2019 ONSC 2179
Ontario Superior Court of Justice

Kauf v. Colt Resources, Inc.

2019 CarswellOnt 5208, 2019 ONSC 2179, [2019] O.J. No. 1722, 145 O.R. (3d) 100, 307 A.C.W.S. (3d) 209

MANUEL KAUF and WEB OBJECTIVES, INC. (Plaintiffs) and COLT RESOURCES, INC., NIKOLAS PERRAULT, SHAHAB JAFFREY, JOE KIN FOON TAI, and PAUL YEOU (Defendants)

Glustein J.

Heard: December 12, 2018; March 6, 2019
Judgment: April 5, 2019
Docket: CV-17-578980-00CP

Counsel: Albert Pelletier, Andrew J. Morganti, Hadi Davarinia [*] , for Plaintiff
Scott Kugler, Marco Romeo, for Defendants, Colt Resources, Inc., Joe Kin Foon Tai, and Paul Yeou
Simon Bieber, Jocelyn Howell, for Defendant, Shahab Jaffrey
Jeffrey Larry, for Defendant, Nikolas Perrault

***Glustein J.*:**

Nature of motion and overview

1 The proposed representative plaintiff, Manuel Kauf ("Kauf"), [1] brings this motion under s. 138.8(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "*Act*"), for leave to proceed with his action for liability for secondary market disclosure under s. 138.3. [2]

2 The motion is brought within a proposed class action against the defendants Colt Resources, Inc. ("Colt"), Nikolas Perrault ("Perrault"), Shahab Jaffrey ("Jaffrey"), Joe Kin Foon Tai ("Tai"), and Paul Yeou ("Yeou").

3 Since Jaffrey and Perrault have separate counsel, I refer in these reasons to the defendants Colt, Tai, and Yeou as the "Colt Defendants", and to "Jaffrey", when considering the submissions of the parties to the extent they differ. [3] I otherwise refer to the "Defendants" as a collective group when their submissions are common.

4 The claims arise out of an investment on or about July 13, 2016 (the "Turcolt Investment") by a Colt subsidiary (Eurocolt), in the amount of 500,000 (CDN $0.74 million) in Turcolt Resources Madencilik Anonim Sirketi ("Turcolt"). Perrault caused the Turcolt Investment to be made but was not authorized to do so.

5 Kauf invested in Colt through the secondary market between July 13, 2016 and January 30, 2017. All Colt shares were halt-traded following a January 31, 2017 Colt press release (the "January 2017 Press Release").

6 Kauf seeks leave to proceed with his claim that the Defendants made certain misrepresentations by omission:

(i) by failing to make timely disclosure of a material change as of July 13, 2016,

(ii) in Colt's Management's Discussion and Analysis ("MD&A") dated August 29, 2016 (the "Q2 2016 MD&A") released with its "Condensed Interim Consolidated Financial Statements - unaudited" for the "Three and six months ended June 30, 2016 and 2015" (the "Q2 2016 Financial Statements") (collectively, the "Q2 2016 Disclosure"),

(iii) in Colt's MD&A dated November 29, 2016 (the "Q3 2016 MD&A") released with its "Condensed Interim Consolidated Financial Statements - unaudited" for the "Three and six months ended September 30, 2016 and 2015" (the "Q3 2016 Financial Statements") (collectively, the "Q3 2016 Disclosure"), and

(iv) in a press release issued by Colt dated December 21, 2016 (the "December 2016 Press Release").

7 Kauf also seeks leave to proceed with his claim that the Q3 2016 Disclosure, the December 2016 Press Release, and the January 2017 Press Release are "public corrections" of the alleged misrepresentations under s. 138.3(1).

8 The Defendants do not oppose leave to plead the following misrepresentation claims:

(i) failure by Colt, Jaffrey, and Perrault to make timely disclosure of material change at or around July 13, 2016 that (a) Perrault made an unauthorized investment in the amount of 500,000 (CDN $0.74 million) in Turcolt; (b) substantially all of Colt's cash was invested in Turcolt and was unavailable for Colt's use; and (c) Colt was unaware of a shareholder agreement in respect of Turcolt,

(ii) misrepresentation by omission by all Defendants in the Q2 2016 Disclosure that (a) Perrault made an unauthorized investment in the amount of 500,000 (CDN $0.74 million) in Turcolt; (b) substantially all of Colt's cash was invested in Turcolt and was unavailable for Colt's use; and (c) Colt was unaware of a shareholder agreement in respect of Turcolt,

(iii) misrepresentation by omission by all Defendants in the Q3 2016 Disclosure that Perrault made the Turcolt Investment without authority, and

(iv) misrepresentation by omission by Colt in the December 2016 Press Release that Perrault made the Turcolt Investment without authority.

9 Further, the Defendants do not oppose leave to plead that the Q3 2016 Disclosure and the January 2017 Press Release are public corrections.

10 The only issues remaining are:

(i) Jaffrey opposes leave to proceed against him with respect to the alleged misrepresentation in the December 2016 Press Release. Jaffrey relies on the knowledge requirement for a non-core document under s. 138.4(1) and submits that there is no reasonable possibility that Kauf can establish at trial that, as of the December 21, 2016 date of the press release, [4] Jaffrey either knew the Turcolt Investment was unauthorized or deliberately avoided acquiring such knowledge (the "Jaffrey Knowledge Issue"); [5] and

(ii) The Defendants submit that there is no reasonable possibility that Kauf can establish at trial that the December 2016 Press Release was a public correction (the "Public Correction Issue"). [6]

11 For the reasons below, I grant leave to proceed to Kauf on both of the opposed issues. I also grant leave to proceed on the claims which are not opposed.

The Parties

12 Kauf is the representative plaintiff on behalf of a proposed class of shareholders seeking leave under s. 138.8(1) to bring the statutory secondary market misrepresentation claims. Between July 1, 2016 and January 30, 2017, Kauf purchased 340,000 shares of Colt's common stock on the Frankfurt Stock Exchange. He owns a total of 1,250,000 shares.

13 Colt is a mining company incorporated pursuant to the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. Its shares are listed on the TSX Venture Exchange and the Frankfurt Stock Exchange.

14 Colt is a reporting issuer in Ontario, Quebec, Alberta, and British Columbia. Colt is a "responsible issuer" as defined in s. 138.1.

15 In the Q2 and Q3 MD&As, Colt described itself as an exploration stage company focused on the acquisition, exploration, and development of mineral properties in Portugal.

16 Perrault was the President and Chief Executive Officer ("CEO") of Colt throughout the alleged class periods until December 21, 2016.

17 Jaffrey was the Chief Financial Officer ("CFO") of Colt throughout the alleged class periods.

18 Tai was a director of Colt and a member of the Audit Committee and the Independent Committee of Colt Resources Middle East ("CRME") at all times relevant to this action.

19 Yeou was a director of Colt and a member of the Audit Committee and the Corporate Governance Committee [7] throughout the alleged class periods.

20 The misrepresentation claims against Tai and Yeou, pursuant to an agreement between the parties in respect of the plaintiffs' motion to amend the statement of claim, [8] relate only to the Q2 and Q3 2016 Disclosures.

Facts

21 On or about July 13, 2016, Perrault caused Eurocolt, a subsidiary of Colt, to incorporate Turcolt and invest 500,000 in the company. Perrault was not authorized by Colt to make the investment.

22 Colt did not issue a Material Change Report or a press release after the Turcolt Investment. It also made three impugned statements (the Q2 2016 Disclosure, the Q3 2016 Disclosure, and the December 2016 Press Release) prior to the January 2017 Press Release. I review those statements and the January 2017 Press Release below.

a) The Q2 2016 Disclosure

23 Perrault (as CEO) and Jaffrey (as CFO) certified on August 29, 2016 that the Q2 2016 Disclosure did not contain any misrepresentations.

24 In its Q2 2016 Disclosure, Colt did not refer to the Turcolt Investment.

b) The Q3 2016 Disclosure

25 Colt released the Q3 2016 Disclosure on November 30, 2016.

26 Perrault (as CEO) and Jaffrey (as CFO) certified on November 29, 2016 that the Q3 2016 Disclosure did not contain any misrepresentations.

