CITATION: *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864
COURT FILE NO.: CV-12-44865100CP
DATE: November 5, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
E. EDDY BAYENS, JOHN SINCLAIR, LUC FORTIN, PIERRE RACICOT and STANLEY SHORTT, in their capacity as TRUSTEES OF THE MUSICIANS' PENSION FUND OF CANADA	Kirk M. Baert, Celeste Poltak, and Jonathan Bida for the Plaintiffs
Plaintiffs	
– and –	Mark Gelowitz, Allan Coleman, and Robert Carson for the Defendants
KINROSS GOLD CORPORATION, TYE W. BURT, PAUL H. BARRY, GLEN J. MASTERMAN and KENNETH G. THOMAS	
Defendants	
Proceeding under the *Class Proceedings Act, 1992*.	**HEARD**: October 22-24, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiffs, E. Eddy Bayens, John Sinclair, Luc Fortin, Pierre Racicot, and Stanley Short are the Trustees of the Musicians' Pension Fund of Canada (Musicians). The Defendants are Kinross Gold Corporation, a Canadian international mining company, and Tye W. Burt, Paul H. Barry, Glen J. Masterman, and Kenneth G. Thomas, who are or were officers or directors of Kinross.

[2] Musicians bring this motion: (1) for certification of this action as a class proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c. c.6; and (2) for leave to proceed with claims for misrepresentation under the Ontario *Securities Act*, R.S.O. 1990, c. S.5.

[3] Musicians advances a statutory claim under the Ontario *Securities Act,* and it advances a common law claim for negligent misrepresentation. It brings a proposed class action on behalf of purchasers of Kinross shares from May 3, 2011 to January 16, 2011 (the class period). It claims damages of $4 billion.

[4] Musicians' action is built upon three core allegations of misrepresentations: (1) in May 2011, Kinross ought to have reported a write down of its goodwill (there was an unreported goodwill impairment) associated with two West African gold mines, the Tasiast mine in Mauritania and the Chirano mine in Ghana (the "Goodwill Misrepresentation"); (2) Kinross failed to disclose that its drilling program for the Tasiast mine had revealed high amounts of low-grade ore (the "Low-Grade Ore Misrepresentation"); and (3) Kinross misrepresented that the expansion project for the Tasiast mine remained on schedule (the "On-Schedule Misrepresentation").

[5] Kinross opposes the granting of leave and the certification of the action as a class action. It submits that Musicians should not be granted leave under the Ontario *Securities Act* to pursue its statutory claim because Musicians has failed to provide evidence to satisfy the Court that it has "a reasonable possibility of succeeding at trial" with its misrepresentation claims. Then, regardless of whether leave is granted for the statutory claims, Kinross submits that the common law negligent misrepresentation claim is not certifiable under the *Class Proceedings Act, 1992.*

[6] With respect to Musicians' three core misrepresentation allegations, Kinross submits first that that there is no reasonable possibility that Musicians will be able to establish that Kinross was obliged to disclose a goodwill impairment earlier than it did. Kinross submits that the results of its drilling program sustained and did not negate the initial expectations for the mine upon which the goodwill valuations were based, and, thus, there was no "triggering event" requiring an earlier write down of goodwill. Kinross submits that the evidence rather shows that the eventual write down of goodwill arose not because of diminished expectations concerning the gold mines exploration potential, but because of systemic market factors across the gold mining industry.

[7] Second, Kinross submits that that there is no reasonable possibility that Musicians will be able to establish the Low-Grade Ore Misrepresentation. It submits that the evidence establishes that there was no misrepresentation at all.

[8] Third, Kinross submits that Musicians cannot rely on the alleged misrepresentation about the schedule for the Tasiast mine because the allegation of a misrepresentation was raised for the first time in Musicians' factum and is not pleaded in the Amended Statement of Claim, and, Kinross submits that, in any event, Musicians have not proffered any admissible evidence demonstrating that this misrepresentation claim would have a reasonable possibility of succeeding at trial.

[9] Turning to the common law misrepresentation claims, Kinross submits that those claims ought not to be certified because: (1) the constituent element of the tort that the claimant relied on the representation has not been pleaded and, therefore, there is no tenable cause of action; or (2) the common law misrepresentation claim fails the preferable procedure criterion for certification because even if reliance were pleaded, this constituent element would have to be determined on a person-by-person basis and a class proceeding would be unmanageable.

[10] For the reasons that follow, I dismiss Musicians' motion.

[11] By way of a brief overview, in my opinion, Musicians' statutory claims under Part XXIII.1 of the Ontario *Securities Act* fail the test for leave, and with the failure of the statutory claims to be granted leave, it necessarily follows that both the statutory claim and the common law negligence claim fail to satisfy the certification criteria of the *Class Proceedings Act, 1992*. What remains is Musicians' uncertified action for common law damages, which may continue as an individual action.

B. METHODOLOGY

[12] In order to explain my Reasons for Decision, I will discuss the applicable law, the evidentiary background, the factual background, the procedural background, and the application of the law to the facts of this case under the following headings:

- Introduction
- Methodology
- The Test for Leave under Part XXIII.1 of the Ontario *Securities Act*
- Evidentiary Background
- Factual and Procedural Background
    - The Parties
    - The Business of Mining for Gold and Reporting Requirements
    - The Purchase of the Tasiast and Chirano Mines - Setting the Base Line for Expectations
    - The Purchase and Development of the Tasiast and Chirano Mines and the Alleged Misrepresentations
    - The Assessment of Indicators of Goodwill Impairment in the Fall of 2011
    - The 2012 Write Down of the Tasiast Mine's Goodwill
    - The Class Action in the United States
    - The Canadian Class Action
- Should Leave be Granted under Part XXIII.1 of the Ontario *Securities Act*?
    - Introduction
    - The Goodwill Misrepresentation
    - The Low Grade Ore Misrepresentation
    - The On-Schedule Misrepresentation
    - Conclusion on Leave under the Ontario *Securities Act*
- Certification
    - Introduction – Certification in a *Securities Act* Class Action
    - The Cause of Action Criterion
    - Identifiable Class
    - Common Issues
    - Preferable Procedure
    - Representative Plaintiff
    - Conclusion on Certification
- Conclusion

[13] As appears from the above list of headings, before I discuss the factual and procedural background, I shall discuss the test for leave under Part XXIII.1 of the Ontario *Securities Act*. This ordering of the discussion is helpful because the underlying crucial dispute between the parties is a debate about how does the court satisfy itself under s. 138.1 of the *Act* that: "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff."

[14] The parties fundamentally differ about the application of the test for leave under Part XXIII.1 of the Ontario *Securities Act* and resolving their debate is necessary at the outset.

[15] I also note here that it my discussion of the factual and procedural background, I shall try to identify the positions and the submissions of the parties and keep them distinct from my factual findings, which are largely based on uncontested or uncontestable facts from the evidentiary record. I will leave my analysis of the factual and legal controversies to the discussion later about whether leave should be granted under Part XXIII.1 of the Ontario *Securities Act*. The latter discussion will include an analysis of the evidence, including the expert evidence of the parties.

C. THE TEST FOR LEAVE UNDER PART XXIII.1 OF THE ONTARIO *SECURITES ACT*

[16] Part XXIII.1 of the Ontario *Securities Act* provides a statutory cause of action where there are misrepresentations in a company's continuous disclosure documents. Subject to statutory defences, Part XXIII.1 imposes liability on the issuer, each director, and each officer who authorized, permitted, or acquiesced in the making of the misrepresentation.

[17] In order to commence an action under Part XXIII.1, leave of the court is required. Section 138.3 (1) states:

> *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.

[18] How s. 138.3 (1) of the Ontario *Securities Act*, or similar provisions in the securities statutes of other provinces, should be interpreted and applied has been considered in a series of cases including: *Ainslie v. CV Technologies Inc.*, [2008] O.J. No 4891 (S.C.J.); *Silver v. Imax*, [2009] O.J. No. 5573 (S.C.J.), leave to appeal ref'd, 2011 ONSC 1035 (Div. Ct.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25; *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, aff'd 2012 BCCA 456; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637; *121851 Canada Inc. v. Theratechnologies Inc.*, 2012 QCCS 699; *Gould v. Western Coal Corp.*, 2012 ONSC 5184; and *Dugal v. Manulife Financial Corp.*, 2013 ONSC 4083.

[19] Historically, the policy idea that there should be a leave requirement before a corporation could be sued for misrepresentations in its disclosure obligations to purchasers of its shares in the

secondary markets came from two sources. The above cases reveal that the understanding the genesis of the policy behind the leave test is important to interpreting and applying the test.

[20] One source for the leave test was the policy discussions by the Ontario Law Reform Commission in its 1982 report about reforming the law about class actions: Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982). The Commission in considering the policy of providing access to justice for injured consumers and shareholders against corporations were concerned that class actions would be used as form of ransom known as a strike suit where the defendant would capitulate and pay for a meritless claim because of the enormous risks associated with losing a class action.

[21] The second source was the policy discussions by three task forces about reforms to the marketing of securities: (1) a federal task force; (2) the "Allen Committee" a task force established by the Toronto Stock Exchange; and (3) a committee of Canadian Securities Administrators. These task forces were formed to consider, among other things, the introduction of statutory civil liability for a misleading disclosure by a reporting issuer. These policy analysts had to balance the policy rationales of providing a remedy for shareholders who had been misled into purchasing shares against the prospect of encouraging strike suits against corporations and the reality that it might be the long-term shareholders who would pay the price if their corporation had to pay compensation to former shareholders who had been misled into purchasing shares.

[22] The Commissioners and the task forces considered whether there should be screening of class action or shareholder claims. The expression, "reasonable possibility of success", came from the Ontario Law Reform Commission, *Report on Class Actions*, which had recommended that the certification procedure include a preliminary merits test to determine whether the action had a "reasonable possibility of success". The Commission's report stated at page 324:

> The preliminary merits test that we propose would require a standard of proof that is not as strict as a *prima facie* case test, but more than simple proof that a triable issue exists".

