Chile is expected to be available for processing by mid-2016.[47]

[80] For Mr. Nseir, this new position vis-à-vis the authorities demonstrates that he has an arguable case that Barrick misrepresented the situation to the markets, as it contradicts the statement made a year earlier in relation to the WMS.[48]

[81] Mr. Nseir also takes issue with Barrick's affirmation that it could not foreseeably have known that the Chilean authorities would find it guilty of environmental violations, leading to the suspension of the project. This affirmation was supported by Barrick's expert, Mr. Rodrigo Guzmán (**Mr. Guzmán**), who Mr. Nseir states did not consider all of the internal documents prepared by Barrick's employees during the construction phase of the project.

---

43 Copiapó Appeals Court, April ninth, two thousand and thirteen (Respondents' documents compendium, tab 57 - BPL01803963).

44 Barrick's press release, April 10, 2013 (Respondents' documents compendium, tab 58 - BPL00233105).

45 Charts demonstrating variations in Barrick's stock price following corrective disclosures, Exhibit P-21A (Petitioner's compendium, tab 9).

46 CMN answer to SMA charges, April 2013, Westhoff Exhibit 24 (Petitioner's compendium, tab 14 – BPL01803101).

47 Barrick's press release, June 28, 2013, Exhibit P-4fff (Petitioner's compendium, tab 40).

48 July 26, 2012, press release, interim financial statements and MD&A for Q2 2012, Exhibit P-4VV (Petitioner's Compendium, tab 13).

[82] Mr. Nseir also points to what he believes to be contradictions between the report to the Board on the status of the project in February 2013 and the press release and market disclosure the next day. Among the issues reported to the Board, one sees:

> While significant progress has been achieved on finalizing the cost estimate and schedule, several priority issues have also been identified which could potentially impact the Project's regulatory approval to operate, specifically:
>
> • A portion of the water diversion system failed resulting in an increase in the flow of sediment downstream and mixing of non contact and contact water. The Project filed a self-declaration of non compliance with the Chilean Environmental Authorities, however, this was rejected. As a result, the project will now face regulatory sanctions which can include: fines, stop orders, suspension or cancellation of the Projects approval permits. An internal crisis team has been formed including a hydrology expert from Bechtel. This team under the leadership of Dante Vargas and Charlie Cappello is actively working to contain this issue while simultaneously developing short and long term remediation plans. This is a very high priority issue for the project and is being treated with the highest level of urgency.[49]

[83] Concerns were raised about the ability to restart pre-stripping.

[84] The filing of two constitutional rights actions, which could lead to the suspension of the project, was also communicated to the Board.

[85] The press release and market disclosure paints the picture somewhat differently. The disclosures in relation to the constitutional actions and the delay in pre-stripping are largely similar. However, the release does not contain any specific mention of a possible cancellation of the project. Rather, it uses the following words:

> [...] Restrictions may also be placed on the project due to the need to repair and improve certain aspects of the water management system in Chile.
>
> Pre-stripping is unlikely to recommence until matters related to dust and water management are resolved. To date, the suspension of pre-stripping has not altered our target of first production in the second half of 2014. However, the outcomes of the regulatory processes, and of constitutional rights protection actions, are uncertain. We will continue to assess the potential for impacts on the timing of first gold production.[50]

[86] For Mr. Nseir, Barrick has cherry picked the evidence that it is asking the Court to consider. He believes that the Court needs to take a more global approach. The purpose of disclosure is to allow investors to properly anticipate the kind of "train wreck"

---

[49] Pascua-Lama Board of Directors Update, February 13, 2013, Mullany Exhibit 104 (Petitioner's compendium, tab 23 – BPL00245208).

[50] February 14, 2013 press release, annual financial statements and MD&A for 2012, Exhibit P-4AAA (Petitioner's compendium, tab 24).

that occurred with the Pascua-Lama project. The misrepresentations of Barrick did not allow the investor to properly do that.

[87] Mr. Nseir affirms that non-compliance with environmental obligations was the most significant risk that the project faced. He posits that there is very credible evidence that Barrick always knew that it was running a risk that the project was not compliant and that it wasn't disclosed. He points to the statement from Mr. Sokalsky from July 2013:

> While we remain confident in the future of Pascua-Lama, we need to acknowledge that, as a company, we did not live up to our compliance obligations at the project, and we've seen just how costly this can be. The setbacks at Pascua-Lama have disappointed our stakeholders, including some of our host communities, and we are working hard to rebuild their trust. This will take time, but if we back up our words with action, I have no doubt we can earn their support.[51]

[88] Environmental non-compliance caused the end of the operations and it should have been disclosed. Indeed, Barrick's authorization to construct the mine was contingent on it following the environmental roadmap set out in the RCA. Without environmental compliance, Barrick would not be entitled to construct the mine and this is exactly what occurred.

[89] For Mr. Nseir, the misrepresentations of Barrick in respect of the three principal issues, premature pre-stripping, failure to respect the acid mine drainage levels in the water and glacier monitoring, were all material.

4.2 Mr. Nseir's Public corrections

[90] The public correction can take many forms and the announcement of the injunction in April 2013 was sufficient to be one.

[91] The stock fell again when Barrick announced the suspension of the project in October 2013, although the decline was much less drastic.[52] This announcement for Mr. Nseir was a further public correction.

4.3 His legal argument

[92] For Mr. Nseir, the syllogism is a simple one. Barrick made misleading representations relating to its respect of various environmental obligations from the

---

[51] July 2013 publication entitled "Pascua-Lam Update from President and CEO Jamie Sokalsky", Mullany Exhibit 122 (Petitioner's compendium, tab 11 – BPL01578511).

[52] Charts demonstrating variations in Barrick's stock price following corrective disclosures, Exhibit P-21A (Petitioner's compendium, tab 9).

beginning of the project's operations until April 2013, when the shares lost 30% in value and the activities were suspended.

[93] These misleading representations are both a violation of the QSA and of section 1457 C.C.Q. Barrick failed to behave as a reasonable individual. These violations give rise to damages and a valid cause of action under both the QSA and the class action provisions of the C.C.P. Mr. Nseir submits that he meets the threshold for the authorization of his action under both statutes.

[94] The evidence creates a presumption that the decline in the share price occurred as a result of the omissions and misrepresentations made by Barrick.

[95] Mr. Nseir adds that even if the action under the QSA is not authorized, a regular class action still should be.

[96] Moreover, for both an action under the QSA and one under section 1457 C.C.Q. to be authorized, he does not have to demonstrate that he relied on the misrepresentations when he purchased his shares. In this vein, he relies on the judgment of Justice Chatelain in *Chandler* c. *Volkswagen Aktiengesellschaft*.[53]

[97] Although Mr. Nseir only purchased shares on the secondary market, relying on *Bank of Montreal* v. *Marcotte*,[54] and *Goldman, Sachs & Co.* c. *Catucci*,[55] he believes that his action should be authorized as a primary market claim as well. The fault is the same and the facts are sufficiently similar to allow a primary claim under the QSA. If the questions for which authorization is sought will advance the claims of people who are in different situations, then the person seeking to advance those claims is entitled to do so on behalf of other people who would either benefit from or be bound by a judgment on the common issues.

[98] Mr. Nseir posits that the approach of the Quebec courts should differ to a degree from that taken by courts elsewhere, as there is no obligation here to adduce evidence by affidavit. The Court is not obliged to weigh all of the evidence at the authorization stage.

[99] He acknowledges that the test under the QSA has more teeth than the one required under C.C.P. Under the former, he must demonstrate that he has a reasonable possibility to win the case. If he does so, the action should be authorized.

[100] Finally, on the issue of prescription, Mr. Nseir takes the position that only those documents issued prior to April 30, 2011 would fall outside the prescription period. He relies on article 2098 of the C.C.Q. which, in class action matters, suspends prescription at the time the application for authorization is deposited.

---

53 2018 QCCS 2270, leave to appeal to C.A. refused, 2018 QCCA 1347.
54 2014 SCC 55.
55 2017 QCCA 1890.

5. BARRICK'S POSITION

5.1 Barrick's Characterization of the Facts

[101] Barrick's position can be essentially resumed by its affirmation that there was never a failure to advise the markets of the environmental issues facing the project. Advice on issues was provided as soon as Barrick became aware of them.

[102] Barrick also calls into question whether or not the elements which Mr. Nseir relies on in support of his claim are material facts, as required by the QSA.

[103] It acknowledges that Mr. Nseir alleges three essential faults committed by Barrick to support his claim. The first of these is that Barrick began pre-stripping prematurely and without the proper authorization. The second is that Barrick violated its obligations with respect to water management. Mr. Nseir's third element is that Barrick violated its obligations with respect to protection of glaciers and glaciarettes in the vicinity of the project.

[104] Contrary to Mr. Nseir, who affirms that Barrick represented to investors that it was in full compliance with Chilean environmental laws, Barrick takes the position that it never so assured investors. Rather, Barrick affirms that it advised investors that it could not confirm full compliance with those laws. It specifically and repeatedly warned investors about the potential risks and consequences associated with non-compliance and told investors that those consequences could well include suspensions, fines, injunctions and the revocation of mining and environmental permits. Those warnings were given to investors on dozens of occasions, from the time that the Pascua-Lama project was announced in May of 2009 until the end of 2013.

[105] Typical of this type of warning would be the cautionary statement on forward-looking information contained in the press release announcing Barrick's decision to go forward with the Pascua-Lama project in May 2009:

> Certain information contained in this Press Release, including any information as to our strategy, plans or future financial or operating performance and other statements that express management's expectations or estimates of future performance, constitute "forward looking statements". Such forward-looking statements include, without limitation expectations regarding the start-up time, design, mine life, production, reserves, total cash costs and exploration potential of the Pascua-Lama project. All statements, other than statements of historical fact, are forward-looking statements. The words "believe", "expect", "will", "anticipate", "contemplate", "target", "plan", "continue", "budget", "may", "intend", "estimate" and similar expressions identify forward-looking statements. Forward-looking statements are necessarily based upon a number of estimates and assumptions that, while considered reasonable by management, are inherently subject to significant business, economic and competitive uncertainties and contingencies. The Company cautions the reader that such forward-looking statements involve known and unknown risks, uncertainties and other factors that

> may cause the actual financial results, performance or achievements of Barrick to be materially different from the Company's estimated future results, performance or achievements expressed or implied by those forward-looking statements and the forward-looking statements are not guarantees of future performance. [...] [56]

[106] In addition, Barrick faults Mr. Nseir for working backwards from the date of its decision to suspend the project. It considers his whole argument to be infected by a hindsight approach, whereas to succeed he needs to demonstrate that Barrick was aware of the alleged material misrepresentations at the time they are alleged to have been made. Barrick says that it cannot be faulted for not disclosing something it was not aware of.

[107] Barrick specifically points to the affidavit of Mr. Dushnisky, where he indicates that until the issue with the WMS in December 2012, he was not aware "that potential non-compliance incidents of significance had occurred at Pascua-Lama."[57]

[108] Barrick points out that at all relevant times, it had a disclosure committee which was charged with evaluating facts which were material and ensuring that they were disclosed to the public, as required.[58]

[109] Typical of Barrick's reporting is the wording found in the December 31, 2008 Year End Annual Information Form, which reads as follows:

> ***Environmental, health and safety regulations; permits***
>
> Barrick's mining and processing operations and exploration activities are subject to extensive laws and regulations governing the protection of the environment, waste disposal, worker safety, mine development and protection of endangered and other special status species. In addition, Barrick's ability to successfully obtain key permits and approvals to explore for, develop and operate mines and to operate in communities around the world will likely depend on its ability to develop, operate and close mines in a manner that is consistent with the creation of social and economic benefits in the surrounding communities. Barrick's ability to obtain permits and approvals and to successfully operate in particular communities may be adversely impacted by real or perceived detrimental events associated with Barrick's activities or those of other mining companies affecting the environment, human health and safety or the surrounding communities. Delays in obtaining or failure to obtain government permits and approvals may adversely affect Barrick's operations, including its ability to explore or develop properties, commence production or continue operations. Barrick has made, and expects to make in the future, significant expenditures to comply with such laws and regulations and, to the extent possible, create social and economic benefit in

---

56 Barrick's press release, May 7, 2009, Exhibit P-4A (Respondents' documents compendium, tab 4 – TJL0000001.006).

57 Affidavit of Mr. Dushnisky, par 39 (Respondents' evidence compendium, tab 3).

58 *Ibid.*, par. 18 and 19.