27 Colt advised the reader in its Q3 2016 Financial Statements that Colt (through Eurocolt) had made the Turcolt Investment, but did not disclose that it was unauthorized. In the "*COMPANY OVERVIEW*" [9] section of the Q3 2016 MD&A and in Note 1 to the Q3 2016 Financial Statements entitled "*GENERAL INFORMATION*", Colt set out the details of the investment (quoted *verbatim*):

> (i) "During the three months ended September 30, 2016, Eurocolt invested 500,000 (C$736,800) in Turcolt Resources Madencilik Anonim Sirketi ["Turcolt"]";

(ii) "Of the 500,000 investment, 250,000 was invested from funds raised from the recent private placement in the third quarter of 2016 and the remaining 250,000 was invested by a loan from a shareholder of Colt to Eurocolt to invest in Turcolt";

(iii) "Turcolt currently has no operations. The investment of 500,000 represents 25% of the nominal paid up share capital in Turcolt and represents 50% of the ownership of equity interest of Eurocolt in Turcolt";

(iv) "However, the shareholder agreement supporting this ownership arrangement is unknown";

(v) "If Turcolt is unwound prior to commencing operations it is unlikely it would receive more than the amount invested regardless of its equity interest";

(vi) "Two out of three directors of Turcolt have been nominated by Eurocolt. Therefore, under *IFRS 10 - Consolidated Financial Statements* definition of control, Eurocolt has [*sic*] ability to control the operations of Turcolt and requires consolidation. Hence, as at September 30, 2016, Tucolt's standalone financial statements have been consolidated in these condensed financial statements of the Company; and

(vii) "The remaining 75% of the nominal paid up share capital for Euros 1,500,000 (C$2,210,400) [10] representing the remaining 50% of equity interest in Turcolt is held by an unrelated private investment holding company in Turkey and its share in Turcolt is represented by non-controlling interest in these condensed interim consolidated financial statements".

28 In the same "*GENERAL INFORMATION*" note, Colt advised the reader to refer to "Note 6 of the condensed interim consolidated financial statements". In that note, entitled "*CASH AND CASH EQUIVALENTS*", Colt noted that its "[c]ash at banks" was now $2,959,921 but that such amount might not be available for use as the terms of the shareholder agreement with Turcolt were unknown:

[The total cash at banks of $2,959,921] [i]ncludes cash balance of Euro 2,000,000 (C$ 2,947,200) held by Turcolt with a local Turkish bank. The terms of the shareholder agreement with Turcolt are currently unknown. The terms, conditions and provisions once known and documented, may have impacts, among other things, on the Company's obligations, the Company's equity interest in Turcolt and the Company's ability to use this cash. Also, refer [*sic*] note 1 "General Information".

29 In the "*COMPANY OVERVIEW*" section of the Q3 2016 MD&A, Colt stated that the cash in Turcolt was unavailable for Colt's use:

Substantially all cash in the Company is cash that resides in Turcolt. As noted in Note 6 of the condensed interim consolidated financial statements, this cash is not available for [*sic*] Company's use.

30 Note 9 of the Q3 Financial Statements ("*ACCOUNTS PAYABLES AND ACCRUED LIABILITIES*") set out details of the shareholder loan Eurocolt had taken to make the Turcolt Investment:

(i) Eurocolt received a "short-term shareholder loan of 250,000 (C$357,500) ... based on the shareholder loan agreement dated July 13, 2016";

(ii) The loan was "provided to Eurocolt for investment in Turcolt at 12% annualized rate of interest payable on maturity";

(iii) "The term of the loan is 120 days which expired on November 13, 2016";

(iv) "The loan is now repayable on demand"; and

(v) "The loan is secured on a personal guarantee given by the Chef Executive Officer ("CEO") [Perrault]" and was secured on (a) "one million shares owned by [Perrault] in Colt Resources Middle East" and (b) "potential to register a second mortgage on the residential property owned by [Perrault] in Portugal".

31 The Q3 2016 Disclosure did not state that the Turcolt Investment was unauthorized.

32 The Q3 2016 Disclosure was posted to SEDAR on November 30, 2016 at 7:25 a.m. EST, before the market opened. Colt's stock price closed at $0.05 on November 29, 2016 and closed at $0.05 every day for more than two weeks after the Q3 2016 Disclosure.

c) The December 2016 Press Release

33 In its press release dated December 21, 2016, Colt announced that (i) its board had named Mr. John Gravelle ("Gravelle") to act as Interim President and CEO; (ii) Colt was "review[ing] its strategic options", and (iii) Perrault was leaving Colt with "[t]erms and conditions of his role [during the transition] currently under negotiation":

> **Colt Resources Inc.** ("Colt" or the "Company") (TSXV: GTP) (FRA: P01) (OTC Pink: COLTF) **is pleased to announce the appointment of Mr. John Gravelle as its Interim President and CEO by its Board of Directors as the Company reviews its strategic options.** Mr. Gravelle was elected to the Company's Board of Directors at its last AGM as an independent director. He is currently the Chair of Colt's Audit Committee. Mr. Gravelle has extensive experience working with mining companies in a professional services capacity. As a result of this he has built a strong network of relationships with senior executives and board members of public and private mining companies. The Company intends to work closely with its former President, CEO and Company co-founder, Mr. Nikolas Perrault, in some form of executive or consulting capacity during this transitional time.
>
> **Terms and conditions of his role are currently under negotiation.**
>
> [Emphasis added.]

34 There had been no prior indications from Colt or otherwise that its President, CEO, and co-founder Perrault had any intention of stepping down.

35 The December 2016 Press Release stated that either Gravelle or Jaffrey could be contacted for "for more information" about the contents of the press release.

36 Following the December 2016 Press Release, the last traded price of Colt shares dropped 22 per cent from the December 20, 2016 share price of $0.045 to $0.035 at the end of the day on December 21, 2016.

d) The January 2017 Press Release

37 On January 31, 2017, Colt issued a press release in which it disclosed that Perrault had made the Turcolt Investment and had not been authorized to do so. Gravelle and Jaffrey were the listed contact people for readers who sought more information. Colt advised:

(i) "In 2016, Nikolas Perrault, the former President and CEO, made the decision to incorporate and invest 500,000 in the Turkish company [Turcolt], with 250,000 of the funds provided from Colt's cash resources and the additional 250,000 borrowed from a shareholder of Colt";

(ii) "While the incorporation of and investment in the Turkish company and the borrowing of funds all required Colt board of directors approval, the former President and CEO did not seek board approval and did not inform the board of these actions when they were done";

(iii) Colt had determined that the "500,000 it had invested in [Turcolt] has been removed from [Turcolt's] bank account without Colt's authorization";

(iv) "The Company is in the process of determining the impact of these removed funds on its financial statements for the third quarter of 2016 and will make any required regulatory filings in this regard"; and

(v) Colt reported that with respect to its remaining projects (a) it would "focus on funding for two assets, the Alvalade project in Portugal and the Company's investment in CRME"; (b) "Colt will continue to consider" whether to invest further in Boa Fe; and (c) the permit for Colt's Tabuçao project was set to expire unless a joint-venture partner was found to fund that project's expenses.

38 On February 1, 2017, the TSX Venture Exchange halted trading of Colt's securities. There has been no trading in Colt's securities since that date.

Analysis

a) Overview

39 The only issues on this motion are whether, on the evidence before the court, Kauf has established a reasonable possibility of success that:

(i) at the date of the December 2016 Press Release, Jaffrey had knowledge (or deliberately avoided acquiring knowledge) that the Turcolt Investment was unauthorized (previously defined as the "Jaffrey Knowledge Issue"); and

(ii) the December 2016 Press Release could be considered as a public correction under the *Act* (previously defined as the "Public Correction Issue").

40 I first review the law on the general issues which are necessary to consider the specific issues before the court. I summarize the general issues as follows: [11]

(i) the legislative framework under the *Act* for secondary market misrepresentation claims,

(ii) the purpose of securities regulation under the *Act* and the remedial nature of the legislation,

(iii) the test for materiality,

(iv) the test on a motion for leave to proceed under s. 138.8(1), and

(v) the necessity to apply the leave test to every claim asserted under s. 138.3.

41 I then review the Jaffrey Knowledge Issue and the Public Correction Issue.

b) The general issues relevant to this motion

Issue 1: The legislative framework under the Act for secondary market claims

42 There is no dispute on this motion that Part XXIII.1 of the *Act* applies to Colt as a responsible issuer, since Colt is a reporting issuer.

43 By way of overview, I adopt the following passage from Hourigan J.A. in *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241 (Ont. C.A.), at para. 36 [*Rahimi*]:

Part XXIII.1 of the *SA* creates a regime governing civil liability for misrepresentation on the secondary securities market. Section 138.3 creates a cause of action for misrepresentation, but s. 138.8 requires the plaintiff to first obtain leave of the court to commence the action.