[23] The Law Reform Commission's recommendation for a merits test, however, did not find its way into the enacted *Class Proceedings Act, 1992*, which adopted a different test for certification, which is now found in s. 5 of the *Act*. The Legislature enacted a largely procedural screening process to determine whether an action was suitable to be litigated as a class action. On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims in the action can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[24] The fruitful source of a merits test for securities class actions came from the policy analysts working to reform the *Securities Act*. The Allen Committee report was supported by the Canadian Securities Administrators (CSA), which established a committee that produced draft legislation in 1998 and 2000. The CSA proposed a statutory civil cause of action for secondary market misrepresentation, whether or not an investor had actually relied on the misrepresentation, along with defences for various participants based on their responsibility for the disclosure. The statutory civil cause of action had liability caps and proportionate liability based on the defendant's share of responsibility, subject to certain exceptions. The Canadian Securities Administrators proposed that there be a "screening mechanism", which would require the court to determine whether the action was being brought in good faith and had a reasonable

possibility of success. In its report dated November 3, 2000, the Canadian Securities Administrators stated at pp. 1-2:

> One of the risks of creating statutory liability for misrepresentations or failures to make timely disclosure is the potential for investors to bring actions lacking any real basis in the hope that the issuer will pay a settlement just to avoid the cost of litigation. To limit unmeritorious litigation or strike suits, plaintiffs would be required to obtain leave of the court to commence an action. In granting leave, the court would have to be satisfied that the action (i) is being brought in good faith, and (ii) has a reasonable possibility of success.

[25] Part XXIII.1 of the Ontario *Securities Act*, which came into force more than a decade after the *Class Proceedings Act, 1992* adopted the merits-based test proposed by the CSA.

[26] In *Ainslie v. CV Technologies Inc., supra,* at paragraphs 12 and 15, Justice Lax discussed the policy behind a leave requirement for a claim to be advanced under Part XXIII.1 of the Ontario *Securities Act*, and she stated:

> 12 ... irrespective of whether it was believed that the proposed legislation would result in strike suits, a screening mechanism was necessary in order to prevent corporate defendants from being exposed to proceedings "that cause real harm to long-term shareholders and resulting damage to our capital markets."
>
> 15. The section [the leave provision of s. 138.8] was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. No onus is placed upon proposed defendants by section 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond. Subsection 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a gatekeeper mechanism.

[27] With this historical background to the test for leave, a review of the case law reveals that there is a consensus among the judiciary that the test of a "reasonable possibility of success at trial" imposes a low evidentiary threshold on the party seeking leave, but the test is, nevertheless, a genuine screening mechanism that requires the court to assess and weigh the evidence and to determine whether the plaintiff's chance of success is a reasonable possibility.

[28] A review of the case law reveals that the area of uncertainty is about how low is the bar for a low threshold merits-based test.

[29] In *Green v. Canadian Imperial Bank of Commerce, supra* and *Dugal v. Manulife Financial Corp., supra*, and in other cases, corporate defendants argue that the standard set in *Silver v. Imax, supra* and *Dobbie v. Arctic Glacier Income Fund*, is too low, and that the more appropriate standard for the leave test is to be found in *Round v. MacDonald, Dettwiler and Associates Ltd., supra.*

[30] An immediate problem, however, with the defendants' argument is that, as noted by Justice Strathy in *Green v. Canadian Imperial Bank of Commerce,* at paragraphs 365 to 372, Justice Harris's judgment in *Round v. MacDonald, Dettwiler and Associates Ltd.* was expressly circumscribed *obiter dicta.* Thus, it is poor authority for a higher bar for the low-bar merits test. However, Justice Strathy also notes that in *Silver v. Imax, supra* and *Dobbie v. Arctic Glacier Income Fund, supra* (and I would add *Dugal v. Manulife Financial Corp., supra*), there was ample evidence or an admission that there was an actionable misrepresentation by the defendant,

and, thus, while these cases set a low threshold, the results would not have been different if a higher threshold had been imposed. Thus, these cases are weak authority for a low bar for the low-bar merits test.

[31] In *Green v. Canadian Imperial Bank of Commerce, supra,* Justice Strathy ultimately agreed with Justices van Rensburg in *Silver v. Imax, supra* and Justice Tausenfreund in *Dobbie v. Arctic Glacier Income Fund, supra,* that the threshold for leave was low, and Justice Strathy stated at paragraph 373:

> 373. I respectfully agree with van Rensburg J. and Tausenfreund J. that the leave requirement is a relatively low threshold. It is meant to screen out cases that, even though possihly brought in good faith, are so weak that they cannot possibly succeed. This is consistent with the purpose of the legislation - to screen out strike suits that are plainly unmeritorious. It is not meant to deprive *bona fide* litigants, with a difficult but not impossible case, from having their day in court. This interpretation is also consistent with the philosophy of our legal system that contentious issues of fact and law are generally decided after a full hearing on the merits.

[32] At first blush, it would appear that Justice Strathy disagrees with the defendants' arguments that *Silver v. Imax, supra* and *Dobbie v. Arctic Glacier Income Fund, supra,* set the leave bar too low and thus make it too easy for a plaintiff to obtain leave. However, in analyzing a case, it is as important to consider both the judge's words and the judge's deeds, and in *Green v. Canadian Imperial Bank of Commerce,* Justice Strathy gave some teeth and bite to the reasonable possibility of success test.

[33] In *Green v. Canadian Imperial Bank of Commerce,* although but for a limitation period defence, he would have granted leave with respect to several alleged misrepresentations, Justice Strathy concluded that there was no reasonable possibility: (1) that the plaintiffs would establish that the July 10, 2007 news release expressed a misrepresentation; (2) that the plaintiffs would establish that the August 13, 2007 news release expressed a misrepresentation; (3) that the plaintiffs would establish that the August 30, 2007 Earnings Conference Call expressed a misrepresentation; (4) that the December 6, 2007 Earnings Conference Call expressed a misrepresentation; and (5) that the December 19, 2008 News Release expressed a misrepresentation. Then, with respect to the three misrepresentations for which he might have granted leave, he ultimately denied leave because they had no reasonable possibility of success given that the plaintiffs' claim were time-barred.

[34] Justice Strathy's deeds in *Green v. Canadian Imperial Bank of Commerce* reveal that the leave test is not a mere "road bump" threshold and is not so low as to be redundant to the notoriously low bar used to test whether a plaintiff has disclosed a cause of action (the not plain and obvious test) under Rule 21 of the *Rules of Civil Procedure* or under s. 5 (1)(a) of the *Class Proceedings Act, 1992.* And, remembering that certification is not to be a test of the merits, in my opinion, the merits-based leave test under the Ontario *Securities Act* sets a higher evidentiary standard than the "some basis in fact" standard used to implement the test for certification under the *Class Proceedings Act, 1992.*

[35] That there is some rigour in the leave test is also demonstrated by Justice Strathy's subsequent judgment in *Gould v. Western Coal Corp.*, 2012 ONSC 5184, of which I will have more to say in the analysis part of these Reasons for Judgment. In that case, Justice Strathy refused to grant leave under Part XXIII.1 of the Ontario *Securities Act.* He concluded that there was no reasonable possibility that the evidence of the plaintiff's experts would be accepted in preference to the defendants' experts' evidence. As will be noted in his judgment, Justice Strathy

made a hard finding not to accept the plaintiff's expert's evidence and the plaintiff did not pass over the low bar for leave.

[36] In *Dugal v. Manulife Financial Corp.*, *supra*, where the leave threshold was satisfied, Justice Belobaba stated at paragraphs 40-41 that he favoured Justice Harris' reasoning in *Round v. MacDonald, Dettwiler and Associates Ltd., supra*, which Justice Belobaba thought reflected the more rigourous Ontario Law Reform Commission standard, but in *obiter dicta,* Justice Belobaba felt that the battle to raise the bar was lost.

[37] In this regard, Justice Belobaba observed that in *R. v. Imperial Tobacco Canada,* 2011 SCC 42, which was a sufficiency of the pleadings case, the Supreme Court of Canada stated at paragraph 17 that under the strike-pleadings rule one only has to show a "reasonable prospect of success" at trial. Justice Belobaba observed that this made the test for the pleadings rule equivalent to "reasonable possibility of success" test.

[38] However, for my part, I do not think that the debate about the measure of the height for the bar for the test for leave is over. I do not see how the Supreme Court's judgment in *R. v. Imperial Tobacco Canada*, which is about a test where the court is obliged to accept the material facts set out in the statement of claim as true, is helpful in setting the bar for an evidentiary merits-based leave test, where the consensus is that the test is a genuine screening mechanism that requires the court to assess and weigh the evidence and to determine whether the plaintiff's chance of success is a reasonable possibility.

[39] Given that there is a consensus from the case law that the test sets a low threshold, the unsettled questions in this limbo dance of case law remains the questions of how low is the low threshold and what must a plaintiff do to show that he or she has a reasonable possibility of success. Given the fact sensitivity of each case, I rather doubt that a bright line affirmative test for what is a reasonable possibility of success in litigation can be articulated, and it may be that defining the test will be a work in progress for some time.

[40] At this juncture of the jurisprudence it can only be confidently said that the burden of proof on the plaintiff is higher than the "some basis in fact" standard used for certification motions but lower than: (a) establishing proof on the balance of probabilities (the civil trial standard); (b) showing that there is no genuine issue requiring a trial (the summary judgment test); and (c) showing a *prima facie* case or showing a serious issue to be tried (tests used for interlocutory injunctions.)

[41] At this juncture of the jurisprudence, it can also be confidently said that in setting the bar, the court must take into account that the leave motion is an interlocutory motion where there will only be a paper record of affidavits and transcripts of cross-examinations and where it is neither possible nor desirable to decide reasonably arguable issues of fact or of mixed fact and law. The court's weighing of the evidence for the leave test must be tempered by the recognition that there has been no discovery and that the analysis is conducted on a paper record with all its attendant limitations: *Green v. Canadian Imperial Bank of Commerce*, *supra* at paragraph 369; *Silver v. Imax*, *supra* at paragraphs 330-334.