> the surrounding communities. Future changes in applicable laws, regulations and permits or changes in their enforcement or regulatory interpretation could have an adverse impact on Barrick's financial condition or results of operations.
>
> Failure to comply with applicable environmental health and safety laws and regulations may result in injunctions, fines, suspension or revocation of permits and other penalties. There can be no assurance that Barrick has been or will at all times be in full compliance with all such laws and regulations and with its environmental and health and safety permits or that Barrick has all required permits. The costs and delays associated with compliance with these laws, regulations and permits could stop Barrick from proceeding with the development of a project or the operation or further development of a mine or increase the costs of development or production and may materially adversely affect Barrick's business, results of operations or financial condition. [...][59]

[110] Quarterly reports and other documents issued by Barrick would continually refer investors back to this qualification of its risks.

[111] Barrick takes issue with the class period proposed by Mr. Nseir. It believes that the May 2009 press release announcing Barrick's decision to begin the Pascua-Lama project[60] cannot be taken as a starting point for the action, as the statement made at that time in relation to environmental compliance was fully accurate and stated that environmental compliance measures were being implemented. In the event that the Court were to authorize the action, Barrick posits that the starting point can only be in May 2012, associated with Barrick's decision to begin pre-stripping.

[112] More specifically, in relation to the allegation that pre-stripping began without the proper authorization, Barrick takes the position that it was justified in believing that it was entitled to begin pre-stripping when it did so in May of 2012. It is only when the new environmental regulator, the SMA, became active in the file around March 2013 that this decision to begin pre-stripping was called into question.

[113] Central to this aspect of the dispute is whether or not the WMS was operational at the time pre-stripping began. The WMS was necessary to prevent acid rock drainage (ARD) from contaminating the natural water supply.

[114] Barrick takes the position that it was operational, despite the fact that some components of the WMS had not been constructed, in particular, the reverse osmosis plant and the forced evaporation system, at the time pre-stripping commenced. However, Barrick believes that they were not required for pre-stripping to begin.

---

59 Annual information Form for the year ended December 31, 2008, p. 82-83 (Respondents' documents compendium, tab 3 – BPL00233051).

60 Barrick's press release, May 7, 2009, Exhibit P-4A (Respondents' documents compendium, tab 4 – TJL0000001.006).

[115] The acid drainage plant had been constructed and was in a state to be operated manually in early May 2012.[61]

[116] As to the reverse osmosis plant, the level of sulfides in the water that it was designed to treat would not be present during the pre-stripping process, but only later on during the project.

[117] With respect to the forced evaporation system, no evidence was really led in relation to the fact that it had not been constructed when pre-stripping began.

[118] In addition on this issue, the holding ponds that had been constructed would have been sufficient to hold any contact water generated during the initial stages of pre-stripping for a sufficient period of time to allow the reverse osmosis plant to be constructed.[62]

[119] Barrick also refers to the RCA, which only refers to the reverse osmosis plant and the forced evaporation system as being required during the operations phase of the project.[63]

[120] Moreover, given the short timeframe needed to build the reverse osmosis plant, it was not foreseen that the environmental authority would halt the project. The costs of building the reverse osmosis plant, $17.4 million and the forced evaporation system, $11.7 million were also relatively insignificant given the cost of the entire project.[64]

[121] Referring to the RCA, Barrick also points out that pre-stripping was considered to be part of the construction phase of the project, an important element with respect to determining whether or not the WMS was sufficiently operational to allow pre-stripping to begin. It relies on the passage of the RCA referred to earlier[65] to conclude that the WMS only needed to be operational as opposed to fully constructed in order for pre-stripping to begin.

[122] Both its internal environmental expert, Mr. Westhoff and the outside consultant, Mr. Proust, were of the opinion that the WMS was sufficiently operational to allow pre-stripping to begin.[66]

[123] Mr. Proust adds that the reverse osmosis plant and the forced evaporation system were only required to be completed for the operations phase.[67]

---

61 Memorandum of May 8, 2012 (Respondents' documents compendium, tab 32 - BPL00245429).
62 Affidavit of Mr. Westhoff, par. 180 (Respondents' evidence compendium, tab 18 – BPL01801405).
63 Exempt Resolution No. 24/2006, section 4.3.2 (Respondents' documents compendium, tab 2, BPL01799927).
64 Affidavit of Mr. Mullany, par. 355 and 356 (Respondents' evidence compendium, tab 10 – BPL01801403).
65 *Supra* par. 62 of the present judgment.
66 *Supra* note 62, par. 121; Affidavit of Mr. Proust (Respondents' evidence compendium, tab 15 - BPL01801380).

[124] As for Mr. Guzmán, he was of the view that the absence of the reverse osmosis plant and the forced evaporation system would not give rise to a suspension of the project; a fine would have been the likely sanction.[68]

[125] Barrick posits that the absence of these installations did not pose a material risk to the project.

[126] It also believed that the DGA technical document, dated April 24, 2012[69] gave rise to the conclusion that pre-stripping could begin. On April 26, 2012, the Pascua-Lama steering committee, made up of senior Barrick executives, received the report of the DGA inspection and a confirmation that pre-stripping could begin.[70]

[127] Other employees of Barrick, including Mr. Kettles, Mr. Potter, Mr. Luciano, Mr. Mullany and Mr. Dushnisky were all of the view that the WMS was sufficiently operational in order to allow pre-stripping to begin and ensure that the contact water would be properly treated before going back into the a Estrecho River. In his e-mail of May 8, 2012,[71] Mr. Dushnisky offers congratulations on the beginning of pre-stripping, underlining that he is glad that it was done with full DGA support. For Barrick, the uptake is that its upper management believed that pre-stripping had been properly authorized by the Chilean environmental authorities.

[128] It was only 10 or 11 months later, when the SMA assumed its role that this belief was called into question. Barrick affirms that Mr. Nseir cannot use this subsequent event to question Barrick's decision to begin pre-stripping in May 2012.

[129] Barrick also points out that pre-stripping was not suspended as a result of any order of the Chilean authorities. In fact, during the few months that pre-stripping did take place, the site was visited by Chilean regulators and there was no order to cease pre-stripping. The end of pre-stripping occurred rather due to a decision taken internally on October 27, 2012. Fine dust, generated by the pre-stripping, was believed to pose a possible health risk to the workers, such that the decision to cease pre-stripping was taken. Barrick issued a press release in relation to this decision on November 11, 2012.[72] Given the subsequent events, pre-stripping was never recommenced.

---

67 Examination of Mr. Proust, March 29, 2019, question 22 (Respondents' evidence compendium, tab 16).

68 Affidavit of Mr. Guzmán, par. 178 (Respondents' evidence compendium, tab 4 – BPL01801398).

69 *Supra* note 42, par. 75 of the present judgment.

70 Minutes of Pascua-Lama Steering Committee Meeting (Respondents' documents compendium, tab 29 – BPL00245414).

71 Email from Mr. Dushnisky to Jose Urrutia and al., dated May 8, 2012 (Respondents' documents compendium, tab 33 – BPL01200796).

72 Construction schedule at Pascua-Lama not impacted by pre-stripping stoppage (Respondents' documents compendium, tab 41 – BPL00233609).

[130] Barrick also takes the position that there was timely disclosure of the litigation instituted in relation to allegedly premature pre-stripping. The first action was instituted in September 2012 by an indigenous group. Another was instituted shortly thereafter.

[131] The reporting took place in Barrick's Third Quarter Report for 2012, dated November 1, 2012:

> Pascua Lama Protection Actions
>
> On September 28, 2012, a constitutional rights protection action was filed in the Court of Appeals of Copiapó, Chile by representatives of four Diaguita indigenous communities against Compania Minera Nevada ("CMN") Barrick's Chilean subsidiary that holds the Chilean portion of the Pascua Lama Project (the "Project"), and the Environmental Evaluation Commission ("EEC") of the III Region of Atacama, Chile, the regulatory body with oversight authority over the Project.
>
> [...]
>
> The plaintiffs in the actions allege that the construction of the Project affects their constitutional rights to life and to live in an environment free of contamination. The actions allege certain non-compliances with the Project´s environmental approval in Chile, including the carrying out of pre-stripping activities allegedly prior to full completion and operation of the acid rock drainage water management and treatment system and alleged impacts on the Toro 1, Toro 2 and Esperanza glaciers.
>
> [...]
>
> The relief sought in the actions is the suspension of the construction of the Project in Chile until all environmental obligations are fulfilled. [...][73]
>
> [The Court's underlining]

[132] The approach to its enforcement powers by the SMA after December 2012, according to Barrick, caught everyone by surprise. It was not foreseeable that the SMA would take an approach which proved to be a markedly different from its predecessors in environmental compliance. It points out that Mr. Westhoff did not believe that the arrival of the SMA would have an impact on the project, in part because he believed that the project was environmentally compliant.[74]

[133] Barrick also underlines that the introduction of the legislation enabling the SMA also provided for the possibility of self-reporting environmental contraventions. This is ultimately what Barrick did following the mudslides in December 2012 and January

---

[73] Third Quarter Report, 2012-11-01 (Respondents' document compendium, tab 40 – TJL0000001.0055).

[74] *Supra* note 62, par 101.

2013, seemingly to its detriment, despite its hope that self-reporting these incidents would allow it to develop a constructive relationship with the SMA. However, it argues that the reaction of the SMA for following the self-reporting could not have been anticipated.

[134] Although the self-report was rejected in late January 2013, Mr. Dushnisky did not consider it material at the time, as it could not have been anticipated that the SMA would sanction the project by suspending its operations, as such a sanction had never been imposed in Chile.[75] This notwithstanding, in its Fourth Quarter and Year-End Report for 2012, Barrick referred to the possibility of restrictions on the project and the challenges with pre-stripping.[76]

[135] In its Annual Information Form for the year ending December 31, 2012, dated March 28, 2013, Barrick provided similar guidance, including the following statement:

> In March 2013, the environmental authority in Chile issued a resolution alleging certain non-compliances related to the acid rock drainage water management system in Chile. CMN will review and evaluate the resolution once it is formally notified of the same and will respond to the allegations as required, including by presenting a plan to bring the system into compliance with the project's environmental permit.[77]

[136] Barrick also posits that this resolution should not be taken as a material change to the Pascua-Lama operation, even if its disclosure was made immediately.

[137] There was then an intervening event. On April 9, 2013, the Copiapó Appeals Court issued an injunction enjoining further work on the project until the constitutional rights actions had been heard. The injunction was issued *ex parte*. That the project would be suspended as a result of this proceeding, let alone on an *ex parte* basis, could not have reasonably been anticipated says Barrick, particularly as the interim injunction had initially been denied in October 2012.

[138] A press release was issued the following day, advising the public of the injunction.[78]

[139] Another press release was issued advising the public of Barrick's decision to suspend construction of the Chilean part of the Pascua-Lama project.[79] This was

---

75 Affidavit of Mr. Dushnisky, par. 61 (Respondents' evidence compendium, tab 3 - BPL01801375).
76 *Supra* note 53.
77 Annual Information Form, 2013-03-28 (Respondents' documents compendium, tab 56 – TJL0000001.0060).
78 Pascua-Lama preliminary injunction in Chile, major construction works in Argentina unaffected, press release dated April 10, 2013 (Respondents' documents compendium, tab 58 – BPL00233105).
79 Barrick to suspend construction on Chilean side of Pascua-Lama, press release dated April 10, 2013 (Respondents' documents compendium, tab 59 - BPL00233106).

followed up by the First Quarter Report, dated April 24, 2013, which included the following wording:

> [...] The company will continue to evaluate all alternatives, in light of the uncertainties associated with the legal and regulatory actions, and the current commodity price environment, including the possibility of suspending the project.[80]

[140] Faced with the decision of the Copiapó Appeals Court and the resolution of the SMA, Barrick states that it decided to acknowledge the charges against it in the hope of fostering a working relationship with the SMA and getting the project back on track. It did so on April 29, 2013,[81] but disputes the contention of Mr. Nseir that this was equivalent to pleading guilty to the charges.

[141] A sanctioning decision on the part of the SMA followed on May 24, 2013.[82] First, a fine was imposed equivalent to approximately US$16 million measured in annual tax units. That fine was then reduced to US$12 million because it was paid quickly by CMN. Secondly, a suspension of construction in Chile was ordered until the WMS had been constructed in accordance with the RCA to the satisfaction of the SMA.

[142] The decision was disclosed immediately through a press release[83] and a Material Change Report was issued on June 3, 2013.[84]

[143] Barrick also posits that the mudslide of January 2013 gave rise to another important fact which could not have been foreseen. The WMS in which Barrick had invested so heavily was plagued by a design flaw, in that it could not adequately handle the spring runoff if there was more volume than anticipated. Ultimately, for pre-stripping to resume a significant redesign to the WMS was required. An additional concern was whether such a redesign required Barrick to engage in a new environmental assessment.