44 Liability for a misrepresentation to the secondary market [12] is governed by s. 138.3(1), which provides that if:

(i) A responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation; and

(ii) A person or company acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected; [13] then

(iii) That person or company has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against (a) the responsible issuer, (b) each director of the responsible issuer at the time the document was released, and (c) each officer of the responsible issuer who authorized, permitted, or acquiesced in the release of the document. [14]

45 A responsible issuer is also liable for a failure to make timely disclosure under s. 138.3(4) which provides that if:

(i) A responsible issuer fails to make a timely disclosure; and

(ii) A person or company acquires or disposes of the issuer's security during the period between the time when the material change was required to be disclosed in the manner required under the *Act* or regulations and the subsequent disclosure of the material change; then

(iii) That person or company has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against (a) the responsible issuer, (b) each director of the responsible issuer at the time the document was released, and (c) each officer of the responsible issuer who authorized, permitted, or acquiesced in the failure to make timely disclosure. [15]

46 Section 75 provides that material changes must be disclosed in both a news release and report:

Publication of material change

75(1) Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change.

Report of material change

75(2) Subject to subsection (3), the reporting issuer shall file a report of such material change in accordance with the regulations as soon as practicable and in any event within ten days of the date on which the change occurs.

47 The term "misrepresentation" is defined in s. 1(1) as (a) "an untrue statement of material fact", or (b) "an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made".

48 A "material fact" is defined in s. 1(1) as "... a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

49 Under s. 1(1), "material change" is defined as "...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 the securities of the issuer".

50 The term "failure to make timely disclosure" is defined in s. 138.1 as a "failure to disclose a material change in the manner and at the time required under this Act or the regulations".

51 A "core document" is defined under s. 138.1 to include "management's discussion and analysis" and "an interim financial report of the responsible issuer".

52 "Non-core" documents, *i.e*. a document which is not a core document, and public oral statements, are subject to an additional burden of proof under s. 138.4(1). That section provides that a person or company (except an expert under s. 138.4(2)) is not liable for a misrepresentation (including an omission of a material fact) under s. 138.3 with respect to a non-core document or public oral statement unless the plaintiff proves that the person or company:

> (i) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;
>
> (ii) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or
>
> (iii) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

Issue 2: The purpose of securities regulation under the Act and the consequent remedial nature of the legislation

53 The Supreme Court has affirmed that the primary purpose of securities regulation under the *Act* is to provide investor protection, access to justice and a level playing field. Consequently, securities legislation should be interpreted broadly and purposively.

54 In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 (S.C.C.) at para. 63 [*Pezim*], Iacobucci J. spoke for the court and held that the "primary goal" of securities regulation "is the protection of investors but other goals include capital market efficiency and ensuring public confidence in the system".

55 Similarly, in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106 (S.C.C.) [*Theratechnologies*], Abella J. spoke for the court and held, at para. 25, that the statutory requirements for continuous disclosure through periodic and timely disclosure are designed to create a "level playing field" where all investors have access to the same information and all pricing and investment decisions are made from the same starting point.

56 Part XXIII.1 of the *Act* provides a mechanism by which aggrieved shareholders may obtain access to justice when issuers breach their continuous disclosure obligations. Secondary market liability legislation "emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors" (*Theratechnologies*, at para. 27).

57 Part XXIII.1 of the *Act* is remedial legislation that should be interpreted broadly and purposively (*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 (S.C.C.), at paras. 75, 178, 186 [*CIBC* SCC]). [16]

58 Côté J. held in *CIBC* SCC that the leave requirement is part of the "specific balance struck" under the legislation providing for the statutory claim, which includes a limitation period and no requirement to prove reliance on the misrepresentation (at para. 75).

59 Consequently, it is settled law that a broad and purposive interpretation of the *Act* is required when interpreting s. 138.3 to ensure the goal of investor protection, keeping in mind the balance set out by the leave requirement as discussed in more detail below.

Issue 3: The test for materiality

60 The relevant principles to establish materiality were set out by Rothstein J. in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.), at para. 61 [*Sharbern*]:

> (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 its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;
>
> (iii) The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;
>
> (iv) Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors;
>
> (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;
>
> (vi) 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; and
>
> (vii) 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.

Issue 4: The applicable test on a motion for leave to proceed under s. 138.8(1)

61 Section 138.8(1) requires a plaintiff to obtain leave of the court in order to bring an action under s. 138.3 for misrepresentation:

> **Leave to Proceed**
>
> 138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

62 The law is settled by the Supreme Court and recent appellate decisions that leave to proceed requires the court to engage in a "robust" analysis of the evidence, but not in the form of a "mini-trial". The plaintiff is required only to establish a "reasonable possibility of success".

63 In *Theratechnologies*, the court reaffirmed the importance of the leave requirement as more than just a "speed bump". The leave requirement is a "robust deterrent screening mechanism so that cases without merit are prevented from proceeding". Abella J. held (at para. 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.

[Emphasis added.]

64 However, the court cautioned against converting a leave application into a "mini-trial" with a "full analysis" of the evidence. The court further cautioned against applying "evidentiary requirements" that are "so onerous as to essentially replicate the demands of a trial". Abella J. held (at para. 39):

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

65 Similarly, in *CIBC* SCC, the court emphasized the importance of the leave requirement to avoid strike suits, by requiring that the court be satisfied the action has a reasonable possibility of success (at paras. 67-68), with a "desired precise balance between deterrence and compensation ... that found expression in all of the limits built into the scheme" (at para. 69).

66 In *Mask* CA, Strathy C.J.O. similarly set out the role of the court on a motion for leave to proceed under s. 138.8(1) (at para. 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.

67 In the recent case of *Rahimi*, Hourigan J.A. reviewed the decisions of the Supreme Court in *CIBC* SCC and *Theratechnologies*, and reiterated the tests set out above (*Rahimi*, at paras. 38 and 40).

68 Consequently, applying the above comments, the court on a motion for leave to proceed under s. 138.8(1) should consider "all of the evidence" including "appropriate inferences" when determining if there is "some credible evidence" that can support a "plausible analysis of the applicable legislative provisions".

69 The court must draw a balance between (i) on the one hand, not engaging in a "finely calibrated weighing process" (as per Strathy J. (as he then was) in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. S.C.J.), at para. 374), and "keeping in mind the relatively low merits-based threshold ... and the limits of the record before [the court]" (*Mask* CA, at para. 45) while (ii) on the other hand, ensuring that it conducts a "robust screening" of the case to ensure that there is a "plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim ... to ensure that cases with little chance of success - and the time and expense they impose - are avoided" (*Theratechnologies*, at paras. 38-39). [17]

Issue 5: The necessity to apply the leave test to every claim asserted under s. 138.3

70 The leave test must be applied to each misrepresentation claim asserted under s. 138.3 and considered with respect to each of the impugned documents in which the misrepresentation is claimed.

71 Kauf's approach at the hearing not to pursue certain misrepresentation claims [18] and instead focus on the alleged particular misrepresentations was consistent with the settled law.

72 In *Paniccia*, Perell J. reviewed the law and summarized the applicable legal principle (at para. 86):

> The statutory causes of action require leave, and the leave requirement was designed to have a gatekeeper function. Leave is required for each discrete misrepresentation, such that leave for one allegation of misrepresentation does not mean that leave is granted for all other allegations of misrepresentation and, therefore, a plaintiff must lead sufficient evidence to satisfy the Court as to the leave requirement for each discrete allegation of misrepresentation. [Footnotes omitted.]

73 Consequently, I apply the leave test to each of the remaining issues, in order to determine whether there is a reasonable possibility of success on the s. 138.3 claim.

c) The specific issues to be determined on this motion

74 The only issues to be determined on this motion relate to the December 2016 Press Release. The court must determine whether Kauf has a reasonable possibility of success to establish at trial that:

> (i) as of the date of the December 2016 Press Release, Jaffrey had knowledge (or deliberately avoided acquiring knowledge) that the Turcolt Investment was unauthorized (previously defined as the "Jaffrey Knowledge Issue"); and
>
> (ii) the December 2016 Press Release constitutes a public correction in relation to the Turcolt Investment (previously defined as the "Public Correction Issue").

75 I address each of these issues below.

Issue 1: The Jaffrey Knowledge Issue

76 The Defendants did not submit that they had no duty to disclose (on the basis of materiality) in the December 2016 Press Release that the Turcolt Investment was unauthorized. Consequently, the issue of the duty to disclose is not before the court.

77 Further, Colt acknowledged, for the purposes of the motion, that there was a reasonable possibility of success that a court could find it knew, as at the December 21, 2016 date of the press release, that the Turcolt Investment was unauthorized (as Perrault was the CEO of the company). Consequently, Colt did not oppose leave to proceed to plead this misrepresentation against it under s. 138.3(1) in connection with the December 2016 Press Release.