[42] At this juncture of the jurisprudence, it is somewhat easier to define what is "not" a reasonable possibility of success at trial, and approaching the test in this negative way does provide some insight into defining the parameters of the leave test under Part XXIII.1 of the Ontario *Securities Act*.

[43] Thus, to properly borrow from the s. 5 (1)(a) analysis of the *Class Proceedings Act, 1992*, if notwithstanding a finding that the facts of the plaintiff's claim are true, it is plain and obvious that the plaintiff could not succeed at trial, then the plaintiff does not have a reasonable possibility of success. Further, if the plaintiff fails to provide any admissible or believable evidence of the material facts of his or her claim, then the plaintiff does not have a reasonable possibility of success. Further still, if the plaintiffs' case is so manifestly weak that it cannot possibly succeed, then the plaintiff does not have a reasonable possibility of success. (This last articulation of the test shows that the bar is higher than the some basis in fact test used for certification.) Further still, if the defendant demonstrates that the plaintiff's claim is frivolous, scandalous, vexatious, or an abuse of process, then the plaintiff does not have a reasonable possibility of success. Further still, if the defendant shows that the plaintiff's claim is based purely on speculation or suspicion rather than evidence, then the plaintiff does not have a reasonable possibility of success. (This is what occurred in *Gould v. Western Coal Corp., supra.*) Further still, if the defendant on the motion for leave meets the heavy burden: (a) of actually disproving the truth of the facts of the plaintiff's claim; or (b) of indisputably proving a statutory defence, then the plaintiff does not have a reasonable possibility of success.

[44] Expressed as a rule, this negative formulation of the test for leave would be as follow:

> There is not a reasonable possibility that an action will be resolved at trial in favour of the plaintiff, if:
>
> > (a) assuming the material facts of the plaintiff's claim are true, it is plain and obvious that the plaintiff could not succeed at trial;
> >
> > (b) the plaintiff fails to provide any admissible or believable evidence of the material facts of his or her claim;
> >
> > (c), the plaintiffs' case is so manifestly weak that it cannot possibly succeed;
> >
> > (d) the defendant demonstrates that the plaintiff's claim is frivolous, scandalous, vexatious, or an abuse of process;
> >
> > (e) the defendant shows that the plaintiff's claim is based purely on speculation or suspicion rather than evidence;
> >
> > (f) the defendant disproves the truth of the facts of the plaintiff's claim; or
> >
> > (g) the defendant proves a statutory defence.

[45] In all events, the court must assess the evidentiary record provided by both parties and measure that evidence against a substantive but low threshold test of probity. In *Green v. Canadian Imperial Bank of Commerce*, *supra* at paragraph 377, Justice Strathy suggested the following analytical framework:

> 377. I begin with the observation that although s. 138.8(1) speaks of whether the action has a reasonable possibility of success, each representation must be examined, in relation to each defendant, to determine whether the plaintiffs' claim in respect of that representation, has a reasonable possibility of success against that defendant. That analysis also requires that I determine whether there is a reasonable possibility that the defendant will not be able to establish the reasonable investigation defence - i.e., that the person conducted a reasonable investigation and had no reasonable grounds to believe that the document or statement contained a misrepresentation. The analysis should therefore proceed as follows:

> (a) identify the representation at issue;
>
> (b) determine whether it was a core document or a non-core document or public oral statement;
>
> (c) determine whether there is a reasonable possibility that the plaintiff will establish at trial that the document or statement contains a misrepresentation of material fact;
>
> (d) determine, in the case of each individual defendant, whether there is a reasonable possibility that the plaintiff will establish at trial that the defendant authorized, permitted or acquiesced in the release of the document or the making of the statement;
>
> (e) in the case of non-core documents or public oral statements, determine whether there is a reasonable possibility that the plaintiff will establish at trial that each individual defendant knew of the misrepresentation, deliberately avoided acquiring knowledge, or was guilty of gross misconduct in connection with the release of the document or the making of the misrepresentation;
>
> (f) determine whether there is a reasonable possibility that the defendants will not establish the reasonable investigation defence with respect to the misrepresentation - that is, that they conducted a reasonable investigation and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

[46] Musicians emphatically and categorically submits that on a leave motion, the court cannot weight evidence or evaluate credibility. It submits that the leave motion is categorically procedural and like the summary judgment rule before its recent amendment, the court is constrained not to weigh the evidence and make findings of credibility. Musicians submits that it would be unfair for the court to weigh the evidence, especially since much of the evidence is exclusively within the knowledge of the defendant, the alleged misrepresentor, and the evidence will only be forthcoming during the discovery stage of the action. Musicians categorically submits that evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for trial, and are impermissible on a motion without *viva voce* evidence.

[47] Although I agree with Musicians' submission that the court's ability to make findings of fact and credibility is constrained by the context that a leave motion poses a very low evidentiary burden on the moving party, and although I agree with its submission that the court must be guided by the evidence that is realistically within the plaintiff's disposal, and although I agree there is a fairness component to what factual findings a court can make on an early interlocutory motion, nevertheless, in my opinion, Musicians goes too far in asserting a categorical prohibition on the court making findings of fact or of credibility.

[48] Musicians' categorical submission ignores the thrust of the case law, and it ignores that there is a consensus in the jurisprudence that the leave test is a genuine screening mechanism that requires the court to assess and weigh the evidence and that requires the court to determine whether the plaintiff's chance of success is a reasonable possibility.

[49] The leave test is not a pure procedural or jurisdictional test, like the former test for a summary judgment, which required a jurisdictional assessment of whether or not there was a genuine issue for trial. In contrast, the leave test is a low-threshold evidentiary merits-based test using affidavit evidence and cross-examinations, and the court is actually required to be satisfied on the evidence that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. This exercise of granting or refusing leave requires some weighing of the evidence, and all the courts that have decided leave motions one way or the other have not

simply assumed that the evidence proffered by the moving party is gospel for the purposes of satisfying the leave test.

[50] In considering the categorical submission of Musicians that the test for leave precludes weighing the evidence, it is notable that after describing the leave test in subsection 138.8 (1) of the Ontario *Securities Act*, the statute goes on to direct that affidavit evidence be proffered to be examined on in accordance with the rules of court. Subsections 138.8 (2) and (3) state:

> (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.
>
> (3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

[51] The leave test is not a test, like the test for disclosing a reasonable cause of action under Rule 21 or s. 5(1)(a) of the *Class Proceedings Act, 1992* that requires the court to assume that the pleaded facts are true. It is a test, as the authorities are uniform in demonstrating, that requires some weighing of the evidence, although in a generous, credulous, and accepting sort of way that does not impose a heavy or onerous burden on the plaintiff. The plaintiff, however, is not without some burden of evidentiary proof, and the defendant is entitled to challenge what the plaintiff proffers as evidence. And, for the purposes of the leave motion, the court is entitled to employ asymmetrical scales of justice and to weigh the evidence, although it will take very little weight to tip the scales for the plaintiff and a great deal of weight to tip the scales for the defendant.

[52] Finally, Musicians submits that since the evidentiary picture is far from complete and since it lacks evidence that is in the exclusive control of Kinross, and since Kinross has not provided key documents and witnesses that would be necessary for this court to fully appreciate the issues that would be dispositive of the plaintiffs' claims, therefore, it would be unfair for the court to weigh the evidence and to refuse to grant leave.

[53] There are several things wrong with this submission of unfairness. First, Kinross delivered affidavits and, for whatever reason, its witnesses were not cross-examined by Musicians, which seemed content to rely on a notice to admit and its own affiants. I do not understand how Musicians can complain of procedural or substantive unfairness when it had the opportunity to cross-examine Kinross's five affiants.

[54] Second, the court is not being asked to fully appreciate the issues that would be dispositive of the plaintiff's claims. The court is required to determine just whether there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff, and that obligation does not require the court to have the full appreciation of all the evidence necessary for a court to decide a case at trial, where there will be many issues and different kinds of issue to decide.

[55] Third, procedural fairness is not the exclusive entitlement of the plaintiff. The unacceptable result of Musicians' submission is that no purpose could be served by a defendant taking up the opportunity provided by the statute of delivering evidence for the leave motion in order to refute the plaintiff's affidavit evidence. There is, however, nothing in the statute that suggests that the plaintiff's evidence must be accepted as irrefutable. As Justice Lax noted in *Ainslie v. CV Technologies Inc., supra*, Part XXIII.1 of the Ontario *Securities Act* was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings,

and, thus, it is necessary, fair, and just that the court have the ability to weigh the evidence of both parties within the constraints of a low bar evidentiary merits-based test.

D. EVIDENTIARY BACKGROUND

[56] In addition to relying on a Request to Admit, Musicians supported its motion with the following evidentiary record:

- an affidavit from Michael Mazzuca, a partner at Koskie Minsky LLP, counsel for Musicians;
- an affidavit from Plaintiff Stanley Shortt, Chair of the board of trustees of Musicians;
- an affidavit from Frank C. Torchio, the President of Forensic Economics, Inc., who was retained to opine about the efficiency of the markets for the common stock of Kinross between February 16, 2011 and January 16, 2012 and an estimate of potential aggregate damages pursuant to s. 138.5 (1) of the Ontario *Securities Act*;
- affidavits from Alan Mak, a chartered accountant with Rosen & Associates Limited, who was retained to prepare a report regarding whether Kinross complied with its financial reporting obligations with respect to goodwill; and,
- affidavits from Mike Wilson, a geologist and senior consultant with CSO Consulting Services Inc., who was retained to prepare a report analyzing Kinross's write down of goodwill.

[57] Messrs. Wilson and Mak were cross-examined.