[144] These concerns were announced to the market by way of a press release, dated June 28, 2013.[85] The same release also announced that the company was concerned about materially lower metal prices and there would likely be a significant after tax impairment charge of $4.5 – 5.5 billion in the Second Quarter of the Pascua-Lama

---

80 Barrick's First Quarter 2013 Report dated April 24, 2013 (Respondents' documents compendium, tab 60 - BPL00249011).

81 CMN acknowledges charges imposed by SMA (Respondents' documents compendium, tab 61 - BPL01803101).

82 Exempt Resolution 477, English, dated May 24, 2013 (Respondents' documents compendium, tab 62 - BPL00235916).

83 Press release - Barrick to assess implications of SMA resolution dated May 24, 2013 (Respondents' documents compendium, tab 63 - BPL00232423).

84 Form 51-102F3 — Material Change Report - Section 7.1 of National Instrument 51-102 — Continuous Disclosure Obligations (Respondents' documents compendium, tab 64 - BPL00232425).

85 Press release - Barrick provides updates on Pascua-Lama project dated June 28, 2013 (Respondents' documents compendium, tab 66 - BPL00247478).

project. For Barrick, coupled with the April announcement, this was an indication that the suspension of the entire project was being contemplated and that investors were well advised to be prudent.

[145] This release was followed up by a Material Change Report on July 5, 2013.[86]

[146] But that was not the end of the story in relation to the WMS, as the Copiapó Appeals Court issued its ruling on July 15, 2013, requiring CMN to complete the Water Management System at Pascua-Lama to the satisfaction of the SMA before resuming construction activities in Chile. Barrick also issued a press release advising of this decision[87] and also did so in its Second Quarter Report. This report is also significant in that it again alludes to the possibility of a full suspension of the project:

> [...] A significant decrease in gold and silver prices from their current levels, a significant increase in the total capital cost estimate or any other change in circumstances that materially reduce the project's economics could cause us to reassess the decision to proceed on this re-sequenced construction schedule and evaluate other alternatives, including the possibility of suspending the project. [...][88]

[147] Then in late September of 2013, the Supreme Court of Chile dismissed an appeal that Barrick had brought from the decision of the Copiapó Appeals Court in that environmental rights protection action. This decision was immediately disclosed by Barrick.[89]

[148] Barrick also refutes the other allegations made by Mr. Nseir with respect to non-compliance with its obligations in relation to the protection of glaciers. It argues that it had always complied with its monitoring obligations, and that if there were issues in respect of same, they were always disclosed, even if they were not material.

[149] Barrick's compliance with its monitoring obligations is, however, somewhat nuanced, as Mr. Mullany did admit that the monitoring of the glaciers required by the initial RCA was not possible given the dangers that it presented for those charged with the task. That is why a new plan was submitted to the DGA.

[150] However, Barrick points out that the issues with the glaciers were never given prominence in the executive summaries of the monthly reports submitted to

---

86 Form 51-102F3 — Material Change Report — Section 7.1 of National Instrument 51-102 — Continuous Disclosure Obligations (Respondents' documents compendium, tab 67 - BPL00232429).

87 Press release - Chilean court issues ruling on Pascua-Lama dated July 15, 2013 (Respondents' documents compendium, tab 68 - BPL00232431).

88 Barrick Reports Second Quarter 2013 Results (Respondents' documents compendium, tab 69 - BPL00249012).

89 Chilean Supreme Court issues ruling on Pascua-Lama, press release dated September 26, 2013 (Respondents' documents compendium, tab 70 - BPL00232441).

management. One can, therefore, draw the conclusion that the issues faced in respect of monitoring were not perceived as overly significant to the progress of the project.

[151] Barrick also disputes Mr. Nseir's contention that the issues with glacier monitoring were not reported to the market. It refers to the Annual Information Form for the year ending December 31, 2012,[90] relied on by Mr. Nseir, where Barrick stated the following:

> In May and August of 2012, the Chilean environmental authority initiated two regulatory sanction processes against CMN alleging certain non-compliances with the environmental approval for the Pascua Lama project. [...] The second matter related to the alleged failure to comply with dust control mitigation measures and certain failures in the implementation of the glacier monitoring plan and resulted in a fine of approximately $42,000. CMN intends to appeal both of these fines.

[152] Referring to Mr. Westhoff's affidavit,[91] Barrick notes that there were two sanctions in relation to glacier monitoring, both resulting in relatively minor fines of approximately US$16,000 and US$38,000 following appeal.

[153] Barrick also notes that the decision of the Copiapó Appeals Court rendered in July 2013 did not sanction the project in relation to glaciers, but rather in relation to the WMS.

[154] The orders read as follows:

> **1.-** Continue to suspend construction of the mining project in question until all measures included in the RCA for the adequate operation of the water management system have been adopted, as well as the urgent and temporary measures ordered by the Environmental Superintendency, subject to verification by the aforementioned environmental authority.
>
> [...]
>
> **3.-** To submit all information before the Environmental Superintendency related to the plan for tracking and monitoring glaciers and glaciarettes so that the latter may oversee and monitor thorough compliance with the environmental law, without prejudice to the corresponding administrative proceedings.[92]

[155] Barrick is also of the view that it made no material misrepresention in respect of its application of the early warning levels relating to water quality and the presence of mineral contaminants in the water. It points out that Mr. Nseir's burden is to show that Barrick acted in violation of its obligations, but also that it knowingly kept that information from the market.

---

90 March 28, 2013, Annual Information Form, Exhibit P4-CCC (Petitioner's compendium, tab 5).
91 *Supra* note 62, par. 117.
92 *Supra* note 13.

[156] Barrick relies on Mr. Westhoff's affidavit.[93] Essentially, the issue faced by the project was the natural deterioration of the water quality between the time of the RCA and the beginning of the construction phase. Barrick had determined that the deterioration was significant enough that even prior to the beginning of construction it would have been obliged to activate the water quality alert response plan. It brought the situation to the attention of the relevant environmental regulators, seeking a change of the levels at which the water quality alert response plan had to be activated.

[157] In December 2011, CMN for Barrick filed a "Screening Inquiry" ("consulta de pertinencia") with the SEA,[94] seeking a determination as to whether the change to the baseline required it to submit a revised EIA. In particular, CMN requested an update of the water quality baseline to reflect quality levels as of April 2012, and when CMN would become responsible for ensuring that water quality did not contain contaminants in excess of the baseline.

[158] According to Mr. Westhoff, the DGA agreed with Barrick's approach. Moreover, the SEA agreed that the proposed approach was not a significant change and did not require the submission of a new EIA or an amendment to the RCA.[95] Barrick does not contest that this opinion received from the SEA did not in and of itself modify the RCA.

[159] Apparently, the SMA was not advised of this opinion received from the SEA, as it issued two charges nos. 23.8 and 23.9 in relation to the Water Quality Alert System:

> Charge 23.8: The use of an unauthorized calculation methodology for determining water quality alert levels based on more permissive levels than those indicated in RCA No. 24/2006.
>
> Charge 23.9: Failing to activate the Water Quality Response Plan in January 2013, after verifying emergency levels, pursuant to water quality alert levels established in RCA No. 24/2006.[96]

[160] Barrick's environmental expert, Mr. Guzmán was surprised by these charges, as in the normal course the SMA should have followed the SEA advisory opinion:

> 184. Based on this decision, CMN adjusted the water quality alert levels. In formulating its charges, the SMA ignored the decision of the SEA and determined that the Project was in breach of RCA No. 24/2006 because of the use of unapproved water quality levels. Applying the original water quality standards set out in the RCA No. 24/2006, the SMA determined that reported water qualities warranted the activation of the Water Quality Response Plan and that CMN had

---

93 *Supra* note 62, see in particular paragraph 183.

94 CMN letter to SEA PL0162/2011 of December 14, 2011, English (Respondents' documents compendium, tab 18 -BPL01803278).

95 SEA Final Order Carta No. 120941 of June 7, 2012, English (Respondents' documents compendium, tab 35 - BPL01801562).

96 *Supra* note 68, par. 181.

> failed to do so. In my view it was improper (and, in my experience, unprecedented) for the SMA to ignore the SEA's decision.[97]

[161] As for Mr. Westhoff, he believed that Barrick had been authorized to use the new alert levels, based on the SEA advisory opinion.[98]

[162] Barrick concludes that it could not have anticipated that the SMA would call into question its application of the water quality response plan based on new alert levels.

[163] The final chapter came in October 2013, when the board of directors of Barrick decided to suspend the project, save for care and maintenance from an environmental perspective. This decision was set out in the company's Third Quarter Report dated October 31, 2013.[99] On November 5, 2013, Barrick also issued a Material Change Report advising the markets of this decision.[100]

5.2 Barrick's Legal Arguments

[164] Barrick's position on the scope of the Court's role in analysing the evidence is that the Court must consider all of the evidence. It posits that there is no difference between the approach that the courts should take in Quebec under the QSA and the one that the Ontario Courts have taken on the Ontario *Securities Act*. Barrick believes that investors across the country should have the assurance that wherever a class action is instituted, the Court's approach to the analysis of the evidence is the same.

[165] Beginning first with section 225.8 of the QSA, Barrick notes the importance of two moments in time in a securities action of this nature, the first being the moment when the issuer issues a document containing a misrepresentation, and the second being the date of the public correction of the misrepresentation. A plaintiff must have acquired the shares between those two moments in time. It adds that these dates must be identified with precision and questions whether or not Mr. Nseir has so identified them.

[166] It further points out the necessity of distinguishing between a material fact and a material change. Changes in material facts must be reported on a periodic basis, whereas material changes in business operations must be reported on a timely basis, as soon as they occur.

[167] Barrick considers this difference to be capital in the present matter, as it posits that the non-disclosure that Mr. Nseir complains of is essentially in relation to material facts and not in relation to material changes in the business.

---

97 *Ibid.*, par. 184.

98 Transcript of the cross-examination of Mr. Westhoff, March 28, 2019, questions 226 and 231 (Respondents' evidence compendium, tab 19).

99 Barrick's Third Quarter Report 2013 (Respondents' documents compendium, tab 72 - BPL00249013).

100 Exhibit 275 to the affidavit of Iulia Fetila Fasie – BPL00232456.

[168] It also underlines the importance of the knowledge requirement set out in section 225.13 of the QSA, which also highlights the importance of determining whether the misrepresentation took place in a core document or a non-core document.

[169] Barrick also affirms that Mr. Nseir has not identified the alleged material misrepresentations with sufficient precision, referring in particular to paragraph 29 of his plan of argument and the 15 documents referred to therein, which allegedly contain the misrepresentations. Moreover, 7 of those documents relate to the period prior to April 30, 2011 and cannot be used to support Mr. Nseir's claim, given the applicable prescription period.

[170] Subsidiarly, Barrick argues that the applicable prescription period actually runs from August 15, 2012. If so, there would only be three documents that contained alleged misrepresentations. This argument is essentially based on the fact that prescription would not be interrupted until such time as the action was authorized, based on the drafting of section 235 of the QSA at the time of the production of the authorization application. The August 15, 2012 date is in fact an artificial one as it essentially results from the agreement between the parties that the petitioner should not be prejudiced by a carriage dispute that had occurred in Ontario.

[171] It adds that Schedule A, provided by Mr. Nseir, constitutes a demonstration of the lack of precision in his identification of the alleged misrepresentations.

[172] In addition, Barrick takes the position that if there were misstatements, they were not material particularly given Barrick's market capitalisation. It refers to the expert report of Mr. Bradley A. Heys.[101]

[173] Mr. Nseir has the onus of proving that the alleged misrepresentations were material. Barrick strongly contests Mr. Nseir's affirmation that materiality is presumed.

[174] It argues that a decline in the share price is not in and of itself evidence of materiality.

[175] Barrick also raises an issue around the description of the class, which refers to "securities", whereas Mr. Nseir only purchased common stock. It states that even if he is somehow found to have met his burden with respect to the materiality of the matters at issue in relation to the common stock of Barrick, he certainly has not done so in relation to any debt or other securities that were traded on the secondary market.

[176] Public correction is also an event that must be identified with precision, as the time it occurs will determine the class period. Barrick refers the Court to *Paniccia v. MDC Partners Inc.* where Justice Perrell noted its importance:

---

[101] Expert report of Bradley A. Heys (Respondents' evidence compendium, tab 6 - BPL01801376/001).

> [64] To plead the statutory causes of action, the plaintiff should: (a) identify the inculpatory statement or omission and when it was made or ought to have been made; (b) specify the falseness of the inculpatory statement; and (c) identify the public correction and when it was made.
>
> [65] The specification of the public correction is important because it determines the class period for the purposes of determining class membership and it is a factor in the calculation of damages under Part XXIII.1 of the Ontario *Securities Act*. The phrase "publicly corrected" is not defined in the Ontario *Securities Act*, and it is taken from economic theory about how to measure damages for misrepresentations that affect the value of securities trading in the primary or secondary market. A key identifier of a public correction is that it can be shown to have a statistically significant impact on market prices.[102]
>
> [References omitted]

[177] It argues that Mr. Nseir has failed to identify the public correction with precision.