78 Jaffrey did submit that there was no reasonable possibility of success that a court could find he knew (or deliberately avoided acquiring knowledge), as at the December 21, 2016 date of the press release, that the Turcolt Investment was unauthorized. Consequently, Jaffrey opposed leave to proceed to plead this misrepresentation against him under s. 138.3(1) in connection with the December 2016 Press Release.

79 I first address the applicable law and then apply the law to the evidence before the court.

1. The applicable law to consider the knowledge requirement in a non-core document under s. 138.4

80 As a non-core document, the December 2016 Press Release is subject to the additional burden of proof under s. 138.4(1), set out at paragraph 52 above, that plaintiff must establish that the person or company knew that the non-core document or public oral statement contained the misrepresentation, deliberately avoided acquiring such knowledge, or engaged in gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

81 The *Theratechnologies* test applies to all aspects of the s. 138.3 claim, including the burden of proof under s. 138.4(1) for a non-core document. Consequently, the court's review of the "knowledge" requirement cannot become a "mini-trial" or "full

analysis" at the "authorization stage". Further, "evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial".

82 Consequently, I consider whether there is a "plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim", such that there "is a reasonable possibility" that Kauf will be able to establish one or more of the "knowledge" preconditions under s. 138.4(1). That analysis must be conducted through a "robust" screening of the evidence.

83 Further, as I discuss at paragraph 66 above, the requirements under s. 138.4(1) can be proven on the basis of "appropriate inferences" (*Mask* CA, at para. 45). A plaintiff should not require direct evidence of knowledge (such as an e-mail or attendance at a board meeting) to establish a claim of "knowledge" at trial under s. 138.4(1), let alone to meet the lower threshold for leave to proceed.

2. Application of the law to the facts in this case

84 The parties put no case law before the court as to the test for knowledge (or deliberately avoiding acquiring knowledge) under s. 138.4(1). Instead, the issue was argued based on the general principles I set forth above, as well as on the evidentiary record. I take this approach when considering the Jaffrey Knowledge Issue before the court.

85 Jaffrey submits that there is no reasonable possibility a claim against him could succeed for misrepresentation in the December 2016 Press Release. He submits:

(i) The evidentiary record does not support that Jaffrey knew (or deliberately avoided acquiring knowledge) at the date of the December 2016 Press Release that the Turcolt Investment was unauthorized;

(ii) The Note to Reader in the Q3 2016 Disclosure removes any responsibility of Jaffrey for the alleged misrepresentation by omission; and

(iii) Policy considerations do not support a claim against him as CFO.

86 I address each of these submissions below.

i. The evidentiary record

87 Jaffrey submitted that there was no "credible evidence" that could support a "plausible analysis" of s. 138.4(1) to establish a "reasonable possibility" that Jaffrey, as of the December 2016 Press Release, either knew that the Turcolt Investment was unauthorized or deliberately avoided acquiring such knowledge. [19] I do not agree.

88 It was Jaffrey who certified that the information about the Turcolt Investment in the Q3 2016 Disclosure contained no misrepresentations. Consequently, there is evidence that he was aware of all of the details which were set forth in the Q3 2016 Disclosure.

89 Consequently, by November 29, 2016, there is a reasonable possibility that Jaffrey knew:

(i) Colt invested 500,000 (CDN $0.74 million) in Turcolt, through Eurocolt, using 250,000 from funds raised in a recent private placement in the third quarter of 2016 and the remaining 250,000 invested by a loan from a shareholder of Colt to Eurocolt to invest in Turcolt;

(ii) The short-term loan to Eurocolt was for 120 days at a 12% interest rate based on a shareholder loan agreement dated July 13, 2016 expiring on November 13, 2016;

(iii) The shareholder loan was now repayable on demand and secured by a personal guarantee from Perrault which was secured on both (a) the "potential to register a second mortgage on the residential property owned by the CEO in Portugal" and

(b) "one million shares owned by the CEO in Colt Resources Middle East" (stated at both notes 9 and 13 of the Q3 Financial Statements and referred to in the Q3 2016 MD&A);

(iv) The shareholder agreement supporting the ownership arrangement was unknown;

(v) If Turcolt was unwound prior to commencing operations it was unlikely Turcolt would receive more than the amount invested regardless of its equity interest; and

(vi) Substantially all of Colt's cash resided in Turcolt and "this cash is not available for Company's use".

90 In the above circumstances, Jaffrey represented (i) Colt had engaged in a significant investment outside its stated mandate of exploration in Portugal; (ii) Colt had substantially all of its cash invested in Turcolt and the cash was unavailable for use; (iii) the shareholder agreement related to the Turcolt Investment was unknown; and (iv) Eurocolt owed 250,000 on a shareholder loan for the investment at 12% payable on demand and secured by 1 million CRME shares. On that evidence, it is reasonably possible that a court could infer that Jaffrey, as CFO and responsible for Colt's financial affairs, either inquired into the background and approval of the investment or deliberately avoided acquiring such knowledge.

91 Consequently, I do not accept Jaffrey's position that there is no "reasonable possibility" that the court could infer that the burden of proof under s. 138.4(1) could be met.

ii. The Note to Reader

92 Jaffrey further relies on the "Note to Reader" contained as part of Jaffrey's certification for the Q3 2016 Disclosure, to submit that a court could not infer Jaffrey knew that the Turcolt Investment was unauthorized as of the date of the December 2016 Press Release. I do not agree.

93 In his officer's certificate delivered with the Q3 2016 Disclosure, Jaffrey certified that the Q3 2016 Disclosure contained "no misrepresentations", and "the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made".

94 The above certification is unambiguous.

95 The Note to Reader states:

In contrast to the certificate required for non-venture issuers under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109), **this Venture Issuer Basic Certificate does not include representations relating to the establishment and maintenance of disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR) as defined in NI 52-109**. In particular, the certifying officers filing this certificate are not making any representations relating to the establishment and maintenance of

(i) controls and other procedures designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

(ii) a process to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

The issuer's certifying officers are responsible for ensuring that processes are in place to provide them with sufficient knowledge to support the representations they are making in this certificate. Investors should be aware that inherent limitations on the ability of certifying officers of a venture issuer to design and implement on a cost effective basis DC&P

and ICFR as defined in NI 52-109 may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

[Emphasis added.]

96 Consequently, the Note to Reader only advises the reader that the "controls", "procedures" and "processes" for matters *outside* the representations made in the disclosure are not certified. The Note to Reader expressly states that the certifying officers *are* responsible for ensuring processes are in place to enable them to make the representations they provide to the reader.

97 Further, it is consistent with the above interpretation of the Note to Reader that a failure to disclose that the Turcolt Investment was unauthorized is not a misrepresentation about whether there is a *process* or *control* in place. Rather, it is a misrepresentation of a *material fact* relevant to the reader, for which the certifying officers take responsibility (including for processes related to those representations).

98 Therefore, I find that the "carve-out" for internal processes and controls in the Note to Reader relied upon by Jaffrey does not vitiate an alleged misrepresentation by omission that the Turcolt Investment was unauthorized. Otherwise, Jaffrey's certification that there are "no misrepresentations" and that "the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made" would be meaningless.

iii. Policy considerations

99 Jaffrey submits that if the court found at trial that he had knowledge that the Turcolt Investment was unauthorized, or deliberately avoided acquiring such knowledge, this would result in "every CFO" being responsible for "every fact" about "every transaction" entered into by the company. I do not agree.

100 Jaffrey knew the facts of the Turcolt Investment summarized at paragraph 90 above. It is on this evidence that a court could infer Jaffrey had knowledge (or deliberately avoided acquiring knowledge) that the Turcolt Investment was unauthorized.

101 Consequently, a finding of liability in this case would not mean that "every CFO" would be responsible for "every fact" about "every transaction" entered into by the company.

iv. Conclusion

102 For the above reasons, I find that Kauf has established a reasonable possibility that as of December 21, 2016, Jaffrey knew or deliberately avoided acquiring knowledge that the Turcolt Investment was unauthorized.

Issue 2: The Public Correction Issue

103 The determination of whether the court should grant leave to Kauf to plead that the December 2016 Press Release is a public correction could have a significant impact on the claim.

104 If Kauf is not granted leave to plead that the December 2016 Press Release is a public correction, then any shareholder who purchased Colt shares after the July 13, 2016 Turcolt Investment [20] and sold their shares after December 21, 2016 could not rely on the December 21, 2016 Press Release (when the share price dropped 22 per cent in one day) as a "time-post" for damages.