[58] Kinross opposed the motion and relied on the following evidentiary record:

- affidavits from Glen Masterman, geologist, who was the Senior Vice-President, Exploration of Kinross who oversaw its drilling at the Tasiast mine;
- an affidavit from Juliana Lam, who was Senior Vice-President, Finance of Kinross who oversaw Kinross's impairment analysis and testing throughout 2011 and 2012;
- affidavits from Edward G. Lee, a managing director at Duff & Phelps, LLC, an investment banking firm that was retained by Kinross to value the Tasiast and Chirano mines at the time of their acquisition by Kinross and to perform goodwill impairment analyses for Kinross for the 2010 and 2011 fiscal years;
- an affidavit from Dr. Gordon Richardson, Professor of Accounting at the Rotman School of Management, University of Toronto, who was retained to opine whether under the International Financial Reporting Standards ("IFRS"), Kinross was obligated to conduct impairment testing in the first, second or third quarters of 2011;
- Affidavits from Robert G. Connochie, a director of Behre Dolbear Group Inc., and a Senior Associate of Behre Dolbear Capital, Inc., who has extensive experience in mineral development and management and who was retained to prepare a report responding to the reports of the Musicians' experts, Messrs. Mak and Wilson;

[59] The Kinross witnesses were not cross-examined. However, it was stipulated and agreed that Mr. Lee and Dr. Richardson would treated as if they had maintained their evidence under cross-examination and Kinross would not raise the issue of Musicians' not cross-examining Lee or Richardson at the hearing of the certification and leave motion.

E. FACTUAL AND PROCEDURAL BACKGROUND

1. The Parties

[60] Messrs. Bayens, Sinclair, Fortin, Racicot and Shortt, are the Trustees of the Musicians' Pension Fund of Canada. The pension fund purchased thousands of Kinross shares during the Class Period on the Toronto Stock Exchange. On January 16, 2012, the last day of the class period, Musicians held 150,156 shares. Musicians' purchased 78,800 Kinross shares during the class period (52,950 shares on a net basis).

[61] Kinross Gold Corporation, is a mining company headquartered in Toronto, Ontario. It is incorporated under the laws of Ontario and is a reporting issuer whose shares trade on the Toronto Stock Exchange and the New York Stock Exchange.

[62] Tye W. Burt, has been Kinross's president, chief executive officer, and a director since joining Kinross in 2005. Paul H. Barry, has been Kinross's chief financial officer and an executive vice-president since March 31, 2011. Glen J. Masterman, was senior vice-president of exploration during the class period. Kenneth G. Thomas, was appointed senior vice-president of projects in December 2009 and held that position throughout the class period.

[63] The individual defendants were all officers during the class period within the meaning of the Ontario *Securities Act* and other securities statutes from across Canada.

2. The Business of Mining for Gold and Reporting Requirements

[64] In order to understand Musicians' proposed class action, it is necessary to understand a few aspects of the business of mining for gold and about a mining corporations reporting or disclosure requirements.

(a) Goodwill Impairment Testing

[65] The value of a mine is comprised of its tangible assets and its goodwill, which is an intangible asset. The goodwill in a mine is the anticipated, speculative, value of the yet-to-be discovered ore, and the goodwill is calculated as a multiple of the net asset value (NAV) of the mine.

[66] From a financial reporting perspective, a goodwill impairment occurs when the goodwill for a cash generating unit (a mine for instance) is overstated. Goodwill should be evaluated for possible impairment on at least an annual basis or more frequently if circumstances arise indicating that the goodwill may be overstated. There are indicators or "triggering events" that call for a goodwill impairment evaluation.

[67] Generally Accepted Accounting Principles ("GAPP") and International Financial Reporting Standards ("IFRS") require a mining corporation to perform "goodwill impairment evaluations" annually and when a "triggering event" occurs. The GAPP standard is that "goodwill of a reporting unit should be tested for impairment between annual tests when an event or circumstance occurs that more likely than not reduces the fair value of a reporting unit below its carrying amount." The IFRS standard is that "case-generating unity to which goodwill has been allocated shall be tested for impairment, annually, and whenever there is an indication that the unit may be impaired."

[68] Canadian public companies such as Kinross must determine whether impairment factors exist on at least four occasions throughout the year, at the end of the Q1, Q2, Q3 and Q4 (year-end).

[69] The circumstances triggering the need for a goodwill impairment evaluation do not necessarily have to be the occurrence of an adverse event such a physical damage to, or the pending disposal of, an asset, and an event triggering goodwill impairment can be the failure to achieve a pre-determined expectation.

[70] In determining whether there is an indication that an asset might be impaired, the IFRS requires an entity to consider, among other things, the following types of information, that show that a triggering event for a goodwill write down can be failed expectations:

> *External Sources of Information*
>
> (a) during the period, an asset's market value had declined significantly more than would be expected as a result of the passage of time or normal use.
>
> (b) significant changes with an adverse effect on the entity have taken place during the period, or will take place in the near future, in the technological, market, economic or legal environment in which the entity operates or in the market to which an asset is dedicated. ....
>
> *Internal Sources of Information*
>
> ... (f) significant changes with an adverse effect on the entity have taken place during the period, or are expected to take place in the near future, in the extent to which, or manner in which, an asset is used or is expected to be used...
>
> (g) evidence is available from internal reporting that indicates that the economic performance of an asset is, or will be, worse than expected.

[71] General industry practice of public companies demonstrates that the following circumstances are triggering events: (a) deteriorating prospects for the businesses; (b) significant underperformance relative to historical or projected future results; (c) where less was recovered than expected; and (d) significant underperformance relative to plan or long-term projections.

[72] As will appear from the discussion later in these Reasons for Decision, Musicians' action is built on the thesis that there was a triggering event that called for a write down of the goodwill for the Tasiast mine. Speaking, technically, Musicians alleges that there were reasons to reduce the NAV multiple used to calculate the goodwill for the mine. It is Musicians' thesis that the failure of Kinross's investigative drilling programs to yield fabulous results required management to recant its exuberant announcements about exciting results and about the mine's prospects "to become one of the world's great gold mines and a long term foundation asset for Kinross."

(b) The Classification of Mineral Resources

[73] Ore is graded by the amount of mineral in grams found per tonne of rock. It costs more to extract the same amount of mineral, in this case, gold from lower grade ore than higher grade ore, and lower grade ore may not be amenable to economically efficient processing methods, such as a carbon in leach (CIL) processing. Lower grade ore may, however, be amenable to low grade processing including crushing and heap leaching.

[74] Areas of mineralization (areas for mining) are generally identified through two types of drilling: "exploration drilling" and "expansion drilling". Exploration drilling involves the search for mineralization in unexplored or underexplored areas. Expansion drilling refers to drilling adjacent to or below an existing known deposit to assess the mineralization in those areas.

[75] Pausing here, I observe that both expansion drilling and exploration drilling are investigative in the sense that the analysis of the drilling results will provide data or information about the prospects for a productive mine, but the results of exploration drilling connote or impart much more of the idea of a discovery or a revelation of previous unknown or unverified mineral resources or, conversely depending upon those results, much more of the idea of the disappointment of not discovering new mineral resources. As will be seen in the discussion later in these Reasons for Decision, the difference between expansion drilling and exploration drilling is an operative factor in understanding the parties' arguments about whether Kinross's management ought to have perceived a triggering event for an assessment of the goodwill at the Tasiast mine.

[76] National Instrument 43-101 – "Standards of Disclosure for Mineral Projects" – is the securities instrument that governs the disclosure of mineral "resources" and mineral "reserves" in accordance with standards incorporated by reference from standards prescribed by the Canadian Institute of Mining. Under these standards:

- A "mineral resource" is a concentration of mineralization in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction.
- Mineral resources are categorized as "inferred", "indicated", and "measured."
- "Inferred" mineral resources can only be estimated with a low degree of confidence because they are based on limited drilling information. Inferred mineral resources are excluded from estimates forming the basis of feasibility or other economic studies of the value of a mine.
- "Indicated" mineral resources have better drilling information (closely spaced drill holes) and can be estimated with a level of confidence sufficient to allow the appropriate application of technical and economic parameters to support mine planning and the evaluation of the economic viability of the deposit.
- "Measured" mineral resources can be estimated with the highest level of confidence because the drill holes supporting a measured mineral are spaced closely enough to confirm, rather than assume both geological and grade continuity.

- A "mineral reserve" is a mineral resource that has been demonstrated to be economically mineable by at least a preliminary feasibility study providing information on mining, processing, metallurgical, economic, and other relevant factors that demonstrate that economic extraction is, or can be, justified.
- Mineral reserves are categorized as "proven" and "probable".

[77] Once an area of mineralization has been identified, the objective of drilling within that area becomes to "upgrade" the category (inferred, indicated, and measured) in which that mineralization can be reported through additional drilling and analysis. This can be accomplished through "infill drilling", in which the drill holes are spaced closely enough within an existing area of mineralization to reasonably assume or confirm both geological and grade continuity. A purpose of in-fill drilling is to increase the confidence in the geological characteristics in ore bodies that are already known.

[78] The process of categorizing mineral resources is time consuming because drilling samples must be taken and then prepared and shipped to laboratories, where the drilling results are analyzed. It may take some time for the analysts to develop or revise 3-dimensional geological models, which are then incorporated into economic studies to study the economics of a project. These studies commonly take the form of a pre-feasibility study and/or feasibility study.

[79] Once upgraded to the measured or indicated mineral resource categories, geological information can be further analyzed with the application of technical and economic parameters and, ultimately, incorporated into economic studies such as pre-feasibility or feasibility studies.

[80] Construction of a new mine does not begin until after there is project authorization and project authorization does not occur until there is a completed feasibility study.