[178] Barrick also takes the view that there is no reasonable possibility that the claim will not be defeated by the statutory defence. It raises the reasonable investigation defence and the forward-looking information defence, which are found at sections 225.17 and 225.18 of the QSA. Section 225.22 is also relevant.

[179] The civil fault alleged over and above the QSA violations also poses problems for Barrick as it argues that the civil fault alleged is no more than the alleged breach of the secondary market provisions of the QSA. Therefore, a class action cannot be authorized if the claim under the QSA is not, as for the class action to stand there would have to be an independent civil fault.

[180] No action would lie under section 1457 C.C.Q., unless the petitioner was able to demonstrate that he relied on the material misinformation in making his purchase of the shares.

[181] Barrick considers that the fraud on the market argument, often adopted in the United States, does not apply in the Canadian context. In other words, there is no presumption that Canadian investors relied on a misrepresentation in making their purchase of the securities.

[182] As for the primary market claim raised by Mr. Nseir, Barrick's position is that he has no independent right of action and therefore that this element of his claim should fail. It affirms that the primary market claim is a completely different cause of action from the secondary market claim and, therefore, the principles of *Marcotte*[103] do not apply.

---

[102] 2018 ONSC 3470.
[103] *Supra* note 54.

6. ANALYSIS

6.1 The Scope of the Analysis

[183] There was a great deal of debate about the degree to which the Court must review the evidence at this stage of the proceedings.

[184] Barrick takes the position that the Court must look at all of the evidence. Mr. Nseir's position is more nuanced.

[185] The starting point to this issue must be the presumed agreement between the parties, concluded while Justice Collier had management of the matter. Both agreed that no leave was required to produce evidence into the record in respect of the QSA action. This is indeed the state of the law at this juncture. However, in the Court's view, that does not fully resolve the issue, as the real question is: notwithstanding the reams of evidence submitted, in a Quebec matter, what must the Court do with it?

[186] Clearly, the production of evidence is different in a claim founded under the QSA than in one based solely on the class action provisions of the C.C.P.

[187] First and foremost, the Court must consider the Supreme Court decision in *Theratechnologies inc.* v. *121851 Canada inc.*, where Justice Abella characterized the role of the Court in the following way:

> [38] In my view, as Belobaba J. suggested in Ironworkers, the threshold should be more than a "speed bump" (para. 39), and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.
>
> [39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient

> evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.[104]

[188] The Quebec Court of Appeal stated the following in *Amaya inc.* c. *Derome*:

> [109] I note as well the motion judge's concern that, without document disclosure, plaintiffs will be unfairly placed when seeking to adduce "credible evidence" required of them in the effort to meet the standard of the screening mechanism. It is true, as Abella, J. wrote, that summary adjudication pursuant to section 225.4 involves a "reasoned consideration of the evidence". But this does not, in itself, justify forcing the defendant issuer to disclose documents. In keeping with Theratechnologies, a motion judge should weigh the evidence proffered by the plaintiff and, if the defendant has chosen to bring evidence as well, that too should be scrutinized in the summary proceedings envisaged by the legislature. Indeed in *Mask* v. *Silvercorp*, decided after both *Theratechnologies* and *Green*, *Strathy*, C.J.O. decided that the "reasonable possibility" leg of the leave test requires scrutiny of merits of the action "based on all the evidence proffered by the parties". That said, the injunction that the evidence from both sides be weighed at this stage, and the burden that a plaintiff faces to bring credible evidence in support of his or her request for leave, does not in itself justify document discovery.[105]
>
> [References omitted]

[189] And so how have the Ontario Courts looked at the analysis of the evidence that the Court should undertake in these matters? The case of *Mask* v *Silvercorp Metals Inc.*, is typical of their position. Therein, Justice Belobaba stated the following:

> [38] I take the same approach here. Given the decisions in *Green* and *Theratechnologies*, the question for me, as I see it, is this: after considering all of the evidence presented by the parties, does any part of the plaintiffs' case have a reasonable or realistic chance of success at trial? Or is the plaintiffs' case so weak or has it been so successfully rebutted by the defendants that is has no reasonable possibility of success?[106]

[190] The Ontario Court of Appeal agreed with the trial judge.

> [41] I do not accept the appellant's submission that scrutiny of the evidence on a leave application should be so limited. In my view, the "reasonable possibility" requirement of the leave test requires scrutiny of the merits of the action based on all the evidence proffered by the parties. Far from undermining the objective of the legislation, such scrutiny of the entire body of evidence is necessary to give effect to the purpose of the screening mechanism.
>
> [...]

---

104 *Supra* note 8.
105 2018 QCCA 120.
106 2015 ONSC 5348.

> [45] The judge was not limited to a consideration of the plaintiff's evidence. He was required to consider the evidence of both parties, keeping in mind the relatively low merits-based threshold, and the limitations of the record before him. He was entitled, indeed required, to undertake a critical evaluation of all the evidence and this necessarily required some weighing of the evidence, drawing of appropriate inferences and the finding of facts established by the record: see *Theratechnologies* at paras. 38-39; *Kinross* at paras. 52, 54-55, 59.[107]

[191] The Court agrees with Justice Chatelain in *Catucci* c. *Valeant Pharmaceuticals International Inc.*[108] that some reflection on the scope of the review of the evidence that should be undertaken at the authorization stage may well be in order. However, with respect, the Court believes that the need for reflection does not principally flow from the differences between Ontario and Quebec laws, other than the codified recognition in Quebec that the approach of the parties to litigation must be proportional. Rather, it is born of the very nature of the proceeding at the authorization stage. Should there be some limitations placed on the amount of evidence that the parties can produce, bearing in mind the legislative objective in the QSA of a robust deterrent screening mechanism? Is allowing essentially unlimited evidentiary production an appropriate use of the Court's resources at the authorization stage?

[192] That said, it is not for the Court to answer these questions in the present matter. As Justice Chatelain did in *Valeant*, the Court must make a reasoned consideration of the evidence proffered by the parties, but it is up to them to underline to the Court the evidence that they principally rely on in support of their respective positions and the reasoned consideration that the Court undertakes will largely be of this evidence.

6.2 Prescription

[193] The issue of prescription is an important one, as it will determine which allegedly misleading statements the Court will have to consider.

[194] As stated above, the parties agree that no claim exists in relation to statements made prior to April 30, 2011. This flows from section 235 of the QSA as it reads at the time the authorization application was produced:

> **235.** Any action for damages under this title is prescribed by the lapse of three years from knowledge of the facts giving rise to the action, except on proof that tardy knowledge is imputable to the negligence of the plaintiff.
>
> However, in the case of an action under Division II of Chapter II, the plaintiff is deemed to have knowledge of the facts as of the date on which the document containing the misrepresentation was first released, the oral public statement containing the misrepresentation was made or the material change should have been disclosed.

---

[107] *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641.
[108] 2017 QCCS 3870, par. 163.

[195] However, Barrick takes the view that any statements made prior to August 15, 2012 are also prescribed as discussed above, referring to the principal set out by the Supreme Court of Canada in *Canadian Imperial Bank of Commerce* v. *Green*.[109] In that case, the Supreme Court took the position that, as the Ontario *Securities Act* was drafted at the time, prescription was only suspended once the secondary market claim was authorized.

[196] Barrick points out that section 235 of the QSA was amended in 2018 to add the following words:

> [....] The prescription provided for by this section is suspended by the filing of a request for authorization with the court under section 225.4; moreover, the suspension of prescription provided for by article 2908 of the Civil Code is effective only as of the filing of that request. ...

[197] Perhaps, this was a reaction to the *Green* judgment.

[198] Therefore, as the argument goes, given that at the time of the filing of the present authorisation request, this amendment had not been made, authorization of the action was required to suspend prescription.

[199] The Court disagrees.

[200] Section 28 of the Ontario *Class Proceedings Act 1992*[110] reads in part as follows:

> 28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,[...]

[201] Article 2908 C.C.Q. reads:

> **2908.** An application for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the application.
>
> The suspension lasts until the application for leave is dismissed, the judgment granting the application for leave is set aside or the authorization granted by the judgment is declared lapsed; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the application for leave, a judgment in the course of the proceeding or the judgment on the action ceases to benefit from the suspension of prescription.

---

109 2015 SCC 60.
110 S.O. 1992, c. 6.

> In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

[202] In the Court's perspective, article 2908 C.C.Q. and section 28 of the *Class Proceedings Act* do not have the same meaning. Clearly, under the latter section, the action must have been commenced whereas, under article 2908 C.C.Q., the application for leave suspends prescription.

[203] At the time Mr. Nseir's application was produced, it was for all intents and purposes an application that a class action be authorized both under the QSA and the C.C.P. In the Court's view, article 2908 C.C.Q. was sufficiently broad to have suspended prescription at the time of the deposit of Mr. Nseir's application in April of 2014.

[204] As to the claim under article 1457 C.C.Q., the Court is also of the view that applicable prescription period is three years from the production of the Application to Authorize the Class Action, as Mr. Nseir does not allege that it was impossible for him to have acted sooner.

6.3 From What Moment Might Barrick's Statements to Shareholders be Material?

[205] Barrick raises another argument as to the appropriate period to consider, which is more relevant. It argues that any misrepresentation as to its environmental compliance are ultimately related to the decision to begin pre-stripping taken in May 2012. Therefore, only statements after this decision are relevant.

[206] The Court agrees, as it is only after this decision that the environmental issues that led to the suspension of the project came to the fore, whether in relation to the glaciers or the WMS. The various Chilean environmental bodies who were involved in the matter did not raise any red flags in respect of environmental compliance during the period before pre-stripping began.

[207] Therefore, it is really only statements post this decision that could have materially affected the share price.

[208] That said, the Court will nonetheless consider those beginning on May 1, 2011.

6.4 The Allegations of Material Misrepresentation

[209] For the purposes of this section, the Court will first consider the various misrepresentations alleged by Mr. Nseir in his written argument. As to Schedule A of his application, as amended on May 17, 2019, the Court concludes that it is not necessary to consider it separately, as the alleged misrepresentations are not significantly different from those alleged in the written argument.

[210] Only the misrepresentations alleged to have been made within the prescription period will be considered. In addition, the Court considers that only those misrepresentations that relate to Barrick's operations in Chile need to be analysed. That is because the principle alleged public correction relied on by Mr. Nseir is an order of the Chilean court and has no bearing on the operations of the project in Argentina.

[211] Before discussing these, the issue of what is material and what is not must also be reviewed. This is essential, given the definitions of misrepresentation and material fact in the QSA.

[212] The burden of proof must also be considered. Mr. Nseir argues the following in his written submissions:

> Yet, the effect of art. 225.30 of the *Securities Act* is to place the burden on defendants to prove that a drop in value of an issuer's stock price following the revelation of previously undisclosed information was not caused by this revelation – in other words, the "materiality" of the information is *presumed*.[111]

[213] The Court does not agree, at least insofar as non-core documents are concerned. For those documents, section 225.13 of the QSA puts the burden on the petitioner to prove that the respondent "knew, at the time that the document was released or the public oral statement was made, that the document or public oral statement contained a misrepresentation".

[214] What then is materiality? In the QSA, as we have seen, material fact defined as a fact that: "may reasonably be expected to have a significant effect on the market price or value of securities issued".

[215] In its decision in *Sharbern Holding Inc.* v. *Vancouver Airport Centre Ltd.*, the Supreme Court of Canada considered the issue of materiality as follows:

> [61] In sum, the important aspects of the test for materiality are as follows:
>
> i. Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;
>
> ii. An omitted fact is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely might have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;

---

[111] *Supra* note 11, par. 21.

> iii. The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;
>
> iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and
>
> v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.[112]

[216] Nor is materiality presumed, as can be seen from the judgment in *Paniccia* v. *MDC Partners Inc.*:

> [71] Materiality is a contextual and fact-specific inquiry, determined on a case-by-case basis from the perspective of the reasonable investor and involves the application of a legal standard to specific facts in light of all of the relevant circumstances and the total mix of information. The court must therefore inquire into what the reasonable investor would consider as significantly altering the total mix of information made available to him or her in the particular circumstances; this is a fact-specific inquiry, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.[113]
>
> [The Court's underlining]

[217] The distinction between periodic disclosure and timely disclosure is also important at this juncture, as most of the misrepresentations that Mr. Nseir is complaining about were made as a part of Barrick's obligation of periodic disclosure.