105 If Kauf is granted leave to plead that the December 2016 Press Release is a public correction, then any shareholder who purchased their shares after the July 13, 2016 Turcolt Investment and sold their shares after December 21, 2016 would be able to rely on the December 2016 Press Release as a time-post for damages. [21]

106 I first address the applicable law and then apply the law to the evidence before the court.

1. The applicable law for leave to plead a public correction

107 I address the applicable law for leave to plead a public correction by considering the following issues:

(i) the applicable threshold to satisfy the public correction requirement on a motion for leave,

(ii) the role of a public correction under the *Act*, and

(iii) the criteria for a public correction.

108 I address each of these issues below.

i. The applicable threshold to satisfy the public correction requirement on a motion for leave

109 The parties provided only one case, *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 (Ont. S.C.J.) [*Swisscanto*], in which the court was required to determine whether leave ought to be granted to plead that a statement was a public correction. In *Swisscanto*, BlackBerry issued a press release stating, among other things (at paras. 16-18, and 68):

(i) BlackBerry was incurring a $1 billion inventory charge "primarily attributable" to BB Z10 devices;

(ii) BlackBerry was changing its revenue recognition practice on BB Z10 devices from sell-in to sell-through - that is, it was deferring revenue recognition on new shipments of BB Z10 products until those products were sold through to end customers; and

(iii) BlackBerry was pursuing "strategic alternatives".

110 The market price of BlackBerry's shares dropped by 15 per cent after the press release was issued (at para. 19).

111 The issue before the court was whether leave should be granted to plead that the press release was a public correction to the alleged misrepresentation that the prior "sell-in" method was GAAP[22] -compliant. The plaintiff alleged that the sell-in method did not comply with GAAP.

112 Belobaba J. applied the leave test from *Theratechnologies* to all of the requirements under s. 138.3. He reviewed both the misrepresentation and the public correction requirements under s. 138.3 by determining "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?" (at para. 30).

113 Belobaba J. concluded that "for all the reasons stated ... there is a reasonable possibility that this action will be resolved in favour of the plaintiff" (at para. 74).

114 Consequently, with respect to both the misrepresentation and public correction requirements, the "reasonable possibility" test applies on a motion for leave. It is not a motion for summary judgment or a mini-trial. While the court is required to provide a robust deterrent screening mechanism, the court does not make a final determination of whether the public correction (or misrepresentation) requirement will be satisfied at trial, and only considers whether there is a "reasonable possibility of success" based on a "plausible analysis of the applicable legislative provision, and some credible evidence in support of the claim".

ii. The role of a public correction under the Act

115 In *Swisscanto*, Belobaba J. conducted a review of existing case law which had considered a public correction under s. 138.3 (even though the leave issue was not before the court in those cases).

116 Belobaba J. summarized the role of a public correction under s. 138.3 as a "time-post" relevant to damages. He held (at para. 57):

> In order to provide a fixed and identifiable time period for liability and the statutorily prescribed assessment of damages set out in s. 138.5(1) and (2), s. 138.3(1) provides a statutory right of action for damages sustained between two time-

posts: the time that the document containing the alleged misrepresentation was publicly released and the time that the misrepresentation was publicly corrected.

117 Belobaba J. commented that the public correction requirement also serves to reverse the onus of proof of damages under s. 138.5(3). He held (at para. 58):

> Once the plaintiff meets the requirements of s. 138.3(1) by showing a misrepresentation and a public correction, causation is presumed and damages are implied. Under the "attribution defence" that is provided under s. 138.5(3), the onus is on the defendant to show that the decline in share price was not caused by the misrepresentation. In other words, for the statutory right of action provided in s. 138.3, causation is transformed into a defence under s. 138.5(3).

118 In *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784 (Ont. S.C.J.), the defendants sought to bring a summary judgment motion to dismiss the claim on the basis that the alleged public correction was not connected to the alleged misrepresentation. The plaintiffs also sought to bring a summary judgment motion with respect to their misrepresentation (and public correction) claims. The parties each wanted their respective motion to proceed first. Perell J. heard a motion for directions to consider the issue.

119 Perell J. permanently stayed both summary judgment motions and ordered the matter to proceed to examinations for discovery. He commented on the role of the public correction requirement (at paras. 154, 164-65):

> **... The public correction of the misrepresentation is an element of the statutory cause of action; it is a surrogate for causation, and it has a fundamental operative role in the calculation of damages.** It is certainly a worthy enough matter to be the subject matter of adjudication, and notwithstanding the arguments of the Plaintiffs, it appears to be a potentially dispositive issue, much like a limitation period defence can be a free-standing dispositive issue.
>
> There is another point worth mentioning. The underlying theory of the SNC-Lavalin Defendants' argument may, and I emphasize the word may, be unsound. The underlying theory of the SNC-Lavalin Defendants' argument is that there is no genuine issue for trial when a constituent element of the statutory cause of action, the public correction, has not been proven. What may be unsound in this theory is that **while the public correction is indeed a constituent element of the statutory cause of action, it is somewhat of a shape-shifter constituent element that does not lend itself to being resolved summarily**.
>
> As a constituent element, public correction operates much differently than say misrepresentation operates as a constituent element in the statutory cause of action or in the common law tort of negligent misrepresentation. As noted by Justice Belobaba, the issue of whether there has been a public correction is transformed into a matter of defence. ...
>
> [Emphasis added.]

120 Further, the time-post role of a public correction must be considered in light of the purposes of the *Act*, set out in s. 1.1, to (a) protect investors from unfair, improper or fraudulent practices, (b) foster fair and efficient capital markets and confidence in capital markets, and (c) contribute to the stability of the financial system and the reduction of systemic risk.

121 Consequently, the leave requirement analysis must be undertaken with consideration of the role of a public correction. If there is a reasonable possibility based on a robust analysis of the evidence that a trial court could find that the purported public correction could serve as a "time-post" for damages, leave ought to be granted.

122 If there is no reasonable possibility that a trial court could find that the purported public correction could serve as a "time-post" for damages, leave ought not to be granted.

iii. The criteria for a public correction

123 In *Swisscanto*, Belobaba J. commented that "the scope and content of the public correction requirement has not been judicially considered, at least not in a principled fashion" (at para. 3). He then reviewed "the case law so far" (at paras. 60-63), and set out criteria to establish a public correction (at paras. 64-65).

124 Belobaba J. set out the following criteria to establish a public correction (quoted *verbatim*, at para. 65):

> (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. [Italics in original.]

125 Belobaba J. held that a "passing reference" in a press release could constitute a public correction (at para. 72):

> And finally, just because the accounting change was a passing reference in the press release, as the defendant claims, is not determinative in deciding whether a public correction has been established. It may, however, assist the defendants should they assert a section 138.5(3) defence at trial.

126 In *Paniccia*, Perell J. denied leave to proceed under s. 138.8(1) on the basis that there was no reasonable possibility the alleged misrepresentation claims could be established. Consequently, he did not consider whether there was a reasonable possibility that the public correction requirement was met. Nevertheless, he summarized the key principles of the public correction requirement as follows:

> (i) "[A] public correction of the false information" is one of the "major constituent elements of the statutory causes of action for misrepresentations in the secondary market" (at para. 63);
>
> (ii) To plead the statutory cause of action, the plaintiff should "identify the public correction and when it was made" (at para. 64);
>
> (iii) "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*" (at para. 65);
>
> (iv) "A key identifier of a public correction is that it can be shown to have a statistically significant impact on market prices" (at para. 65);

(v) "[T]he 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" (at para. 66);

(vi) "The public correction need not be made by the issuer of the security and can take any form of message, including statements by the issuer, credit rating agencies, market analysts, and short-sellers in newspaper articles and internet postings, even anonymous ones" (at para. 66); and

(vii) "The public correction need not be a mirror-image of the alleged misrepresentation or a direct admission that a previous statement is untrue" (at para. 66).

127 In *Wong v. Pretium Resources*, 2017 ONSC 3361, 139 O.R. (3d) 353 (Ont. S.C.J.) [*Wong*], Belobaba J. granted leave to bring a secondary market misrepresentation claim under s. 138.8(1). The company (Pretium) had obtained a mineral resource estimate ("MRE") with respect to its Brucejack gold mine. The MRE was used for a feasibility study that concluded that "Brucejack contained economically recoverable mineral reserves capable of supporting a successful bulk-mining operation". However, the feasibility study was dependent on the validity of the underlying MRE (at para. 6).

128 Pretium hired Strathcona to test and verify the validity of the MRE (and by extension, the feasibility study). Strathcona intended to extract and test a 10,000 ton sample and report on the test results. However, because Pretium had difficulty finding a custom mill that was available, Strathcona procured a sample tower to test a portion of the bulk sample before it was shipped for milling (at paras. 7-9).