3. The Purchase of the Tasiast and Chirano Mines – Setting the Base Line for Expectations

[81] In September 2010, Kinross purchased Red Back Mining Inc., which owned two mines in West Africa, the Tasiast mine in Mauritania and the Chirano mine in Ghana. The purchase price was $8.72 billion. Of that purchase price, $3.21 billion (36%) was allocated to tangible assets and $5.54 billion (64%) was allocated to goodwill. The goodwill was allocated $918 million for the Chirano mine and $4.6 billion for the Tasiast mine, which had the prospect of an anticipated to be lucrative expansion project. (This class action is largely built upon the allegation that the optimistic forecasts for the Tasiast mine did not pan out and the schedule for a feasibility study, construction, and extraction of ore proved to be unrealistic.)

[82] Just before Kinross's acquisition of the Tasiast mine, Red Back Mining, its former owner, had reported approximately 9.3 million ounces of estimated proven and probable mineral reserves and measured and indicated mineral resources at the Tasiast mine, plus an additional 1.9 million ounces of estimated inferred mineral resources.

[83] Following its acquisition of the Tasiast mine, Kinross performed a scoping study, which was later described in Kinross's 2010 Annual Report as follows:

> Kinross has completed a scoping study for the Tasiast expansion project, based on a 16-year mine plan for the expanded project. During the first eight full years of operation, average annual production is expected to be approximately 1.5 million gold equivalent ounces at an average cost

> of sales per ounce of approximately $480-520, with an expected average gold grade of approximately 2g/t, and expected average recoveries of 93%.

[84] Kinross retained Duff & Phelps, a firm of valuators, to value the assets it had acquired from Red Back. The valuation was performed as of the acquisition date, September 17, 2010, and was set out in a valuation report dated August 10, 2011.

[85] To determine the value of Tasiast and Chirano, Duff & Phelps used a net asset value ("NAV") methodology, which uses a discounted cash flow method in which the annual after-tax cash flows that are expected to be generated over the remaining useful life of the assets are projected. These cash flows are then converted to a present value equivalent that uses a rate of return that accounts for the relative risk of achieving the cash flows and for the time value of money. An essential component of the evaluation is the Life of Mine projection. In this case, the Life of Mine plans were based on the acquisition models used by Kinross in assessing the value of Red Back's operations and were prepared by Kinross's Corporate Development team.

[86] In developing Life of Mine projections, for Duff & Phelp's valuation model, the Corporate Development team estimated future production based on stated mineral reserve and mineral resource estimates, as well as a portion of the "potential ounce estimates" or "POEs", which represent mineralization expected to exist but which cannot yet be classified as a mineral reserve or a mineral resource (i.e., exploration potential).

[87] Duff & Phelps determined the peer median NAV multiple, and the multiple it applied for Chirano was 1.85x, and the multiple it applied for Tasiast was 3.43x. After applying the NAV multiples, the fair value of the Chirano and Tasiast mines were determined to be approximately $2.043 billion and $6.578 billion respectively. Thus, the amount of goodwill for Tasiast was approximately $4.62 billion.

[88] It may be helpful to keep in mind that in the case of the Tasiast mine, the NAV multiple was 3.43x at the beginning and throughout the proposed class period. The eventual write-down was because of the reduction in the multiple applied to the NAV.

[89] At the time of purchase, Kinross promised a feasibility study by mid-July 2011 and production in 36 months near the end of 2013.

4. The Purchase and Development of the Tasiast and Chirano Mines and the Alleged Misrepresentations

[90] The Tasiast mine had two zones of deposits: (1) the Piment zone, where the existing mine was operating; and (2) the West Branch zone. Both zones are located in a 10 km segment of an 80 km geological trend. It will be important to keep in mind that at the time of the completion of the Red Back transaction, Kinross already knew of the existence of lower grade sulphide mineralization in parts of the Piment zone and parts of the West Branch zone.

[91] The focus of the Tasiast expansion project was on the West Branch zone of the mine. Kinross's initial drilling priority for the remainder of 2010 was to expand the West Branch mineral resource through expansion and exploration drilling. It intended to develop the West Branch zone using an open pit mine. Kinross's mine plan envisioned a low mining cost allowing for a mining rate of 60,000 tonnes per day through a carbon in leach (CIL) processing plant. The initial plan excluded the low grade ore, which would be removed as waste rock without being

processed. The "scoping study" for Tasiast that Kinross completed after acquiring Red Back was based on the expectation of processing ore primarily from the high grade core, and treated the lower grade "halo" as waste.

[92] On November 3, 2010, a few months after the purchase, Kinross issued a press release reporting its third quarter results. The press release reported 9.3 million ounces of estimated proven and probable mineral reserves and measured and indicated mineral resources, plus an additional 5.2 million ounces of estimated inferred mineral resources – an increase of 3.3 million ounces since Red Back's mineral resource estimate around the time of the closing of the purchase of the mines.

[93] Pausing here and foreshadowing the discussion later in these reasons for decision, two important points should be noted about this increase of 3.3 million ounces of gold. First, the increase was from exploration drilling i.e., it was an increase from newly discovered mineral resources; it was not an increase from in-fill drilling, which is concerned about classifying already discovered mineral resources. Second, this increase was achieved in 2010, and, as will be seen later, this increase was ignored or overlooked by Mr. Mak, Musicians' expert witness, in his opinion that a triggering event had occurred within months of Kinross's acquisition of the Tasiast mine.

[94] Returning to the narrative, the press release reiterated management's view of the Tasiast mine's potential. Kinross reported that updates to the Tasiast mineral resource model were exceeding expectations, and Kinross reported that it had increased the previous mineral resource estimate. The press release stated that Kinross's scoping study of the Tasiast ore body was targeted for completion in December 2010 and that Kinross was in the process of selecting an engineering firm to undertake a feasibility study to be completed by mid-2011.

[95] Moving on to 2011, having undertaken some exploratory drilling in the few remaining months of 2010, Kinross's plans for 2011 were directed at in-fill drilling at the already discovered resources.

[96] On February 16, 2011, Kinross issued: (a) a press release; (b) annual management's discussion and analysis ("MD&A"); and (c) annual financial statements, which disclosed total goodwill of $5.98 billion. The notes to the financial statements indicated that $5.16 billion of this goodwill (86.3%) was for the Tasiast and Chirano mines.

[97] The press release reported 9.7 million ounces of estimated proven and probable mineral reserves and measured and indicated mineral resources (an 0.4 million ounce increase) plus estimated inferred mineral resources of approximately 8.6 million ounces (an increase of 3.4 million ounces) as at December 31, 2010.

[98] In its press release, Kinross stated that it had completed a scoping study for the Tasiast mine that provided for an average annual production in the first 8 years of the mine at 1.5 million gold ounces, at an average cost of sales per ounce of $480-520, with an expected average gold grade of approximately 2 g/t, and expected average recoveries of 93%. In the press release, Tye Burt stated that Kinross's work to date "confirms our view of its potential to become one of the world's great gold mines." Kinross also stated that it was "continuing its aggressive exploration and engineering drilling campaign" at the Tasiast mine. Kinross stated that the project feasibility study was scheduled for completion in mid-2011 and that construction was expected to start in mid-2012, with operations expected to commence early in 2014.

[99] During the first two quarters of 2011, Kinross completed a substantial amount of in-fill drilling on the Tasiast property, amounting to approximately 250,000 metres in total. Its evidence was that the primary objective of the 2011 drilling program was infill drilling to upgrade estimates in the inferred mineral resource category to the categories of measured or indicated mineral resources.

[100] On March 28, 2011, Kinross issued a press release and announced that the feasibility study was 36% complete and that it remained on schedule to be completed in mid-2011. The press release stated that results from drilling at the Tasiast mine "continued to meet or exceed expectations". It also stated that "[t]he expansion project remains on schedule to commence operation early in 2014."

[101] By the end of Q1 of 2011 (March 31, 2011), 95% of the infill drilling progress had been completed at the Tasiast mine's West Branch and "largely completed" by the end of Q2 (June 30, 2011).

[102] Based on the 2011 drilling results, in support of its case that a goodwill impairment analysis was required in 2011, Musicians submits: (a) that no new proven, probable and measured ore mineral and resources were reported as having been discovered at the Tasiast Mine; (b) that the Q1 and Q2 2011 summary of reserves and resources showed a 3-fold decrease in the total quantity of ore that was originally expected to be produced at the mine; (c) the actual average grades of ore reserves that were reported as of Q2 2011 were lower than the 2.0 g/t average that was forecast in Kinross's Q4 2010 scoping study; and (d) the revised cost of sales estimates per ounce of gold at Q2 2011 was $727, which represented a 40% to 50% increase in gold production cost of sales compared to the scoping study.

[103] Returning to the narrative, in April 2011, Kinross hired Independent Project Analysis, Inc. ("IPA") to evaluate the Tasiast expansion project. (IPA's involvement concerns Musicians' allegation that Kinross misrepresented the development schedule for the Tasiast mine.)

[104] On May 3, 2011, Kinross released: (a) a press release; (b) its Q1 2011 interim financial statements, which reported total goodwill of $6.08 billion; and (c) MD&A for the period ended March 31, 2011. The notes to the financial statements indicated that $5.27 billion of this goodwill (86.5%) was for the Tasiast and Chirano mines.

[105] In its disclosures, Kinross stated that it was continuing its aggressive drilling campaign at the Tasiast mine. It stated that the infill drilling at the West Branch zone of the mine was approximately 95% complete and that the feasibility study was 62% complete and remained on schedule for completion in mid-2011. It reiterated that "the expansion project remains on schedule to commence operation early in 2014." Kinross's press release stated that the results from its drilling campaign "continue to meet or exceed expectations". Kinross's Q1 2011 MD&A also stated that "results from the infill and mineral resource expansion campaign continue to meet or exceed expectations."

[106] Musicians submits that the statements were materially false and misleading because they gave investors the erroneous impression that Kinross could still satisfy the schedule it had established for the Tasiast expansion.

[107] In May 2011, Independent Project Analysis, Inc. (IPA) delivered its draft report about the Tasiast expansion project. IPA advised Kinross that its proposed schedule for the project was 21% faster than similar projects and that the project team was extremely time constrained. IPA

advised that the proposed schedule posed significant safety, cost, and operability risks to the project. Kinross was advised that the project was under resourced and that it was critical that an operations manager and a schedule specialist be hired as soon as possible.