[218] The distinction was discussed by the Supreme Court of Canada in *Theratechnologies*:

---

[112] 2011 SCC 23.
[113] *Paniccia* v. *MDC Partners Inc.*, *supra* note 102.

> [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".
>
> [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.[114]

[219] Finally, before beginning the analysis of each of the alleged misrepresentations, it is important to recall that insofar as statements made in non-core documents are concerned, Mr. Nseir must demonstrate that at the time they were made, Barrick knew that they were false. In the event the statements were made in a core document, the burden would then shift to Barrick who must show that it benefits from one of the statutory defences in respect of that statement. Two are raised by Barrick, the "reasonable investigation" defence and the "forward-looking information" defence.

6.4.1 Introduction

[220] The crux of Mr. Nseir's argument is that Barrick vaunted its environmental compliance from the time that the project was announced until the time it was suspended by the Chilean court in 2013. He affirms that from the outset, Barrick knew that it was not complying with its environmental obligations and in stating the contrary to the market made material misrepresentations affecting the market price.

[221] The preliminary injunction issued by the Copiapó Appeals Court on April 9, 2013 was the initial public correction followed by the indefinite suspension of Pascua-Lama announced by Barrick on October 31, 2013.

[222] As we will see, the difficulty with this position is that it is put forward with the benefit of the rear-view mirror. In other words, Mr. Nseir posits that the decision of the Chilean court in April 2013 suspending the project due to environmental non-compliance is evidence that Barrick knew all along that it was non-compliant, thereby misleading the market. In the Court's perspective, the appropriate analysis cannot be made in this way. While the decision of the Chilean court clearly denotes a serious environmental situation around the time it was rendered, taken alone it is not sufficient

---

[114] *Theratechnologies Inc.* v. *121851 Canada Inc.*, *supra* note 8.

to demonstrate that the statements made by Barrick that Mr. Nseir relies on, contained material misrepresentations at the time they were made.

[223] This is all the more the case given that the ultimate cause of the suspension of the project, whether one refers to the decision of the Copiapó Appeals Court in April 2013 or the announcement of Barrick in October 2013 that it was suspending the project, save for care and maintenance, was not, in essence, the result of environmental non-compliance. Rather, it was the result of the failure of the WMS, which happened after the injunction proceedings were issued.

[224] On this point, the Court acknowledges that it respectfully takes a somewhat different view from that espoused by Justice Belobaba in DALI.[115] The Court will further discuss its reasoning a bit later.

[225] One is also struck by the fact that in all of its documentation, Barrick cautioned investors about the uncertainties surrounding environmental questions.[116] Any reasonable investor in a company engaged in mining projects in a foreign country should have considered those statements in any investment decision. No guarantee of full compliance was ever provided to investors; quite the contrary!

[226] Another element which leaves room for pause is that Mr. Nseir has provided no evidence of an economic nature, either to support the materiality of the alleged omissions or misrepresentations or his assertion that the ultimate decision to suspend the project, save for care and maintenance, was economically material to the stock price of Barrick, given the amount of the write-off in relation to the global evaluation of Barrick.

[227] The Court will nonetheless consider the misrepresentations raised by Mr. Nseir.

[228] For the ease of the reader, the Court will again reproduce the alleged misrepresentations made in the written argument that fall within the prescription period:

6.4.2 The Statement of October 27, 2011

- Barrick repeated the following statement on October 27th, 2011:

> "*On the legislative front, Argentina passed a federal glacier protection law in October 2010 that restricts mining in areas on or near the nation's glaciers. Our activities do not take place on glaciers, and are undertaken pursuant to existing environmental approvals issued on the basis of comprehensive environmental impact studies that fully considered potential impacts on water resources, glaciers and other sensitive environmental areas around Veladero*

---

[115] *DALI Local 675 Pension Fund (Trustees)* v. *Barrick Gold*, *supra* note 3.
[116] *Supra* par. 105 of this judgment.

> *and Pascua-Lama. We have a comprehensive range of measures in place to protect such areas and resources.*"[117]
>
> [Reference omitted]

[229] The statement was a representation made in a core document. That said, in the Court's view, Mr. Nseir has not demonstrated that he has a reasonable possibility of demonstrating that this statement for October 2011 could be considered as a material misrepresentation or that Barrick will not benefit from a statutory defence.

[230] The evidence before the Court shows without a doubt that Barrick had a robust system in place to ensure that the disclosures that it made in its core documents were accurate at the time they were made.

[231] Moreover, Barrick states the following in his plan of argument:

> [...] Messrs. Dushnisky, Potter and Mullany all testified to the seriousness with which Barrick, members of its senior management and the Disclosure Committee approached the Company's continuous disclosure obligations. Mr. Stringer, Barrick's current Corporate Secretary and a member of its legal department at the time, explained that the role of the Disclosure Committee was to help: (i) assess the materiality of information; (ii) ensure that material information was disclosed in a timely fashion as required by applicable securities laws; and (iii) oversee Barrick's disclosure controls, procedures and practices. Among other things, the Committee met regularly to review the Company's draft quarterly and annual disclosures.

[232] This is an accurate characterization of the evidence before the Court.

[233] But there is more. At the time the statement was made, the evidence shows that it was true. No activities were taking place on glaciers. Although the activities were taking place close to the glaciers, there was a monitoring program in place. That said, it would be remiss not to acknowledge that as early as July 2011, Mr. Mullany, a representative of Barrick, had acknowledged the difficulty of continuously monitoring the glaciers due to weather conditions.

[234] However, even recognizing that the impugned statement might have provided more information to the investor, at the time it was made, the difficulty in fully implementing the glaciers monitoring program was not material to the overall project or the share price. While its failure did lead to some fines, it was never the cause of the suspension of the project. This can be concluded from the decision of the Chilean court in July 2013 which, while it did contain observations on glaciers monitoring, did not ground its decision to suspend the project on the glacier monitoring program.

---

[117] *Supra* note 11, p. 13 (see also Respondents' documents compendium tab 16, TJL0000001.0044/067).

6.4.3 The December 2011 Press Release

- In December 2011, Barrick published a press release purporting to respond to alleged falsehoods contained in a report published by Argentinean environmental NGO CEDHA. It made the following statements in this report:

> *"In addition to this, the company has implemented a glacier monitoring program for the entire Pascua - Lama project area, along with additional requirements associated with glacier protection as mandated in the project's environmental approval by Chilean authorities after extensive public input."*
>
> *"CEDHA also wrongly claims that the project's dust emissions have not been considered with respect to impact on glaciers. In reality, the company has put in place a range of measures to mitigate the potential impact of dust emissions on glaciers. All of those measures have been incorporated into the project's Environmental Impact Statement (EIA), which was approved by environmental authorities. During the EIA revision process, it was determined that the Pascua-Lama project will not generate damaging dust accumulation in areas where glaciers are present. The project will put in place a set of dust abatement and control measures such as road watering and proper road planning."*
>
> *"Barrick monitors water at 73 stations located in Chile and Argentina and communities have participated in water monitoring activities on both sides of the Pascua-Lama project. Thirty monitoring stations will be equipped to transmit real-time measurements of water quantity and quality to the relevant authorities."*
>
> [Reference omitted]

[235] The statement contains three elements which must be considered separately, taking into account that they were made in a non-core document.

[236] The first relates to glacier monitoring, and the Court repeats its comments made directly above.

[237] As to dust suppression, there is not one *iota* of evidence that Barrick was not fully aware of the need for dust suppression and had not put measures in place to alleviate dust.

[238] The final one relates to water quality monitoring. While there is no evidence before the Court to show that real-time measurements of water quality were not carried out as required, there is evidence to demonstrate that the monitoring that was carried out was likely not considering the alert levels originally set out in the RCA. This is because the original alert levels set out in the RCA, at the time construction was commenced, could not be met due to natural degradation in the water quality by the time the construction phase began.

[239] If the failure to disclose the issue with alert levels can be considered an omission, the Court concludes that Mr. Nseir has no real possibility of demonstrating that this omission was material.

[240] Firstly, when the statement was made, there is no evidence that the issues surrounding water alert levels were an impediment to the progress of the project.

[241] When Barrick became aware of the difficulty of meeting the alert levels in the RCA, it took steps to resolve the situation by working with the environmental authority, the SEA. Up until the intervention of the SMA in early 2013, Barrick had no reason to believe that the question of the alert levels related to water quality might put the project into jeopardy. It engaged in a screening inquiry process in order to determine whether or not the RCA needed to be reopened in order to permit for new critical levels to be used for monitoring. The answer of the SEA was to the effect that the proposed change did not need to be submitted to the SEIA for the issuance of a new RCA:

> a) This Executive Division believes that from the background information that has been made available it can be concluded that the proposed modification of the methodology used to calculate Alert Levels, with the objective of specifying alert levels NA-0 and NA-1 and establishing a criterion for distinguishing natural water quality from water quality influenced by the project, does not constitute a materially significant change, and therefore need not be submitted to the SEIA, in view of the following: ...
>
> [...]
>
> III. This Executive Division considers that the criterion relating to whether the works, actions or measures designated to affect or complement a project or activity are susceptible of generating new adverse environmental impacts is similarly inapplicable, as the implementation of a new methodology for calculation of baseline water quality levels could not lead to new adverse environmental impacts.[118]

[242] The take away from this is that at the time of this press release, it cannot be said that Barrick was aware that it contained a material misstatement. Nor is it a statement that might have been expected to materially affect the share price. No one could have anticipated, given the natural degradation in the water quality and given the collaboration of the SEA in respect of the project, that Barrick's approach to this issue would become important in 2013 at the time of the Chilean court's decision.

6.4.4 Barrick's Annual Report for 2011

- In its Annual Report for 2011, Barrick again vaunted its "Environmental Stewardship" in the following way:

---

[118] SEA letter of June 7, 2012 (Respondents' documents compendium, tab 35 -BPL01801562).

> "Barrick is committed to protecting the environment for present and future generations. From exploration to mine closure, responsible environmental management is the basis of our operational approach. (...) We comply with government regulations in these areas and have also developed stringent internal performance standards for water conservation, biodiversity, climate change, closure and incident reporting, as a preventative measure and to meet our goal of consistent performance at all locations."[119]
>
> [Reference omitted]

[243] There is nothing in the evidence to illustrate that the statement was a misrepresentation.

6.4.5 April 20, 2012, Registration Statement, as amended on May 9, 2012

- In April 2012 Barrick repeated the claim that its "activities at the Pascua-Lama Project do not take place on glaciers, and are undertaken pursuant to existing environmental approvals issued on the basis of comprehensive environmental impact studies that fully considered potential impacts on water resources, glaciers and other sensitive environmental areas around the project." It also described its "environmental audit policy" as follows:

  "*Barrick has a policy of conducting environmental audits of its business activities, on a regular and scheduled basis, in order to evaluate compliance with: applicable laws and regulations; permit and license requirements; company policies and management standards including guidelines and procedures; and adopted codes of practice. All operating mines and selected project sites are subject to triennial audits, with certain sites being audited more frequently*."[120]

  [References omitted]

[244] Again, there is nothing in the evidence to illustrate that the statement was a misrepresentation.

6.4.6 Barrick's Report for the Second Quarter of 2012

- Barrick again stated that its activities at Pascua-Lama were "undertaken pursuant to existing environmental approvals" in its July 26, 2012 report for the Second Quarter of 2012. It also announced that pre-stripping had commenced at Pascua-Lama, falsely claiming that it had completed the project's water management system in order to be able to do so:

---

[119] *Supra* note 11, p. 15.
[120] *Ibid.*, pp. 15-16.

> *"During the second quarter, the project achieved critical milestones with completion of Phase 1 of the pioneering road and also the water management system in Chile, both of which enabled the commencement of pre-stripping activities."*[121]
>
> [References omitted]

[245] Risking repetition, let us remember that this is the sole statement relied on by Justice Belobaba in Dali to authorize the class action in Ontario. The Court agrees that it is the only one that comes close to being a material misstatement, but reaches a different conclusion.

[246] The statement was made in a core document and touches several critical milestones of the project. The important ones relate to the Water Management System and to the beginning of pre-stripping.

[247] Both Mr. Nseir and Justice Belobaba take the position that the statement, properly read, leads to the conclusion that the WMS had been completed. Barrick takes a different view; fairly read the statement only means that a critical milestone was reached with the WMS.

[248] The Court agrees that the most "un-tortured" reading would lead a reader to conclude that the WMS was complete. That said, let's go back to the following words of Justice Belobaba:

> Every delay in pre-stripping resulted in a costly delay in revenue-generation and an ever-increasing pressure to get to "first gold" production as quickly as possible. The announcement of July 26, 2012 that a "critical milestone" had been achieved was, to put it bluntly, a big deal."[122]

[249] The Court agrees that the big deal to a potential investor was that pre-stripping could begin and it did begin without any intervention from the courts or the regulator. In other words, it was this element of the statement that would have been material to the stock price.