129 The sample tower test failed to confirm the validity of the MRE. Strathcona repeatedly urged Pretium's executive team to publicly disclose these facts to the market, but Pretium believed that the sample tower method was flawed and that a full testing of the entire bulk sample would establish the presence of economically-viable gold resources (at paras. 10-15).

130 Strathcona then resigned from the bulk sample program because Pretium would not disclose that the bulk sample testing did not confirm the validity of the MRE and feasibility study. Pretium issued two press releases in relation to the Strathcona resignation - one announcing the resignation of Strathcona on October 9, 2013, and the second setting out the reasons for the resignation in a more detailed press release dated October 22, 2013.

131 Belobaba J. noted the significant loss in share value between the October 9 and 22 press releases which referred to Strathcona's resignation. That loss formed the basis of the plaintiff's claim for damages (at paras. 17-18):

> In a news release on October 9, Pretium announced Strathcona's resignation and in a further news release on October 22, Pretium summarized the reasons provided by Strathcona for its withdrawal and then added its own views that these concerns were unfounded. Over these 13 days in October, Pretium share prices plummeted by more than 50 per cent from $7.01 to **$3.45.**
>
> The plaintiff, who resides in Richmond Hill, Ontario, had purchased 1000 shares on August 21, 2013. **He says he sustained losses over the time period in question and commenced this proposed class action.** [Emphasis added.]

132 Belobaba J. considered the representations made by Pretium in its prior documents that (i) Strathcona had been hired to oversee and report on the bulk sample project; (ii) Strathcona was a "reputable firm" and "recognized expert"; and (iii) the sample tower was an integral part of the testing procedure (at paras. 32-33).

133 Belobaba J. held that there was a reasonable possibility that the plaintiff could succeed on a statutory misrepresentation claim based on the omission to disclose Strathcona's findings and concerns.

134 Consequently, Belobaba J. granted leave to proceed under s. 138.8(1). He held (at para. 40):

> In my view, **given that the primary goal of the OSA is investor protection**, given that the surrounding circumstances as set out above in paragraphs 32 to 35 and viewed objectively favoured disclosure, **and given that Pretium could very**

easily have satisfied both the statutory disclosure obligation and its own desire to make clear that Strathcona's findings were unfounded by doing (in each of the seven releases) exactly what it did in the October 22 news release, I find there exists a reasonable possibility that the plaintiff's submission - that Strathcona's concerns were material and should have been disclosed - will succeed at trial.

[Emphasis added, footnotes omitted.]

135 The Defendants submit that the effect of the decision in *Wong* was that while leave would have been granted to plead a misrepresentation arising from the October 9, 2013 press release, the "time-post" for a public correction would only run from the October 22, 2013 press release, which set out the reasons for Strathcona's resignation. Under the Defendants' submission, any shareholder who sold shares after October 9, 2013 would not be able to rely on the "more than 50 per cent" price decrease "over these [next] 13 days", because it was only on October 22, 2013 that the company disclosed the reasons for Strathcona's resignation.

136 I do not agree.

137 In *Wong*, Belobaba J. did not analyze the public correction requirement, [23] but his reasons (at paras. 17-18) reflect that he considered the decrease in share price "[o]ver these 13 days in October", which took place from the date of the first notice of Strathcona's resignation in the October 9, 2013 press release, until the omitted facts related to the sample tower test were disclosed in the second press release dated October 22, 2013. Belobaba J. noted that the plaintiff had "sustained losses over the time period in question". Belobaba J. held that the claim had a "reasonable possibility" of success.

138 Consequently, while not directly analyzed in *Wong*, I take from that decision that Belobaba J. was satisfied that the October 9, 2013 disclosure of Strathcona's resignation, which itself resulted in a share price decline, could "reasonably" constitute a partial public correction [24] (as would the subsequent October 22, 2013 Pretium statement that set out the previously omitted reason for the resignation).

2. Application of the law to the facts of the present case

139 I first review the positions of the parties. I then apply the above principles to the facts of the case.

i. The position of the Defendants

140 The Defendants submit that the December 2016 Press Release cannot be both a misrepresentation (by failing to disclose that the Turcolt Investment was unauthorized), while also being a public correction that the Turcolt Investment was unauthorized. The Defendants submit (quoted *verbatim*):

(i) The December 21 news release could not omit and state the very same thing, nor could it reveal that Perrault made the investment in Turcolt without authority if that information was "first" revealed on January 31, 2017; and

(ii) The December 21 news release cannot simultaneously propagate a misrepresentation and correct that same misrepresentation.

141 The Defendants submit that Kauf has failed to meet the following requirements under the case law to establish a reasonable possibility that the December 2016 Press Release could be a public correction (quoted *verbatim*):

(i) The public correction is not pleaded with precision;

(ii) There is no linkage or connection between the December 21 news release and the alleged misrepresentation; and

(iii) The December 21 news release was not reasonably capable of revealing the existence of the alleged misrepresentation.

142 The Defendants further submit that Kauf was required, and failed, to lead evidence to establish that the December 2016 Press Release could have been viewed by the market as a corrective statement of the alleged misrepresentation that the Turcolt Investment was unauthorized.

143 The Defendants do not dispute, for the purpose of the leave motion (while reserving the right to challenge causation at trial), that the December 2016 Press Release had a significant impact on the value of Colt's shares.

ii. The position of Kauf

144 Kauf submits that he has pleaded the public correction with precision. Kauf relies on the statements in the December 2016 Press Release that (i) Perrault was being replaced by Gravelle; (ii) the replacement took place "as the Company reviews its strategic options"; and (iii) the "terms and conditions of [Perrault's] [transitional] role are currently under negotiation".

145 Kauf submits that (i) there was a linkage between the December 2016 Press Release and the alleged misrepresentation and (ii) the press release was reasonably capable of revealing the existence of the alleged misrepresentation. Kauf submits that there is a reasonable possibility that those statements signaled to the market that there were some undisclosed concerns with respect to Perrault's conduct concerning the Turcolt Investment, resulting in a sell-off of shares with a 22 per cent drop in the price.

146 Kauf submits that it is not necessary that the December 2016 Press Release specifically refer to the Turcolt Investment being unauthorized in order to find a reasonable possibility of success that it constitutes a partial public correction. Kauf submits that the market could reasonably understand that there was some connection between Perrault's departure and the Turcolt Investment.

147 Kauf submits that Colt cannot rely on its failure to disclose that the Turcolt Investment was unauthorized when Colt was the party who engendered negative market speculation through its failure to make full disclosure and instead sent out a "storm warning" [25] that depressed the share price.

148 Finally, Kauf submits that he is not required to lead expert or other evidence as to the effect on the market of the December 2016 Press Release. Kauf submits that a court could conclude, based on common sense inferences arising from the total mix of information available, that the press release provided "corrective" information related to the Turcolt Investment which negatively affected share value.

149 Consequently, Kauf submits that it is reasonably possible that the December 2016 Press Release was both (i) a "partial public correction", by advising at least some readers that "something was wrong" about Perrault's conduct in relation to the Turcolt Investment; and (ii) a misrepresentation, by not disclosing "what was wrong" about Perrault's conduct in relation to the Turcolt Investment, i.e. that he was not authorized to make the investment.

iii. Analysis

150 Taking into account the broad and purposive nature of securities legislation to provide investor protection, and applying the principles set out in the case law above, I find that there is a reasonable possibility of success at trial that the court will find that the December 2016 Press Release constitutes a public correction in relation to the Turcolt Investment.

151 I do not agree with the Defendants that "the public correction is not pleaded with precision".

152 The "falsity" pleaded is that the Turcolt Investment was unauthorized. Colt advised readers of the Q3 2016 Disclosure that it (through Eurocolt) had made the investment in Turcolt. Until the January 2017 Press Release, Colt did not advise that Perrault had made an unauthorized investment.

153 For the purposes of this hearing, the Defendants acknowledge that it is reasonably possible that a court could find that the alleged misrepresentation was material and can be supported on the evidence.

154 The pleaded public correction is the December 2016 Press Release. Kauf pleads that the statements that (i) Perrault was being replaced by Gravelle; (ii) the replacement took place "as the Company reviews its strategic options"; and (iii) the "terms and conditions of [Perrault's] [transitional] role are currently under negotiation" constituted corrective information advising the market of undisclosed concerns about Perrault's involvement in the Turcolt Investment. Such a pleading is precise, and meets the *Swisscanto* test.