[108] Further, IPA advised Kinross that the schedule for the feasibility study for the Tasiast project was twice as fast (10.4 months) as compared to other projects. Kinross was told that the Tasiast expansion project also faced risks because it was located in Mauritania, West Africa, where projects cost on average 45% more and have an average life cycle time 39% longer relative to projects in more stable regions. IPA recommended that Kinross address its staffing issues and postpone project authorization to allow sufficient time to finalize the scope and improve project definition.

[109] Musicians submits that once it was determined in the spring of 2011 that: (a) significant additional mineralization had not been discovered; and (b) the ore that was confirmed through expanded drilling was of lower overall quality than originally anticipated, the Defendants were obliged to write-down the goodwill asset because the originally anticipated gold potential could not be supported by the drilling program.

[110] On August 10, 2011, Kinross released: (a) a press release; (b) its Q2 2011 interim financial statements, which disclosed total goodwill of $6.36 billion; and (c) MD&A for the period ended June 30, 2011. The notes to the financial statements indicated that $5.54 billion (87.1%) of this goodwill was for the Tasiast mine ($4.62 billion) and the Chirano mine ($918.6).

[111] In its press release, Kinross reported that drilling since the beginning of 2011 had added approximately 2.9 million ounces of additional mineral resources and upgraded approximately 6.4 million ounces of estimated inferred mineral resources to the measured and indicated categories.

[112] In its press release, Kinross stated that results from the drilling program at the Tasiast mine continued to be very encouraging, increasing geological confidence in the mineral resource estimate, adding to the size of the overall mineral resource estimate, and indicating the potential for additional areas of mineralization beyond those previously incorporated in the initial project mine plan. In the press release, Tye Burt stated that "[w]e continue to believe that Tasiast is one of the world's great gold projects and a long-term foundation asset for Kinross. Our drilling campaign at Tasiast is yielding exciting results which not only increase our confidence in the resource, but suggest significant new opportunities and potential project expansions which warrant further study."

[113] Kinross announced that it was extending the Tasiast feasibility study to the end of the first quarter of 2012 based on recent drill results and other emerging opportunities. It announced that its in-fill drilling program was to be extended to the Piment zone.

[114] The August 10, 2011 press release revealed what Kinross described as an opportunity arising from the existence of a lower grade "halo" around the main West Branch ore body, but Kinross also noted that the processing of the "halo" required further study as part of the ongoing feasibility study process for the Tasiast expansion project. The press release stated:

> **Potential heap leach opportunity at West Branch:** ... recent drilling has confirmed the presence of lower grade sulphide mineralisation enveloping the main West Branch orebody in the existing pit model which may be amenable to crushing and heap leaching. If so, this would potentially improve the strip ratio and project economics by converting material previously considered waste

> rock into ore. The potential for a supplemental heap leach facility is now being studied as part of the project feasibility study.

[115] Kinross submits that in considering the heap leach option, it had added approximately 180 million tonnes of the lower grade sulphide mineralization to the previous mineral resource estimate. As a result, the total aggregate gold ounces (as defined by drilling in the conceptual pit shell), had increased but the average grade of mineralization across the entire (larger) ore body had diminished.

[116] Musicians alleges that Kinross's press release and Q2 2011 MD&A were misleading in reporting that recent drilling confirmed the presence of lower grade ore enveloping the main West Branch ore body that would be amenable to crushing and heap leaching. Musicians submits that this statement was misleading because although Kinross had been aware of the existence of the low grade ore since the purchase of the mine, the statement implied that the presence of lower grade mineralization enveloping the main West Branch ore body was a new and recent discovery.

[117] Kinross disputes that there was any misrepresentation with respect to the low grade ore. The press release stated that the lower grade "halo" could potentially improve the waste-to-ore ratio and project economics "by converting material previously considered waste rock into ore". What had changed was that Kinross now had information that the known lower grade sulphide mineralization might have some economic value to the Tasiast expansion project, depending on a variety of factors that would have to be analyzed in a feasibility study. Factors favouring mining the low grade ore included the fact that price of gold had increased significantly from $1200/ounce at the time of the Red Back to about $1795/ounce. Although further investigation was required, Kinross says that it believed that there was the potential to improve the expected recovery of the heap leaching process beyond the expected recovery that had been estimated in Red Back's analysis.

[118] Musicians alleges further that Kinross had sufficient information by August 2011, if not earlier in May 2011, to know that the potential at Tasiast was not what was expected and that the schedule could not be successfully implemented. Musicians submits that Kinross's drilling program at the Tasiast mine revealed lower grade ore for the West Branch zone than projected for the expansion project, and the low grade ore enveloped the main zone of high grade ore, which meant that Kinross could not extract the higher grade ore without first mining out the lower grade ore. The result was than 48% of the total ore would be processed by methods that would recover only 60-75% of the gold ore.

[119] Around the time of the August 2011 press release, Kinross prepared an internal memorandum about the subject of a goodwill impairment review. The memorandum was by Melissa Rossit, a Kinross manager, but only quotes the relevant International Auditing Standard (IAS). Musicians' alleges that Kinross failed to disclose that it did not conduct an impairment analysis for the Tasiast or Chirano mines that it was required to do at each quarter. Instead, Musicians argues that Kinross assumed that the price at which it acquired the mines in September 2010 reflected the actual value of the two mines since the assets were determined to have no impairment indicators because they had been recently acquired and thus the carrying value closely approximated the fair market value.

[120] Musicians allege that by August 2011, Kinross knew that its construction schedule was unrealistic and that it ought to have revised the schedule.

[121] Musicians alleges that Kinross had sufficient information by at least August 2011 (Q2 2011) and likely May 2011 (Q1 2011) to know that the Tasiast mine would fail to meet expectations and, therefore, Kinross ought to have written down the goodwill.

[122] Musicians' theory of the proposed class action case is that when the drilling program did not yield significant new discoveries of gold, there was a triggering event the required Kinross to re-evaluate the NAV multiple of 3.43x for the Tasiast mine, which was very high compared to industry wide averages and very high compared to other Kinross mines.

[123] Musicians submits that the 3.43x NAV multiple was not sustainable during the class period without the discovery of substantial gold discoveries, which did not in fact occur. The absence of discoveries meant that Kinross ought to have written down the goodwill. Musicians' accounting expert, Alan Mak, opined that the write-down should have occurred in early May 2011, after 8 months of drilling at the mine.

[124] Kinross denies that there was a triggering event. It says based on the application of IFRS criteria, nothing came to light in the first, second or third quarters of 2011 that suggested that Kinross needed to proceed further to test for goodwill impairment. Kinross says that in April 2011, it conscientiously determined that no indicators of impairment were present as at March 31, 2011.

[125] Relying, in part, upon Justice Strathy's judgment in *Gould v. Western Coal Corp.*, 2012 ONSC 5184 at paragraphs 95 and 261, Kinross submits that Mr. Mak's evidence is not credible and could not be relied on at trial because he opined on matters outside of his area of expertise, engaged in extensive fact finding, and weighed evidence and drew unsupported conclusions based on suspicion and innuendo.

[126] It was the opinion of Dr. Gordon Richardson, Kinross's expert witness, that it was reasonable for Kinross accounting staff to assume that carrying values on the books of Kinross closely approximated fair value as at March 31, 2011. Further, it was his opinion that Kinross's management was correct in determining that no indicators of impairment were present as at June 30, 2011, and he concluded that it was reasonable for Kinross accounting staff to believe that rising gold prices in Q2 2011 would be more than enough to compensate for any negative factors, and accordingly, there was no triggering event during the first half of 2011.

5. The Assessment of Indicators of Goodwill Impairment in the Fall of 2011

[127] Returning to the narrative, during the third and fourth quarters of 2011, Kinross continued drilling to support the feasibility study, including drilling at both the West Branch and Piment zones. Kinross continued to receive infill and geotechnical drilling results through these periods, and it submits that it was not until late in the fourth quarter that Kinross received all of the drilling results necessary for the feasibility study.

[128] In August 2011, Kinross made an assessment whether there were any indicators of impairment, this time as at June 30, 2011, and it concluded that no indicators of impairment were present based on the IFRS criteria.

[129] In October 2011, Kinross made an assessment whether there were any indicators of impairment, this time as at September 30, 2011 and concluded that no indicators of impairment were present based on IFRS criteria.

[130] It was the opinion of Dr. Gordon Richardson that Kinross's management was correct in determining that no indicators of impairment were present as at September 30, 2011, and he concluded that it was reasonable for Kinross accounting staff to believe that rising gold prices would be more than enough to compensate for any negative factors.

[131] In the fall of 2011, Kinross retained Duff & Phelps to determine the market-related inputs including gold prices, foreign exchange rates, discount rates, and NAV multiples for the annual goodwill impairment testing for the upcoming 2011 year-end. For internal purposes Kinross asked Duff & Phelps to estimate the key inputs as at September 30, 2011, for a preliminary "what if" scenario analysis to assess whether there could be a risk of impairment at year end.

[132] In early October 2011, Duff & Phelps provided preliminary estimates of these inputs as at September 30, 2011. Kinross assumed, for the purposes of this preliminary "what if" analysis, that the NAV multiple that had been implied in the purchase price allocation remained one of the most meaningful indications of fair value for the Tasiast and Chirano mines due to their recent acquisition. At that time Duff & Phelps also believed that the acquisition multiples would still be the most appropriate indicators of value for the 2011 Impairment Valuation. The "what if" analysis showed that there did not appear to be a risk of impairment at September 30, 2011.

[133] On November 2, 2011, Kinross released; (a) a press release; (b) its Q3 2011 interim financial statements, which reported total goodwill at $6.36 billion; and (c) MD&A for the period ended September 30, 2011. The notes to the financial statements stated that $5.54 billion (87.1%) of this goodwill was recorded for the Tasiast mine ($4.62 billion) and the Chirano mine ($918.6 million).