[250] The evidence demonstrates that Barrick's management, based on timely information that it had received from the site, fully and justifiably believed that it was authorized to begin pre-stripping. This is all the more the case given the actual wording of the RCA, which could lead to a conclusion that the missing elements of the WMS were only required once mining operations began.

[251] The focus in the RCA during the construction phase of the project was on the management of non-contact water, although elements of the contact system are also mentioned:

---

[121] *Ibid.*, p. 16.
[122] *DALI Local 675 Pension Fund (Trustees)* v. *Barrick Gold*, *supra* note 3.

> 4.3.1) Construction Phase
>
> The construction phase of the Pascua Lama Project Modification will comprise the following main activities in the Chilean territory:
>
> - Construction of works to intercept, store and process drainages from the Nevada Norte sterile deposit and to deviate non-contact waters;
>
> [...]
>
> The construction of works and facilities for management and treatment of acid drainage from the Nevada Norte waste dump will be carried out in such a manner that they are operational before starting the pit pre-stripping, which will involve disposal in the dump. This ensures that the Project will not affect water quality of the Rio Estrecho at any stage, including the construction phase.
>
> The acid drainage handling and treatment works and installations, comprise four main systems: interception and deviation channels for non-contact waters around the sterile deposit to prevent possible filtrations and the consequent acidification; ditches and wells to capture drainages at the foot of the sterile deposit and collection of both, shallow and underground water flows; pipelines and pools to collect drainages and a drainage treatment plant. Following are the works and installations to be constructed for drainage handling and treatment.[123]

[252] The reverse osmosis and forced evaporation plants are not referred to in the construction phase of the RCA, but rather in the operations phase.[124]

[253] The acid drainage plant had been built, as Mr. Proust, Barrick's consultant, reported on May 8, 2012:

> [...] The contact water collection system has been executed adequately and is operational (currently returning water to the Estrecho river through the chamber). The two contact water accumulation ponds (currently without any water) are also operational. The treatment plant has been built and is in a condition to be operated manually (the automation systems are being implemented). [...][125]

[254] Finally, the DGA Technical report of April 24, 2012 also would lead to the conclusion that the contact water system was sufficiently complete to allow pre-stripping to commence:

> According to the information gathered in the field and presented by the owner, it can be concluded that the works have been executed according to the standards envisaged in the approved project, including various improvements to their execution. The works associated with the contacted water management system

---

123 Exempt Resolution No. 24/2006 (Respondents' documents compendium, tab 2 - BPL01799927).
124 *Ibid.* pp. 125-126.
125 May 8, 2012 Proust Report (Respondents' documents compendium, tab 32 - BPL00245429).

> are fully complete with no apparent construction details pending. Furthermore, their proper operation has been verified on the last two inspections. [126]

[255] Therefore, even acknowledging that the entire WMS was not complete when the statement was made, the evidence shows that the elements required for the construction phase and more particularly for pre-stripping to commence were complete. The statement in relation to the most material element for the investor buying the stock at that time, pre-stripping, cannot be said to be a misrepresentation. The Court respectfully disagrees with Justice Belobaba.

[256] In addition, in the fall of 2012 the Chilean courts, although considering the matter on an interim basis, did not sanction premature pre-stripping. Here is what Mr. Westhoff stated in his affidavit:

> 137. On September 28, 2012, certain local community groups brought a constitutional rights lawsuit against CMN in the Copiapó Court of Appeals, arguing that, contrary to the requirements of RCA No. 24, 2006, pre-stripping had commenced at Pascua-Lama prior to the completion of the WMS and that, as a result, the Project was damaging the environment by polluting the waters of the Estrecho River. The Court denied the injunction, but allowed the case to proceed to a hearing.

[257] This affirmation was not denied, and although an injunction was ultimately issued in April 2013, the fact that pre-stripping was allowed to continue in September 2012 is significant and gives reason for pause when placed against Mr. Nseir's position.

[258] He places great emphasis on the reference to the premature commencement of pre-stripping in the charges made by the Chilean prosecutor in March 2013, including:

> 23.4 The hydrogen peroxide oxidation unit was not built in the Acid Drainage Treatment Plant.
>
> 23.5 The Reverse Osmosis or Alternative Secondary Treatment Plants were not built.
>
> 23.6 The Forced Evaporation System was not built.[127]

[259] It is also correct to state that on May 24, 2013, the SMA required that these works be completed prior to the resumption of the construction phase.[128]

[260] The Copiapó Appeals Court maintained the suspension of construction in its decision of July 15, 2013.[129]

---

[126] *Supra* note 42.

[127] Administrative sanction proceedings, March 27, 2013 (Petitioner's Exhibit 23.1, document BPL01217682).

[128] Exempt Resolution No. 477, Santiago, May 24, 2013 (Petitioner's compendium, tab 6 - Exhibit P-11A).

[261] Even so the Court cannot hold that this purported misrepresentation of July 2012 had a material effect on the share price of Barrick when it was allegedly corrected on April 10, 2013. Nor can the Court find that Mr. Nseir has established the necessary relationship between the alleged misrepresentation and the purported public correction. That correction is set out as follows:

> The Court of Appeal for the Chilean province of Copiapó issues a preliminary injunction ordering Barrick to halt construction at Pascua-Lama, based on environmental infractions.[130]

[262] The press release reads:

> PRESS RELEASE - April 10, 2013
>
> **Pascua-Lama preliminary injunction in Chile; major construction works in Argentina unaffected**
>
> TORONTO — Barrick Gold Corporation (NYSE:ABX)(TSX:ABX) (Barrick or the "company") is aware of media reports indicating that a Chilean court has issued a preliminary injunction pending a full hearing, halting construction activities on the Chilean side of the Pascua-Lama project. The company has not yet been formally notified of the court order and will assess the potential implications once it has received official notification.
>
> Construction activities in Argentina, where the majority of Pascua-Lama's critical infrastructure is located, including the process plant and tailings storage facility, are not affected.[131]

[263] In *Swisscanto* v *BlackBerry,*[132] Justice Belobaba stated the following in relation to the concept of public correction:

> [63] One can also add the following. The plain meaning of the word "corrected" means to "set right" or "mark the errors". It follows from this that the public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact – that is, the existence of a misrepresentation.
>
> [...]
>
> [65] In my view, the public correction requirement in s. 138.3 of the OSA can be satisfied as follows:

---

129 *Supra* note 13.
130 Schedule B – Table of corrective disclosures (Authorization Motion of August 23, 2019).
131 Pascua-Lama preliminary injunction in Chile; major construction works in Argentina unaffected, press release dated April 10, 2013 (Respondents' documents compendium, tab 58 - BPL00233105).
132 2015 ONSC 6434.

> (i) The public correction must be pleaded with sufficient precision to provide fair notice to the defendant. The plaintiff must point to specific words or figures that allegedly constitute the public correction of the alleged misrepresentation. Because the function of the public correction requirement under s. 138.3(1) is to establish the second "time-post" for fixing liability, the plaintiff must also identify the timing of the public correction.
>
> (ii) The pleaded public correction need not be a "mirror-image" of the alleged misrepresentation or a direct admission that a previous statement is untrue. But there must be some linkage or connection between the pleaded public correction and the alleged misrepresentation – at the very least, the pleaded public correction must share the same subject matter as, and in some way relate back to, the misrepresentation. The fact that an alleged public correction is over or under-inclusive relative to the misrepresentation is not a bar to establishing that the words or figures constitute a public correction. Of course, the more tenuous the connection between the public correction and the misrepresentation, the more likely that the defendant will be able to show under s. 138.5(3) that shareholder losses were unrelated to the misrepresentation.
>
> (iii) The public correction must be reasonably capable of revealing to the market the existence of the alleged misrepresentation. However, the public correction need not prove, or help prove, that the earlier statement or omission was in fact a misrepresentation as defined by s. 1(1) of the OSA. Moreover, the public correction need not be understood by the ordinary investor as revelatory of the existence of a misrepresentation. It may be the case that only market participants with specialized knowledge and expertise (e.g., analysts or traders) are able to understand that particular words or figures constituted the public correction of a misrepresentation. But that will be sufficient.
>
> (iv) The public correction may take "any of a number of forms" and need not emanate from the defendant corporation. The source of the public correction can be third parties, including media reports or internet postings.[133]
>
> [The Court's underlining; references omitted]

[264] In the Court's perspective, the alleged public corrections put forward by Mr. Nseir pose several problems. The risk of the unfavorable Chilean court decision rendered on April 9, 2013 should not have been a surprise to any investor. The constitutional actions leading up to it had been announced in November 2012

[265] Here is what Justice Belobaba says about the April 10 statement:

> [87] There is nothing in the two Barrick press releases of April 10, 2013, the Dow Jones Newswire of the same date, or the press release of October 31, 2013 that can fairly be said to reveal the existence of any of the 11 alleged omissions. That is, there is nothing in these four alleged "partial corrections" that even

---

133 *Ibid*.

> suggest that Barrick may have commenced pre-stripping before the WMS was completed in violation of the RCA.[134]

[266] On this the Court agrees with him. But, there is more.

[267] Pre-stripping had already been stopped on October 27, 2012 for other reasons unrelated to any alleged violation related to Barrick having commenced it prematurely and had not recommenced. The constitutional rights actions, including the allegation of premature pre-stripping had been announced to the market on November 1, 2012, when Barrick described the actions as: "seeking the suspension of construction of the Chilean portion of the Pascua-Lama project due to alleged non-compliance with the requirements of the Project's Chilean environmental approval."[135] Therefore, the injunction itself was not "revealing to the market the existence of an untrue statement of material fact".[136]

[268] The suspension of pre-stripping was announced in February 2013:

> During the fourth quarter of 2012, considerably stronger than normal winds contributed to increased dust in the open pit area. We immediately voluntarily halted pre-stripping activities in order to implement additional dust mitigation and control measures. Subsequently, regulatory authorities in Chile issued an order to suspend pre-stripping until such dust-related concerns are addressed.[137]

[269] In the Court's view, if pre-stripping was indeed commenced prematurely, such that the July statement constituted a misrepresentation, it was publicly corrected by both of the November 2012 and February 2013 statements to the market.

[270] In April 2013, the suspension of pre-stripping would have long since been taken account of in the stock price.

[271] But what of the element of the July 2012 statement that relates to the "completion" of the WMS? Justice Belobaba considered that the June 28, 2013 press release was a public correction:

> [97] Here is the June 28, 2013 press release. I have under-lined the relevant language:
>
> June 28, 2013 (Press Release) "Schedule Re-sequencing and Reduction of 2013-2014 Capital Spending ... The company has submitted a plan, subject to review by Chilean regulatory authorities, to construct the project's water management system in compliance with permit conditions for completion by the end of 2014, after which Barrick expects to complete remaining construction works in Chile, including pre-stripping. Under this scenario, ore from Chile is

---

134 *DALI Local 675 Pension Fund (Trustees)* v. *Barrick Gold, supra* note 3.
135 *Supra* note 53.
136 *Swisscanto v BlackBerry, supra* note 132, par. 63.
137 *Supra* note 50.

> expected to be available for processing by mid-2016. In line with this timeframe, and in light of challenging market conditions and materially lower metal prices, the company intends to re-sequence construction of the process plant and other facilities in Argentina in order to target first production by mid-2016 (compared to the previous schedule of the second half of 2014)."
>
> [98] This press release reveals that the WMS had not been constructed in compliance with the environmental permit and when it is properly completed, pre-stripping will resume. To the informed reader, and certainly to any stock analyst that was following Barrick, this information strongly suggests that the earlier disclosure of July 26, 2012 (that the WMS had indeed been completed and pre-stripping could begin) may not have been true. Indeed, when the June 28, 2013 press release hit the street, the share price dropped $1.28. Granted, this same press release announced that Barrick was conducting impairment testing and a $5 billion impairment charge may be forthcoming. And the news of this impairment charge may have prompted much if not all of the drop in the share price. However, the "attribution" analysis that the defendant may in due course pursue under s. 138.5(3) of the OSA to establish proportionate causation is not before the court on this leave motion.