155 Considering the "total mix" of information (*Sharbern*, at para. 6) is necessary to determine the linkage between the alleged misrepresentation and the alleged corrective statement. That mix includes the information disclosed in the Q3 2016 Disclosure. [26]

156 Colt in effect advised its shareholders in the Q3 2016 Disclosure that there was no reason to doubt the propriety of the Turcolt Investment, stating that Colt (through Eurocolt) had made the investment, while disclosing material facts which included:

(i) "[T]he shareholder agreement supporting the ownership arrangement was unknown";

(ii) "Substantially all cash in the Company is cash that resides in Turcolt", and "this cash is not available for Company's use";

(iii) Eurocolt had received a "short-term" shareholder loan in the amount of 250,000 so that it could it make the investment, with interest at 12% and the term of the loan having expired such that it was payable on demand; and

(iv) The loan was secured on a personal guarantee given by Perrault which was secured on, amongst other things, one million shares owned by Perrault in CRME.

157 Three weeks later, Colt advised its shareholders that Perrault was dismissed under adverse circumstances, with terms and conditions of Perrault's transitional role under negotiation and with Colt reviewing its strategic options. An "appropriate" inference could be open to the trial judge, as permitted under *Mask* CA, to find that it was only upon the December 2016 Press Release that Colt shareholders had any reason to suspect impropriety by Perrault with respect to the Turcolt Investment. That linkage only arose at that time.

158 However, the Defendants submit that because the fact that the Turcolt Investment was unauthorized was only disclosed by Colt "for the first time" [27] in the January 2017 Press Release, there can be no linkage between the December 2016 Press Release and the alleged misrepresentation. I do not agree.

159 The statements in the December 2016 Press Release sent out a "storm warning". Investors could reasonably have "connected the dots" and concluded that Perrault engaged in some form of negative conduct that led to his departure, given the statements that the terms and conditions of his transitional involvement had not yet been negotiated and Colt was exploring strategic options.

160 Investors would have known that Perrault's departure was three weeks after the Q3 2016 Disclosure which advised that (i) Colt (through Eurocolt) had made a significant investment with substantially all of its cash in a Turkish company with no operations, which had not been within its publicly-stated mandate of explorations in Portugal; (ii) the shareholder agreement was unknown; (iii) a shareholder loan with significant interest was now payable on demand; and (iv) 1 million CRME shares owned by Perrault were security for the loan.

161 There had been no prior indications from Colt or otherwise that Perrault had any intention of stepping down.

162 The Defendants submit that it could only have been a "lucky guess" or "speculation" for an investor to "connect the dots" and conclude from the December 2016 Press Release that the Turcolt Investment was unauthorized. However, I find that such a narrow and semantic connection is not required under the case law, particularly when, as in *Wong*, the corporation created the uncertainty of linkage because it failed to disclose a material fact in its press release.

163 It may be that one investor may have "connected the dots" differently from another, and it may even be that no particular investor "connected the dots" to a conclusion that Perrault made an unauthorized investment. Some investors may have made that connection. Some investors may have speculated that his departure was in relation to the Turcolt Investment, and others may have not done so. Sophisticated investors or analysts may have speculated correctly as they would have followed the company, and perhaps chose to sell their shares, leaving those unsophisticated shareholders holding their shares until after the shares were halt-traded following the January 2017 Press Release.

164 However, the one connection which all investors could reasonably have made is that Perrault engaged in some negative conduct that led to his dismissal, after investors just learned three weeks earlier about the Turcolt Investment. That connection put "corrective" information into the market, which was reasonably capable of revealing that there was "something wrong" about the information provided prior to the December 2016 Press Release. These statements advised the market that some unknown concern about Perrault's conduct may have existed with respect to the Turcolt Investment.

165 Had the Defendants complied with their disclosure obligations,[28] there would have been no speculation required as to linkage to Perrault's conduct. The full corrective information statement would have been before the market, instead of a "storm warning" that created market speculation and arguably caused a 22 per cent decrease in share value.

166 In *Swisscanto*, the press release considered by Belobaba J. said nothing about whether the prior sell-in revenue recognition approach was GAAP-complaint. The "passing reference" in the press release was that "certain BlackBerry 10 devices that were shipped in the quarter will not be recognized until those devices are sold through to end customers" and that BlackBerry was incurring a $1 billion inventory charge "primarily attributable" to BB Z10 devices (at paras. 16, 17, and 68).

167 The defendants in *Swisscanto* took the same approach as the Defendants in the present case, submitting that "a press release about a change in revenue recognition beginning in 2014 is not a 'correction' of the revenue recognition in prior quarters" and that "[t]here is insufficient correlation between the alleged misrepresentation and the pleaded public correction" (at para. 54).

168 After setting out all of the principles discussed above, Belobaba J. held (at paras. 68-71):

> (i) "The pleaded public correction is sufficiently specific";
>
> (ii) "The decision to adopt the sell-through method for the BB10 in 2Q14 shares the same subject matter and is obviously connected to the misrepresentation alleged";
>
> (iii) "The fact that Blackberry changed its accounting policy for 2Q14 is reasonably capable of revealing the alleged misrepresentation that using the sell-in accounting method in earlier periods was not GAAP-compliant"; and
>
> (iv) "[T]he announcement by Blackberry that it would be incurring a significant inventory charge in 2Q14 is also connected to, and reasonably revelatory of, the alleged misrepresentation".

169 Consequently, Belobaba J. concluded (at para. 73):

> In sum, I agree with the plaintiff that the announcement about the switch to sell-through accounting in 2Q14 and the associated $1 billion inventory charge, when read in context, can fairly and reasonably be said to be a public correction of the sell-in method of revenue recognition that was used in the previous two quarters. I find that the public correction requirement in s. 138.3 is satisfied. [Footnotes omitted.]

170 In *Swisscanto*, both the press release and the alleged misrepresentation relate to revenue recognition. However, there is no reference to the purported misrepresentation that the earlier sell-in method was GAAP-compliant (which BlackBerry had represented to shareholders). As in the present case, BlackBerry shareholders would have been left to speculate as to why the change was made, with no indication of any GAAP issues. Belobaba J. held that no such direct reference was needed to draw the linkage. Belobaba J. found that the press release "share[d] the same subject matter and is obviously connected to the misrepresentation alleged".

171 In *Wong*, Belobaba J. did not directly address the public correction issue, but his approach of permitting a claim for leave based on losses between the press release on October 9, 2013, which announced Strathcona's resignation, and the subsequent October 22, 2013 press release, which only later set out the reasons for the resignation, is fully consistent with the principles under s. 1.1 of the *Act* set out at paragraph 120 above, and I adopt a similar approach.

172 In the present case, Colt did not refer to the Turcolt Investment in the December 2016 Press Release. As in *Wong*, the specific information related to the misrepresentation was only published in the second press release. As in *Wong*, Colt advised investors in the December 2016 Press Release that Perrault had suddenly left Colt after being its co-founder, with no explanation except that the departure was in negative circumstances and that Colt was considering strategic alternatives. Those statements relate to Perrault's conduct, and as in *Wong*, are connected to the misrepresentation alleged.

173 Consequently, I disagree with the Defendants' submission that a statement cannot be both a misrepresentation and a partial correction related to the same alleged undisclosed material fact.

174 Based on the total mix of information available to the market, a reader could have (i) understood from the December 2016 Press Release that Perrault had done "something" negative which led to his dismissal from Colt, and (ii) linked it to the Turcolt Investment announced just three weeks earlier. That "correction" is the "link" to Colt's failure to disclose that Perrault made an unauthorized investment, which is the alleged misrepresentation in the case. At the same time, the December 2016 Press Release failed to disclose that the Turcolt Investment was not authorized.

175 It may be at trial that the connection between the public correction and the misrepresentation is found to be tenuous. It is possible that the loss may not be fully attributed to the unauthorized nature of the investment and may be more attributable to other factors. However, that issue is to be resolved by the trial judge. The Defendants are entitled under s. 138.5(3) to lead evidence that shareholder losses were unrelated to the misrepresentation.

176 Contrary to the Defendants' submission, it is not necessary to rely on the subsequent January 2017 Press Release to establish a partial correction in the December 2016 Press Release. The January 2017 Press Release only stated what Colt and Jaffery could have stated earlier, if the trial judge finds that they knew the investment was unauthorized. The subsequent conduct "shed[s] light on potential or actual behaviour of persons" at the relevant disclosure time (*Sharbern*, at para. 60), but is not the basis upon which the link is made.

177 Consequently, as in *Swisscanto*, the announcement of Perrault's departure under negative circumstances, resulting in Colt reviewing its strategic alternatives, "when read in context, can fairly and reasonably be said to be a public correction" of the misrepresentation that the investment was authorized, by disclosing to the reader that Perrault had acted improperly in some manner, only three weeks after announcing a major investment by the company.