[134] The press release stated that the infill drilling program occupied approximately 90% of drilling resources in the third quarter with the drilling program being 95% complete in the Piment zone. Kinross reported that work on the feasibility study continued and was expected to be completed at the end of the first quarter of 2012. Production start-up was targeted for mid-2014. Kinross's press release stated that "[f]urther drilling and exploration at Tasiast continue to increase the Company's confidence in the ore body and define new areas for potential growth." In the press release, Tye Burt stated that "[o]ur drilling campaign at Tasiast continues both to confirm our confidence in the resource and indicate potential further expansions to our previous model."

[135] In mid-December 2011, Kinross determined that updated drilling information suggested that it should use a different production profile in the "what if" analysis that would be more consistent with the work of AMC Consultants Pty Ltd. ("AMC"), a third party, that had been retained to prepare a Life of Mine plan for the Tasiast mine. Using this modified profile in late-December, Kinross saw, it says for the first time, that the interaction of various factors – including the estimates of the production profile, discount rate, long-term gold price, foreign exchange rate, and the increased capital and operating costs that were currently being used in the "what if" analysis – could combine to result in a NAV for the Tasiast mine that could be below the NAV that had been calculated in the purchase price allocation. In other words, there was a potential risk of a goodwill impairment for Tasiast, depending on the inputs as at December 31, 2011.

6. The 2012 Write Down of the Tasiast Mine's Goodwill

[136] In January 2012, Duff & Phelps developed and gave Kinross preliminary estimates of the key production attributes as at December 31, 2011. Duff & Phelps reached a preliminary conclusion that NAV multiples had suffered a systemic contraction across the mine industry and that the contraction appeared to be more than just a short-term phenomenon. The range of contraction across the mining industry was between between 14.3% and 56.4%. For the Tasiast mine, Duff & Phelps reduced the multiple from 3.43x to 2.40x, a 30% contraction (representing less of a decline than the decline of the median market multiple).

[137] Duff & Phelps determined that the NAV for the Tasiast mine was approximately $1.914 billion, which was a slight downward change from the NAV calculated for purchase price ($1.920 billion). Based on Kinross's expectations of what the Life of Mine plan could be and Duff & Phelps's preliminary estimates of the inputs at the time, Duff & Phelps reported that an an impairment would be likely. Duff & Phelps stated in its 2011 Valuation Impairment report, the reduction in value for Tasiast was not a product of factors specific to the mine but was a function of changes in market factors including, significantly, the contraction of the market multiples. The NAV multiples were falling for everybody in the industry.

[138] On January 16, 2012, Kinross issued a press release providing preliminary 2011 operating results and a 2012 outlook. Kinross announced that, as a result of an evolving understanding of the Tasiast ore body, it expected to record a material non-cash accounting charge, primarily related to the goodwill recorded for the Tasiast mine. It revealed that it was going to conduct a comprehensive capital and project optimization process, which it stated could result in a revision of previously-disclosed "scoping and pre-feasibility level assumptions and forecasts" regarding the Tasiast mine. It disclosed that it would explore project development alternatives and that it anticipated another six to nine months of additional analysis and planning to determine the optimum processing mix for the Tasiast deposit and the timing for developing those processing alternatives.

[139] With respect to the goodwill impairment, the press release stated:

> As required by International Financial Reporting Standards, the Company is in the process of carrying out its annual impairment assessment and expects to release the results of this assessment with its year-end financial results. In view of the Company's evolving understanding of Tasiast project parameters, and market conditions, including industry-wide increases in capital and operating costs, the Company expects to record a material non-cash accounting charge, primarily relating to the goodwill recorded for the Tasiast mine in connection with the 2010 Red Back acquisition. As disclosed in the 2011 third quarter financial statements, as at September 30, 2011, the book value of total assets of Tasiast was $7.1 billion, of which $4.6 billion was goodwill. The Company has not finalized the Tasiast feasibility study or mine plan, and drilling results processed to date continue to demonstrate significant exploration potential supporting a world class mine.

[140] In response to Kinross's announcement, the price of Kinross shares dropped from $13.20 per share on January 16, 2012 to $10.17 on January 19, 2012, a drop of nearly 23% over 3 trading days.

[141] January 16, 2012 is the end of the proposed class period.

[142] On February 15, 2012, Kinross announced that it was writing down $2.94 billion of its goodwill, i.e., $2.49 billion for the Tasiast mine (54% downward adjustment) and $447.5 million for the Chirano mine (49% downward adjustment).

[143] Kinross's annual MD&A stated that it expected to complete its feasibility study in the first half of 2013 (1.5 to 2 years beyond the original date of mid-2011), construction was targeted to commence in mid-2013 (one year beyond the original date of mid-2012) and production would begin in 2015 (one year beyond the original date of early 2014).

[144] On March 12, 2012, Musicians issued a Notice of Action for a proposed class action for misrepresentation. The action concerns Kinross's write down of $2.94 billion of goodwill: $2.49 billion for the Tasiast mine and $447.5 million for the Chirano mine.

[145] Musicians submits that given Kinross's drilling program results, it knew no later than August 2011 that its expectations for the Tasiast mine were false hopes and Kinross ought to have known that its construction schedule was unattainable, and thus Musicians submits that Kinross failed in its obligations to disclose a goodwill write-down and to correct its construction schedule. Musicians summarizes its claim in paragraph 14 of its factum, which states:

> 14. The Plaintiffs do not impugn the Defendants' business decision to purchase the Red Back mines for an amount that was far in excess of the value of the mines. However, having conducted 6 months of "extensive" and "exhaustive due diligence" before the purchase, having determined to purchase the mine in August 2010 and having undergone "aggressive" and extensive drilling at the mines from September 2010 onward, it is the Plaintiffs' contention that the Defendants had sufficient information by August 2011, if not earlier in May 2011, to know that the potential at Tasiast was not what they expected and that the aggressive schedule could not succeed.

[146] At the current time, Kinross has written off the goodwill for the Tasiast mine (after the initial write-down there were two more substantial write downs). As of June 30, 2013, Kinross valued the Tasiast mine at $1.42 billion. At the current time, the feasibility study for the Tasiast mine is still outstanding and is now promised for Q1 2014, and Kinross's decision about whether to proceed with the Tasiast expansion project will not be made until 2015 at the earliest.

[147] In support of its certification motion and for leave to proceed with a claim pursuant to Part XXIII.1 of the Ontario *Securities Act*, Musicians delivered an affidavit from Mr. Mak with his expert opinion. It was Mr. Mak's opinion that: (a) Kinross paid a premium over the value of Tasiast assets because it anticipated ore discoveries; (b) the drilling results failed to establish the existence of the anticipated ore discoveries; (c) the absence of the anticipated ore discoveries was known in early to mid-2011 because ore reserve data for proven and probable reserves remained unchanged from December 2010 through to June 2011; (d) these circumstances were a triggering event that under GAPP and a goodwill write down should have been announced by Kinross. In his report, Mr. Mak opined:

> Insofar as the Company became aware that Tasiast ore reserves were materially lower than expected prior to December 31, 2011, it would have been obliged to evaluate goodwill asset impairment at the earlier financial reporting dates. We understand that the original drilling infill program for the mine was largely completed by as early as March 31, 2011. Hence the Tasiast goodwill write-down may have been required for Kinross' March 31, June 30 or September 30, 2011 quarterly financial statements.... To the extent that the Company knew, or ought to have known of adverse data indicating that the expectations set out in the scoping study were not feasible as of December 31, 2010, an impairment evaluation of the Tasiast mine goodwill should have been performed for the 2010 year end (along with any required write-down of the goodwill asset.)

[148] Musicians' expert witness, Mr. Torochio, describes a methodology for calculating damages on an aggregate basis. Mr. Torochio proposes a mathematical model called a "multi-trader" model. This model uses algorithms and statistical analyses to approximate the number of shares purchased during the class period and held to the end of the class period. The Plaintiffs' model incorporates varying turnover rates for different types of investors, based on the idea that different types of investors purchase and sell shares at different rates.

[149] Musicians estimate damages for the class using the trading model and the prescribed formula in section 138.5 of the *OSA* for Part XXIII.1 and claims $1.68 billion for shares purchased during the class period and held as of the close of trading at the end of the class period. This damage figure does not include damages for shares purchased by Canadian citizens on foreign exchanges.

7. The Class Action in the United States

[150] A class action has been commenced in the United States Southern District of New York. The US plaintiffs allege that from August 2010 until January 2012, Kinross made materially false and misleading statements in respect of the Red Back mines; that is: (a) Kinross misrepresented that it had done extensive due diligence before acquiring the mines; and (b) it misrepresented that its development schedule for the Tasiast mine was achievable.

[151] On September 7, 2012, Kinross brought a pleadings motion in the U.S. action, and it moved to dismiss the Amended Complaint in the US action. It argued that the plaintiffs had failed to plead facts giving rise to a strong inference that the defendants acted with *scienter* and that Kinross made actionable misstatements.

[152] On March 22, 2013, Justice Engelmayer of the US District Court dismissed the claim for the due diligence misrepresentation, but refused to dismiss the claim that Kinross had misrepresented the schedule for the Tasiast expansion project. Justice Engelmayer found that the plaintiffs had alleged sufficient facts to show the Defendants had to appreciate by August 2011 that a material delay of the schedule for construction and production was likely and that the schedule was no longer realistic.

[153] The Defendants moved for reconsideration of the motion to dismiss. Their motion for reconsideration was denied on June 6, 2013.

8. Canadian Class Action

[154] On March 12, 2012, Musicians issued a Notice of Action.

[155] On April 10, 2012, Musicians delivered its Statement of Claim.

[156] On May 24, 2012, Musicians delivered its Amended Statement of Claim.