[272] The Court needs only to comment briefly, given that Mr. Nseir has not alleged the June press release as a public correction. Respectfully, it cannot agree that the statement would allow the reader to conclude that the WMS was not complete at the time of the July 2012 statement. It ignores the intervening fortuitous events of December 2013 and January 2013, which revealed defects in the design, not that the WMS had not been properly completed. The evidence indisputably leads to the conclusion that the real shortcoming with the WMS had nothing to do with it being incomplete, but everything to do with the design fault whereby the channels that been constructed were unable to adequately cope with a sudden melt of ice and snow creating higher than expected flows of water. It was the two incidents of intense melting and the under-capacity of the WMS channels in December 2012 and January 2013 that led to the self-report made by Barrick and the ultimate SMA finding that the project should be suspended. No misrepresentation has been alleged in respect of this design flaw in the WMS. On the contrary, Barrick had every reason to believe that the channels, designed by a renowned engineering firm would perform appropriately.

[273] Even if the project could not resume until the construction of the reverse osmosis plant and the acid drainage plant, the redesign and reconstruction of these channels was eminently more important to the resumption of the project as it is ultimately the water from the channels that these two plants were designed to treat. This is precisely what Barrick announced to the market on June 28, 2013.[138] Finally, the cost building the reverse osmosis plant and the acid drainage plant was extremely insignificant in the context of the overall project and could have been carried out with minimal delay. The suspension of the project as it related to the failure to construct these elements of the WMS would have been short.

---

[138] *Supra* note 47.

6.4.7 Barrick's February 2013 Quarterly and Year End Report

> ➢ In its February 2013 Quarterly Report, Barrick minimized the ongoing investigation by the Environmental Superintendent (which eventually resulted in an order suspending construction) in the following way:
>
> "*Restrictions may also be placed on the project due to the need to repair and improve certain aspects of the water management system in Chile.*"[139]
>
> [Reference omitted]

[274] June of 2013 was not the first time that the issues with the WMS were reported to the market. As Mr. Nseir states, in its February 2013 Fourth Quarter and Year End Report, Barrick also raised them.

[275] The Court does not agree with Mr. Nseir's assessment that Barrick minimized the risk. At the time of this report, Barrick was still working with the SMA with a view to having the project move forward. It certainly was not clear at that time what restrictions might be placed on the project, but clearly the possibility existed. The market was informed in a responsible way.

[276] In addition, one must recognize that in February 2013, Barrick had just experienced the two malfunctions of the channels in the WMS. It was hardly in a position to fully comprehend at that time what the position of the SMA would be in respect of the WMS, and more importantly what would be required from a work and cost point of view to reengineer it to avoid the problems that had occurred in December 2012 and January 2013.

6.4.8 Barrick's November 2012 Disclosure

> ➢ In November, 2012, Barrick disclosed the actions filed before the Copiapó Court of Appeals (which ultimately resulted in orders for the project's suspension) – Barrick commented only that "no amounts [had] been accrued for any potential losses related to these actions" and that it intended to "vigorously defend" them.[140]
>
> [References omitted]

[277] With respect, this is an incomplete assessment of Barrick's position. In fact, it also stated that the petitioners were: "seeking the suspension of construction of the Chilean portion of the Pascua-Lama project due to alleged non-compliance with the requirements of the Project's Chilean environmental approval."[141]

---

139 *Supra* note 11, p. 16.
140 *Ibid*.
141 *Supra* note 73.

[278] Clearly, this disclosure does not constitute a material misrepresentation of the situation, as it existed in November 2012.

6.4.9 Barrick's Annual Information Report for 2012

> ➢ In its Annual Information report for 2012, published in March 2013, Barrick repeated that it ""[believed] that it [was] in substantial compliance with all current government controls and regulations at each of its material properties."[142]
>
> [Reference omitted]

[279] What Mr. Nseir neglects to point out in his argument is that in the same document, Barrick also reported on the constitutional actions and stated: "The relief sought in the actions is the suspension of the construction of the project in Chile until all environmental obligations are fulfilled."[143] The risk was clearly announced to the market.

[280] More importantly, if one looks at the report, in its entirety, many of the issues that Mr. Nseir complains about were communicated to the market:

> During the fourth quarter of 2012, strong winds contributed to increased dust in the open pit area. Barrick voluntarily halted pre-stripping activities in order to implement additional dust mitigation and control measures. Subsequently, regulatory authorities in Chile issued an order to suspend pre-stripping until such dust-related concerns are addressed. The project has strengthened dust mitigation and control measures, including enhanced tunnel ventilation, revised blasting fragmentation, use of more robust protective equipment and a dust monitoring system.
>
> Restrictions have also been placed on the project due to the need to repair and improve certain aspects of the water management system in Chile. In December 2012 and January 2013, a portion of the noncontact water diversion system was damaged. As a result, interim and permanent improvements to the water management system are currently being evaluated. In addition, upgrades to the water treatment plant are being evaluated and completion of the industrial water conveyance system is pending. Interim measures to repair and improve the non-contact water management system are expected to be completed by mid-year, while completion of the other aspects is expected by the end of the first quarter of 2014. See "— Environment" below.
>
> Pre-stripping of the pit in Chile is unlikely to recommence until matters related to dust and water management are resolved. [...][144]

---

142 *Supra* note 11, p. 16.

143 Annual Information Form, 2013-03-28 (Respondents' documents compendium, tab 56 – TJL0000001.0060).

144 *Ibid.*, p. 80.

[281] Finally, whether one takes the time frame of the year 2012 or the date of the publication in March 2013, Barrick was still in the process of trying to work with the SMA to resolve the issues which led to its self-reporting in January 2013. It did not have the benefit of the guidelines of the SMA, which were only issued in February 2013.[145] Considering the affidavits of Mr. Westhoff, Mr. Mullany and Mr. Duschnisky, the un-contradicted evidence is that Barrick's management believed that the self-reporting would lead to a positive outcome and would allow the project to move forward.

6.5 The Alleged Public Correction in October 2013

[282] The Court has already considered the April 10, 2013 press release.

[283] The other correction raised by Mr. Nseir is the announcement of the indefinite suspension of Pascua-Lama on October 31, 2013. This was not a correction of any misrepresentation. The suspension of the project had already been communicated to the market following the injunction, in April 2013, as had the challenges that the project faced. Barrick's First Quarter Report for 2013 had clearly raised the possibility that the project would not go forward.[146]

[284] Again, the October statement was not "revealing to the market the existence of an untrue statement of material fact".[147]

6.6 The Statutory Defences

[285] Without fully repeating the facts, the preceding review of the documents is also demonstrative of the rigour of Barrick's reporting to the markets. The various press releases and more formal reports are largely based on information gathered at the project and provided to management on a monthly basis. Mr. Nseir has not demonstrated that there are substantive or material differences between the monthly reports and the facts reported to the market.

[286] In the Court's perspective, Barrick had a "system designed to ensure that the issuer meets its continuous disclosure obligations" including a disclosure committee, and could reasonably rely on it in preparing the various documents that it issued. It would benefit from the statutory defence set out at article 225.17 of the QSA.

6.7 The Primary Market Claim

[287] With respect, Mr. Nseir's position that his situation would also entitle him to make a primary market claim is curious. Primary market claims are governed by section 217 of the QSA. This section directly refers to: "[a] person who has subscribed for or

---

145 *Supra* note 68, par. 122.
146 *Supra* note 80.
147 *Swisscanto v BlackBerry*, *supra* note 132, par. 63.

acquired securities in a distribution effected with a prospectus containing a misrepresentation". The Court sees several difficulties with Mr. Nseir's position.

[288] As Justice Kasirer, as he then was stated in *Amaya inc.* c. *Derome*, there is a distinction between a primary and a secondary market claim under the QSA:

> [53] [...] A class action for misrepresentation in the primary market – an investor who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation for example – can proceed immediately to the authorization stage under article 575 *C.C.P.*, because section 217 of the *Act*, unlike an action taken in the secondary market, does not require special leave. [...][148]
>
> [The Court's underlining)

[289] The only evidence that Mr. Nseir has put forward in relation to Barrick issuing a prospectus containing a misrepresentation is found in Schedule A and refers to a September 8, 2009, Preliminary Short Form Prospectus and amendments on September 9, 2009.[149]

[290] Two observations follow. Firstly, this prospectus is not within the prescription period and therefore cannot be the foundation of any action against Barrick.

[291] In addition, the statements made at the time did not contain any material misrepresentations. In and of itself, this is sufficient to dispose of any primary market claim.

6.8 The Claim under Article 1457 C.C.Q.

[292] Mr. Nseir posits that he has undeniably put forward an arguable case that Barrick committed an actionable fault by falsely representing that Pascua-Lama was compliant with its environmental obligations.

[293] To consider this position, the Court must be mindful of its role. An example of the appropriate approach is set out in *Charles* c. *Boiron Canada inc.*:

> [42] L'alinéa 1003*b) C.p.c.* se limite à établir que la demande d'autorisation d'exercer une action collective doit être accordée si « les faits allégués paraissent justifier les conclusions recherchées ». C'est ainsi que la Cour suprême expose le principe applicable :
>
> > [62] Plus particulièrement, dans le contexte de l'application de l'al. 1003*b)*, notre Cour et la Cour d'appel ont utilisé divers termes, tant en

---

[148] *Amaya inc.* c. *Derome*, supra note 105.

[149] Preliminary Short Form Prospectus, September 8, 2009, Exhibit P-4G (Petitioner's compendium, tab 4).

> français qu'en anglais, pour décrire et qualifier la fonction de filtrage exercée par le tribunal saisi d'une requête en autorisation d'un recours collectif. En 1981, le juge Chouinard écrivait qu'à l'étape de l'autorisation, la question est de déterminer si « les allégués justifient les conclusions prima facie ou dévoilent une apparence de droit » (*Comité régional des usagers*, p. 426). À son avis, le tribunal « écarte d'emblée tout recours frivole ou manifestement mal fondé et n'autorise que ceux où les faits allégués dévoilent une apparence sérieuse de droit » (p. 429).
>
> [...]
>
> [65] Comme nous pouvons le constater, la terminologie peut varier d'une décision à l'autre. Mais certains principes bien établis d'interprétation et d'application de l'art. 1003 *C.p.c.* se dégagent de la jurisprudence de notre Cour et de la Cour d'appel. D'abord, comme nous l'avons déjà dit, la procédure d'autorisation ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage. Le requérant n'est pas tenu de démontrer que sa demande sera probablement accueillie. De plus, son obligation de démontrer une « apparence sérieuse de droit », « *a good colour of right* » ou « *a prima facie case* » signifie que même si la demande peut, en fait, être ultimement rejetée, le recours devrait être autorisé à suivre son cours si le requérant présente une cause défendable eu égard aux faits et au droit applicable.
>
> [...]
>
> [68] Tout examen du fond du litige devrait être laissé à bon droit au juge du procès où la procédure appropriée pourra être suivie pour présenter la preuve et l'apprécier selon la norme de la prépondérance des probabilités.
>
> [SOULIGNEMENTS AJOUTÉS — ITALIQUES DANS L'ORIGINAL]

[43] En somme, cette condition sera remplie lorsque le demandeur est en mesure de démontrer que les faits allégués dans sa demande justifient, prima facie, les conclusions recherchées et qu'ainsi, il a une cause défendable. Toutefois, des allégations vagues, générales ou imprécises ne suffisent pas pour satisfaire ce fardeau. En d'autres mots, de simples affirmations sans assise factuelle sont insuffisantes pour établir une cause défendable. Il en sera de même pour les allégations hypothétiques et purement spéculatives. Selon l'auteur Shaun Finn, en cas de doute, les tribunaux penchent en faveur du demandeur sauf si, par exemple, les allégations sont manifestement contredites par la preuve versée au dossier.[150]

[References omitted]

[294] In his motion to authorize a class action, he describes this fault as follows:

---

[150] 2016 QCCA 1716.

> 2.3. The available evidence demonstrates that the Respondents failed to provide timely disclosure of material changes and made several misrepresentations regarding the environmental compliance of its Pascua-Lama mine project.

[295] The ultimate remedy sought by Mr. Nseir for the members of the class is compensatory damages. His conclusion reads:

> **ORDER** the Respondents to pay each member of the Class their respective claims, plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q.;

[296] In short, the fault alleged and the remedy sought are the same as those sought in relation to the alleged breaches under the QSA. The difference is that Mr. Nseir does not have to meet the robust QSA test. He merely has to show a defendable case. Has he?

[297] As article 574(2) C.C.P. states, for a class action to be authorized, the facts alleged must appear to justify the conclusions sought. In the context of the present proceedings, any damages that might be awarded following a finding of fault under article 1457 C.C.Q., must result from more than a finding that Barrick made a simple misrepresentation. The misrepresentation must be material as outlined in the case law dealing with claims made under Canadian securities legislation. This is because the right to damages arising from a drop in the share price only exists when the misrepresentation has been shown to be material, in that it had a material effect on an investor's decision making.

[298] In the Court's view, where the legislator has set out a specific regime governing damage actions against issuers of securities who make misstatements or fail to provide information to the market, the fault giving rise to compensatory damages must be the one set out in the statutory regime.