178 I also do not agree with the Defendants that expert or shareholder evidence is required to determine the market effect of a press release. There was no evidence before Belobaba J. in *Swisscanto* as to the effect on the market of the "passing reference" in the press release.

179 The only expert evidence before the court in *Swisscanto* related to whether the sell-in method was GAAP-complaint, as BlackBerry had represented that to be the case. BlackBerry relied on that evidence to submit that it had not made a misrepresentation.

180 In the present case, no expert evidence is required to establish materiality of the "unauthorized investment" misrepresentation issue, as the Defendants acknowledge that it is material for the purposes of the motion.

181 In *Swisscanto*, no expert evidence was provided on the effect of the public correction on investors. Belobaba J. drew a common sense inference that the press release could reasonably be linked to the misrepresentation.

182 Similarly, in the present case, given the context of the Q3 2016 Disclosure and the sudden departure of Perrault three weeks later in negative circumstances with the company assessing strategic options, it is reasonably possible that the court

could draw an inference that Perrault's unknown negative conduct could be linked to the Turcolt Investment as a result of the December 2016 Press Release.

183 Further, the policy implications of the Defendants' position are inconsistent with investor protection principles of the *Act*. Colt ought not to be able to benefit from "carving" out negative news by "storm warnings" leading to speculation about Perrault's conduct, and then claim that there is no linkage because they did not disclose that the Turcolt Investment was unauthorized. Such an approach incentivizes corporations to issue press releases which do not fully disclose material facts, but instead create uncertainty in the market with each investor wondering about the exact nature of the impugned conduct, with the corporation later relying on its failure to provide full disclosure and submitting that no losses can be claimed as a result of no linkage between the press release and the misrepresentation.

184 The approach submitted by the Defendants does not serve the purposes set out in s. 1.1 of the *Act*, as discussed in *Pezim* and *Theratechnologies*, to (a) protect investors from unfair, improper or fraudulent practices, (b) foster fair and efficient capital markets and confidence in public markets, and (c) contribute to the stability of the financial system and the reduction of systemic risk.

185 The Defendants submit that investor protection is ensured under the *Act* since those investors who purchased and sold under the basis of the same misrepresentation suffer no damages.

186 However, a partial correction through a "storm warning" places some corrective information into the market, such that shareholders who purchased on the basis of a misrepresentation that inflated share value suffer damages through the "carving" out of a partial correction. Investors in such a situation are not buying and selling with the same information they had as to the misrepresentation, since the speculation linked to the earlier misrepresentation did not exist when the shares were purchased.

187 For the reasons I set out above, I find that the December 2016 Press Release was "reasonably capable of revealing to the market the existence of the alleged misrepresentation" (*Swisscanto*, at para. 65), while at the same time, perpetuating the misrepresentation that the investment was unauthorized. I find that the *Theratechnologies* test has been met. I grant leave to Kauf to proceed with the Public Correction Issue.

Order and costs

188 For the above reasons, I grant leave to proceed to Kauf against the Defendants under s. 138.8(1) on the misrepresentation claims set out at paragraphs 8 and 9 above, as well as leave to proceed on the Jaffrey Knowledge Issue and the Public Correction Issue.

189 If the parties are unable to agree on costs, Kauf shall deliver a costs submission of no more than five pages (not including the costs outline) by April 19, 2019. Each of the Colt Defendants, Jaffrey, and Perrault shall deliver responding costs submissions of no more than five pages (not including the costs outline) by May 3, 2019. Kauf may deliver a reply costs submission of no more than five pages by May 10, 2019 to collectively address the responding costs submissions of the Defendants.

Motion granted.

Footnotes

* Mr. Morganti appeared with Mr. Pelletier as counsel for the plaintiff on December 12, 2018 and Mr. Davarinia appeared with Mr. Pelletier as counsel for the plaintiff on March 6, 2019.

1 Web Objectives, Inc. ("WOI") is also a proposed representative plaintiff in this action. The plaintiffs allege that WOI is wholly owned by Tom Douramakos, who was formerly a representative plaintiff in this action. WOI is the owner of 175,000 common shares purchased from Colt's private placement (and not on the secondary market). As such, WOI does not bring this motion under s. 138.8(1).

2 Unless otherwise noted, all references to sections are to the *Act*.

3 Perrault made no submissions at the hearing.

4 Jaffrey advised the court at the first date of the hearing that he would rely on the knowledge requirement under s. 138.4(1) with respect to the December 2016 Press Release. Even though that submission did not appear to be directly raised by Jaffrey in his factum, the parties agreed that since the evidentiary record relevant to the issue was already before the court, this issue could be argued at that time. Consequently, the Jaffrey Knowledge Issue was argued on December 12, 2018.

5 Jaffrey submitted that Kauf did not plead that Colt or Jaffrey either knew about the unauthorized investment or deliberately avoided acquiring such knowledge at the date of the December 2016 Press Release. However, given that the issue was fully argued on the evidence before me, the Defendants agreed that if leave is granted on this issue, Kauf can amend his claim to particularize the knowledge allegations.

6 The second day of the hearing was required to address the Public Correction Issue, as the Defendants only raised the issue at the first day of the hearing. Kauf reasonably requested an adjournment of that issue so that he could provide additional submissions. Both Kauf and Colt filed additional factums on the Public Correction Issue prior to the return of the motion on March 6, 2019.

7 Both Tai and Yeou were also members of other committees at Colt.

8 On consent, I ordered leave to amend the statement of claim at the outset of this hearing.

9 All references in block letters and bold in the Q3 2016 Disclosure are as set out in the original text.

10 Collectively, the $736,800 investment by Colt and the $2,210,400 investment by the unrelated private investment holding company resulted in a total of approximately $2.95 million invested in Turcolt.

11 There is no dispute between the parties as to the applicable law on these general issues.

12 (regardless of whether the misrepresentation is in a "core" or "non-core" document, subject to the additional burden of proof under s. 138.4(1))

13 "Publicly corrected" is not defined in the *Act*. A corrective disclosure need not emanate from the issuer. Rather, the source of a public correction can include credit rating agencies, newspaper articles, market analysts, and even anonymous internet postings by short-sellers: *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348 (Ont. S.C.J.), at para. 30 [*Mask*SC], affirmed 2016 ONCA 641, 132 O.R. (3d) 161 (Ont. C.A.) [*Mask* CA].

14 Claims under s. 138.3(1) may also be brought against "influential persons", "each director and officer of an influential person", and "experts" as defined in s. 138.1.

15 Claims under s. 138.3(4) may also be brought against "influential persons", and "each director and officer of an influential person" as defined in s. 138.1.

16 Both the majority reasons of Côté J. (at para. 75) and the dissenting reasons of Karakatsanis J. (at paras. 178 and 186) affirm the same principle. See also *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 2 S.C.R. 331 (S.C.C.), at para. 32.

17 See also the recent summary of the test for leave by Perell J. in *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470, 142 O.R. (3d) 421 (Ont. S.C.J.) [*Paniccia*], at paras. 87-88.

18 Kauf initially asserted numerous alleged misrepresentations in his factums filed for the first hearing which the Defendants opposed on the basis that there was no evidence to support those claims. During the course of the initial hearing, Kauf modified the misrepresentations upon which he sought leave, resulting in those which were not opposed as set out at paragraphs 8 and 9 above, and the two remaining issues before the court.

19 Jaffrey is one of the persons listed as a contact for the December 2016 Press Release. Kauf submits that, as such, "[i]t appears that ... Jaffrey authorized the release of this statement". For the purposes of this motion, no issue was raised that Jaffrey could not be liable for the statements in the December 2016 Press Release in that capacity, subject to the Jaffrey Knowledge Issue.

20 (as the start date of the class would be based on the initial alleged failure to make timely disclosure)

21 (subject to the right of the Defendants to show under s. 138.5(3) that shareholder losses were unrelated to the misrepresentation)

22 (generally accepted accounting principles)

23 There is no indication in the reasons that the issue was raised by the parties.

24 (and also a misrepresentation because the October 9, 2013 news release did not set out the reasons for Strathcona's resignation)

25 (a term used by Kauf in his reply factum)

26 (which did set out some corrective information by disclosing the existence of the Turcolt Investment and the information set out at paragraphs 27-30 above)

27 (The Defendants rely on that phrase which was taken from Kauf's factum on the Public Correction Issue.)

28 (assuming it was material that the Turcolt Investment was unauthorized, which is not at issue on the leave motion)