[299] The Court's first observation is that Barrick was always timely with its disclosure of any material changes, as the foregoing discussion of the various disclosures made by Barrick demonstrates. The Court will not repeat it here.

[300] With respect to material misrepresentations regarding environmental compliance, considered at the time that they were made and taken as a whole, the evidence does not demonstrate any such misrepresentations by Barrick. In relation to a project so vast and complicated as Pascua-Lama, it cannot be sufficient for a plaintiff to isolate a few general statements which, taken alone, might be construed to misrepresent the reality, when the documents where these statements appear contain additional information that provides the context and the specifics of the situation and gives the investor the true picture.

[301] Mr. Nseir's foundation to his claim for compensatory damages is that Barrick's environmental non-compliance, which it misrepresented, led to the announced the

suspension of the project in April 2013 and a significant drop in the share price. Therefore, any analysis of whether or not the condition set out at article 575(2) C.P.C. has been satisfied must consider whether an alleged material misrepresentation was of the nature to affect the share price.

[302] In the Court's perspective, Mr. Nseir has not set out a reasonably arguable case to demonstrate this. Where the Court has failed to find a material misrepresentation, this is obviously the case, but what of those situations where there was an element of misrepresentation or a failure to provide complete information?

[303] Drawing on the above discussion in relation to liability under the QSA, the first element where the Court raised the specter of incomplete information was in relation to the glacier monitoring programs.[151] The Court will not repeat the discussion, save to reiterate that the challenges that Barrick faced in the glacier monitoring programs did not lead to the suspension of the project. Therefore, any failure of Barrick to provide the market more complete information as to its inability to fully carry out the glacier monitoring program did not play a role in the fall in the share price in April 2013.

[304] The same conclusion can be drawn in respect of any failure to provide complete information on the challenges related to the measurement of the alert levels in the water courses around the project. Again, it was not the failure to use the alert levels set out in the RCA that led to construction being suspended in April; it was the failure of the channels in the WMS. The final decision of the Copiacó Appeals Court in July 2013 also makes this clear, as it "suspend[ed] construction of the mining project in question until all measures included in the RCA for the adequate operation of the water management system have been adopted."[152] The issue surrounding water monitoring was referred to as requiring that Barrick: "request the initiation of the administrative proceedings to review the RCA."[153] This is essentially the process that Barrick had already engaged in with the SEA.

[305] The next area where the Court raised some concern about Barrick's representations was in relation to pre-stripping. This can easily be disposed of by acknowledging that pre-stripping was a nonissue in the announcement of the suspension of construction in April 2013. It had long since been stopped voluntarily by Barrick and would not resume until more robust dust suppression measures could be implemented. Moreover, the intervening events of the malfunction of the WMS channels meant that these would have to be repaired prior to the resumption of any construction, including pre-stripping.

[306] The occurrence of this intervening event, about which no misrepresentation has been alleged, cannot be minimized. The real cause of the suspension of the construction of the project in April 2013 was the inadequate design of the WMS

---

151 See par. 234 of this judgment.
152 *Supra* note 13.
153 *Ibid.*

channels. The issue with them would have prevented construction from going forward, notwithstanding the temporary injunction that was issued.

[307] Other short comings or unfinished parts of the acid drainage treatment installation could have been resolved quickly and with minimal cost. The issue of the WMS channels was something else altogether. Therefore, when one asks what ultimately caused the share price to fall, the inescapable answer is the design flaw in the WMS channels. Mr. Nseir's damages result from this and not from any misrepresentation made by Barrick. He does not meet the requirement of article 575(2) C.C.P.

[308] There is another important reason why Mr. Nseir's action does not meet the requirement of this article. He has failed to allege that he relied on any misrepresentations of Barrick when he decided to purchase Barrick shares. The need to demonstrate reliance to ground an action under article 1457 C.C.Q. has been discussed by the Court of Appeal in the matter of *Allaire* c. *Girard & Associés (Girard et Cie comptables agréés)*, where it stated:

> [53] Le premier juge rappelle que la responsabilité professionnelle des comptables ne sera engagée que si la faute qu'on leur impute est bien à l'origine de l'investissement. Le dommage doit, en effet, être une suite directe et immédiate de cette faute: *Caisse populaire de Charlesbourg* c. *Michaud*, [1990] R.R.A. 531, pp. 537 et 538 (C.A.); *Verrier* c. *Malka*, AZ-98011480 (C.A.), [1998] R.R.A. 715; *Irwin Management Consultants Ltd.* c. *Thorne, Riddell,* AZ-95011575 (C.A.), [1995] R.R.A. 589; *Garnet Retallack & Sons Ltd.* c. *Hall Y Henshaw Ltd.*, AZ-90011437 (C.A.), [1990] R.R.A. 303.[154]

[309] In the *Theratechnologies* decision, Justice Abella also acknowledged the need to demonstrate reliance on the issuer's misrepresentation.[155]

[310] In a different context, the Court of Appeal decided that for an action to lie under article 1457 C.C.Q., the plaintiffs were required to show that they relied on the misinformation in the financial statements.[156]

[311] The Court acknowledges that the judgment of Justice Chatelain in *Chandler c. Volkswagen Aktiengestllchaft*,[157] might well lead to the conclusion that reliance is not a required element to find fault under article 1457 C.C.Q. However, it is clear from her recital of the facts that there was reliance on the part of the investor in that case, and, further, this reliance was alluded to by Justice Schrager in his reasons dismissing the application for leave to appeal.

---

154 2005 QCCA 713.
155 *Supra* note 8, par. 28.
156 *Wightman* c. *Widdrington (Succession de)*, 2013 QCCA 1187, par. 200.
157 *Supra* note 53.

[312] Finally, on the question of article 1457 C.C.Q., the Court would be remiss if it did not note the total absence of any allegation of fact that links the value of Barrick's shares during the class period to the alleged misrepresentations, other than the following vague affirmation:

> 2.37. The misrepresentations and failures to disclose listed in the present motion caused the value of Barrick's stock to be overvalued during the entirety of the class period;

[313] At best, this is a vague, subjective and imprecise allegation, which does not meet the threshold set out in *Infineon Technologies AG* v. *Option consommateurs*[158] as the basis for an arguable case:

> [134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants' alleged anti-competitive conduct is sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.[159]

[314] One might also consider the judgement of Justice Roy, as she then was, in *MacMillan* c. *Abbott Laboratories*, where she concluded:

> [111] M. MacMillan ne fournit aucune étude, expertise ou autre documentation qui permette de transformer une hypothèse en "faits qui paraissent justifier les conclusions recherchées", et ce, surtout dans le contexte particulier où l'obésité elle-même, sans prise de médicament, est un facteur risquant de provoquer ces événements.
>
> [112] Le Tribunal ne peut autoriser le recours sur la base d'inférences ou d'hypothèses non vérifiées.[160]
>
> [Reference omitted]

[315] It is of course trite law to state that occasions when a petitioner will be required to file an expert's report at the authorization stage are rare. However, this is a case where the Court considers that to demonstrate causality, some independent demonstration of the relation between the value of the share price and the representations of Barrick

---

158 2013 SCC 59.
159 *Ibid*.
160 2012 QCCS 1684, appeal to C.A. dismissed, 2013 QCCA 906.

during the class period should have been offered. Absent the demonstration that environmental compliance at Pascua-Lama was a significant factor in the valuation of the shares, one cannot demonstrate that the alleged public corrections led to their decline in value.

[316] This is all the more the case given that the project was only one of many throughout the world being operated by Barrick. Mr. Heys explains this as follows:

> 71. Given the size of Barrick, and the fact that the Pascua-Lama project was only one part of that business, any alternative disclosure during the Class Period would have had to have a relatively large impact on the expected economics of the Pascua-Lama project to have been economically material to the Company as a whole. [....][161]

[317] The fall of the shares is described as follows:

> 2.38. During the class period, the price of Barrick's stock fell as difficulties which had been known to Barrick, and should have been disclosed earlier, became public. A chart of Barrick's stock price on the Toronto and New York stock exchanges for the class period is filed as Exhibit **P-20**, *en liasse*;[162]

[318] Again here, while not as blatant as the preceding allegation, this is a vague and imprecise allegation, particularly given the size of Barrick's operations and the variables outside of its own operations that could affect the stock price.

[319] Notably, there is no allegation in relation to the materiality of the "difficulties" on the stock price. Considering Justice Perell's words in *Paniccia*,[163] minimally, such an allegation should have been made, all the more so given the scope of Barrick's operations.

[320] The Court concludes that the conditions of article 575(2) C.C.P. are not met.

[321] Given this finding, only a brief consideration of the other criteria of article 575 C.C.P. will be undertaken.

[322] As to article 575(1) C.C.P., it is clear that the claims of the members of the class would raise the similar issues of law or fact. Barrick raises an issue of proportionality, given that in relation to the claim under article 1457 C.C.Q., the question of reliance will have to be considered in respect of each member of the class. While the Court recognizes that this argument may have some merit, given its finding on article 575(2) C.C.P., it is unnecessary to decide this question at this juncture.

---

161 *Supra* note 101.
162 Re-re-amended Consolidated Motion (May 17, 2019).
163 *Supra* note 102.

[323] As to article 575(3) C.C.P., the Court considers that the conditions for its application are present.

[324] Finally, article 575(4). The Court does not call into question that Mr. Nseir is an appropriate representative, both for the secondary market claim under the QSA and the claim under article 1457 C.C.Q.

[325] As to his status as an appropriate representative to institute a primary market claim, the Court is mindful of the words of Justice Mainville in his judgment refusing leave to appeal in *Goldman, Sachs & Co.* c. *Catucci*,[164] which would lead to the conclusion that Mr. Nseir may well be an appropriate representative. However, given the distinction between a primary and secondary markets claim recognized by the Court of Appeal in *Amaya*, the Court concludes that Mr. Nseir does not have independent right of action to institute a primary market claim and would not be an appropriate representative in respect of such a claim.

6.9 The Actions against the Individual Defendants

[326] Given the conclusions in relation to the liability of Barrick, the Court will only consider this question summarily. A similar attempt to pursue directors or employees that was undertaken by the plaintiff in *Lambert (Gestion Peggy)* c. *2993821 Canada inc. (Écolait ltée)*. Justice Pinsonnault dealt with it as follows:

> [41] Avec grand respect pour l'opinion contraire, aucun fait précis n'est allégué relativement à ces administrateurs, et encore moins une faute indépendante de celle apparemment commise par Écolait. Force est de constater qui si le Tribunal autorisait l'ajout des trois administrateurs à l'action collective, cette autorisation reposerait essentiellement sur la qualification juridique des contrats que propose la demanderesse Peggy Lambert qui invite le Tribunal à conclure que les trois administrateurs poursuivis auraient en quelque sorte « manipulé » le conseil d'administration d'Écolait pour l'amener à conclure ou cautionner des contrats qu'elle qualifie d'abusifs et ainsi privilégier leurs intérêts personnels au détriment de ceux de cette société.
>
> [42] En soit, il n'y a rien de répréhensible comme tel à tenter d'adjoindre à un recours existant des codéfendeurs qui permettront qu'un jugement favorable à la demanderesse et aux membres du Groupe qu'elle représente puisse être exécuté en cas d'insolvabilité d'Écolait. Encore faut-il que ce droit d'action envisagé puisse être exercé contre ces administrateurs avec une chance minimale de succès, ce qui, de l'avis du Tribunal, n'est pas le cas en l'espèce.[165]

[327] As no precise fact is alleged against the individual defendants in the present matter, the same principals apply.

---

[164] *Supra* note 55.

[165] 2018 QCCS 2431, confirmed on appeal to C.A., 2018 QCCA 2189.

WHEREFORE, THE COURT:

[328] **DISMISSES** Petitioner's Re-re-amended (May 17, 2019) Consolidated Motion for Authorization to Pursue an Action in Damages under the *Securities Act*, and for Authorization to Institute a Class Action and Obtain the Status of Representative;

[329] **WITH JUDICIAL COSTS**.

THOMAS M. DAVIS, J.S.C.

Mtre André Lespérance
Mtre Bruce Johnston
Mtre Jean-Marc Lacourcière
TRUDEL JOHNSTON & LESPÉRANCE
Lawyers for the Petitioner

Mtre William Brock
Mtre Nicholas Rodrigo
Mtre Kent E. Thomson
Mtre Luis Sarabia
Mtre Faiz Munir Lalani
DAVIES WARD PHILLIPS & VINEBERG S.E.N.C.R.L, S.R.L
Lawyers for the Respondents

Hearing dates: May 21, 22, 23, 24, 27 and December 19, 2019

TABLE OF CONTENTS