[157] In its Amended Statement of Claim, Musicians pleads a statutory cause of action under Part XXIII.1 of the Ontario *Securities Act.*

[158] Musicians' allegations of misrepresentations are set out in paragraphs 84-86b of the Amended Statement of Claim, which state:

The Defendants' Misrepresentations

84. Kinross's financial statements, management discussion and analysis, press releases and other public statements created a materially misleading and distorted picture of the value of the Tasiast and Chirano mines.

85. The defendants made, authorized or acquiesced in the making of the following misrepresentations, all of which were false, inaccurate or misleading:

(a) they stated Kinross's financial reporting complied with Generally Accepted Accounting Principles and International Financial Reporting Standards (as the case may be), which it did not;

(b) they consistently overstated the goodwill in the Tasiast and Chirano mines by failing to record an impairment charge;

(c) they misstated the grade of gold ore at the Tasiast and Chirano mines;

(d) they represented amounts for Kinross's mineral reserves and resource estimates for the Tasiast and Chirano mines that were inaccurate or objectively unreasonable;

(e) they repeatedly reported positive and improving progress for Kinross's drilling program at the Tasiast mine, which reports were false or materially misleading; and

(f) they falsely stated that the Tasiast mine was "destined to become one of the world's largest producing gold mines" and made other similar statements regarding the mine's incredible future, which statements were not objectively reasonable at the time.

86. The defendants knew or ought to have known these misrepresentations were false, inaccurate or misleading. The defendants knew or ought to have known that as a result of the high amounts of low grade gold ore exhibited at the Tasiast mine, Kinross was required record an impairment in the value of goodwill.

[159] In its Amended Statement of Claim, Musicians pleads three of the five elements of a common law negligent misrepresentation claim. The elements of a claim of negligent misrepresentation are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos*, [1993] 1 S.C.R. 87.

[160] Musicians does not plead that it relied on the representations in making the decision to purchase Kinross shares. Rather, it pleads that purchasing shares as such is an act of detrimental reliance. The closest Musicians comes to pleading reasonable reliance and consequential damages from the reliance is in paragraph 99 of the Amended Statement of Claim, which states:

99. The plaintiffs and Class Members relied on these misrepresentations to their detriment by the act of purchasing or acquiring Kinross shares. They also relied on the defendants' obligation to make timely disclosure of all material facts, to comply with securities law and to prepare financial statements, MD&As and Kinross's other filings in accordance with GAAP or IFRS. The defendants violated these obligations.

F. SHOULD LEAVE BE GRANTED UNDER PART XXIII.1 OF THE ONTARIO *SECURITIES ACT?*

1. Introduction

[161] Since Kinross does not contest the good faith requirement of the test for leave under Part XXIII.1 of the Ontario *Securities Act*, the issues to be determined on the motion for leave are whether there is a reasonable possibility that the action will be resolved at trial in favour of Musicians for any one or more of the three core allegations; which I have labelled as: (1) the Goodwill Misrepresentation; (2) the Low-Grade Ore Misrepresentation and (3) the On-Schedule Misrepresentation.

[162] For the reasons set out below, it is my conclusion that leave should not be granted for any of the three alleged misrepresentations.

[163] I do not grant leave for the On-Schedule Misrepresentation because this allegation was not pleaded in the Amended Statement of Claim.

[164] I do not grant leave for the other two alleged representations because there is no reasonable possibility that the action will be resolved in favour of Musicians.

2. The Goodwill Misrepresentation

(a) Preliminary Observations

[165] It is beyond doubt that Kinross wrote down its goodwill in February 2012 and that its shareholders who purchased shares between May 3, 2011 and January 16, 2012 took a financial pounding. Kinross provided a reason for its write down of goodwill that explained it as a necessary response to systemic industry-wide adverse economic conditions.

[166] Musicians disputes Kinross's explanation, and Musicians submits in effect that the pronounced explanation was a cover-up of the real explanation, which was that Kinross knew or ought to have known not long after it purchased the mine that its fervent expectations for the Tasiast mine were disappointed expectations.

[167] Musicians' pleaded case against Kinross under Part XXIII.1 of the Ontario *Securities Act* is grounded on the factual propositions that Kinross knew or ought to have known that its representation of the goodwill for the Tasiast mine was misleading because it knew or ought to have known as early as March 2011 that a goodwill impairment had occurred because Kinross's expectations for the amount of ore at the mine were or ought to have been known to be disappointed expectations.

[168] Musicians summarizes its case with respect to the goodwill misrepresentation at paragraphs 189-190 of its factum as follows:

> 189. When Kinross acquired Red Back and a 100% interest in the Tasiast mine in [September 30] 2010, it paid a premium of $5.5 billion over the value of Red Back's identifiable net assets. The premium reflected Kinross' expectation of significant yet-to-be confirmed gold reserves being found on the Tasiast property. At the time of acquisition in August 2010, Kinross knew that lower

> grade sulphide mineralization enveloped the main West Branch orebody, a factor that negatively impacts the project economics. By March 31, 2011, the infill drilling program had been 95% completed, further confirming materially lower than expected ore reserves and adverse data.
>
> 190. **As the failure to achieve a predetermined expectation of asset performance constitutes a "triggering event", the Tasiast goodwill write down ought to have been taken by Kinross in its March 31, June 30 or September 30, 2011 quarterly financial statements.** However, it was not until January 16, 2012, that Kinross announced it expected to record a material goodwill impairment charge relating to the Tasiast mine and would delay the schedule for the Tasiast expansion project by 6 to 9 months. The announcement caused a share price drop of $13.20 on January 16, 2012 to $10.17 by January 19, 2012, representing more than $3.4 billion in lost shareholder value. [emphasis added]

[169] Stripped down to its essence, it is Musicians' argument that Kinross ought to have written down the goodwill for the Tasiast mine within six months or eleven months, at the latest, after its purchase of the Tasiast mine because the failure to achieve its high expectations was a triggering event for a write down.

[170] In my opinion, for the reasons that follow, there is no reasonable possibility that Musicians' action based on this theory of a misrepresentation will be resolved at trial in its favor.

[171] I begin the discussion with four preliminary observations. First, I note that it is not necessary for me to determine whether Kinross's explanation for the write down of its goodwill is correct. Based on the evidence advanced on this motion, I tend to be of the view that Kinross's explanation was sound, but that conclusion does not address Musicians' case that a write down of goodwill ought to have occurred many months earlier.

[172] Second, I also note at the outset that despite the parties poking at each other about whether Kinross's state of mind was actually one of disappointment, this issue of Kinross's subjective state of mind is beside the point, because the genuine issue is whether Kinross objectively ought to have been disappointed to the degree that a write down of its goodwill was the right and necessary thing to do in accordance with the reporting requirements of GAAP and IFRS.

[173] It is clear to me that, even to this day, Kinross is still subjectively enthusiastic about the prospects for the Tasiast mine, but the point of Musicians' proposed class action is that Kinross's enthusiasm was mistaken because the results being achieved at the mine ought objectively to have informed Kinross that it was overstating the goodwill of the mine.

[174] Third, and this is an important observation with respect to applying the test for leave in the circumstances of the case at bar, Kinross's resistance to leave being granted focuses on just one crucial element or foundation principle of Musicians' misrepresentation claim. The crucial element for Musicians' action is that because of the information available to Kinross about the in-fill drilling at the Tasiast mine between January 2011 and the end of that year, Kinross's management ought to have announced a write down early in 2011 and not waited to complete its annual goodwill impairment testing in early 2012.

[175] The precise point I wish to make is that whether there is a reasonable possibility that this fundamental part of Musicians' case will be resolved at trial in Musicians' favour can fairly be decided now without examinations for discovery, etc. Put somewhat differently, the viability of a fundamental part of Musicians' action can be decided on the largely paper record before the court.

[176] By way of contrast, there might be other elements of Musicians' action that have a reasonable possibility of a favourable resolution for Musicians because more facts or opinions will be forthcoming during the course of the action. However, the factual foundation for the theory of Musicians' case is now known and does not await further disclosures. Whether there was a triggering event based on the known empirical results of the drilling programs at the Tasiast mine are now known facts that will not be changed by the discovery process or by a trial. Although, I will not be deciding this motion on the basis that Musicians should be assumed to have put its best evidentiary foot forward, which is a principle used on a summary judgment motion, practically speaking, there is nothing outside the paper record that can augment Musicians' case that it has a reasonable possibility of showing at trial that objectively there was a triggering event calling for a write down of the goodwill for the Tasiast mine. Musicians' case is built on what it says should have been Kinross's objective response to the results of its drilling programs.

[177] Fourth, Kinross submits that, in any event, for the allegations against Dr. Thomas and Dr. Masterman, Musicians have offered no evidence and therefore leave should not be granted as against these particular defendants. I simply disagree. Assuming that there is a case against Kinross, there is sufficient evidence to connect these defendants to the alleged misrepresentations.

(b) Why There is No Possibility - Let Alone a Reasonable Possiblity - that Musicians' Action will Succeed at Trial

[178] I turn now to explain why there is no possibility – let alone a reasonable possibility – that Musicians' action for the Goodwill Misrepresentation could succeed at trial.

[179] On February 15, 2012, Kinross announced that it was writing down $2.94 billion of its goodwill and in less than a month, on March 12, 2012, with little more than a rejection of management's explanation for the write down, Musicians issued a Notice of Action for a proposed class action for misrepresentation.

[180] There is no suggestion that Musicians brought its action in bad faith, but as I view its proposed class action and its claim under Part XXIII.1 of the Ontario *Securities Act*, the action was launched with nothing more than the speculation and the suspicion that only a culpable explanation could rationalize the evaporation of billions of dollars of goodwill.

[181] For the purposes of this leave motion, Musicians' is under no obligation to demonstrate that Kinross's non-culpable explanation for the write down was untrue or incorrect, and it is not necessary for me to make any findings about the merits of Kinross's explanation. What is, however, necessary is that I decide whether Musicians' allegations of misrepresentations have a reasonable possibility of success at trial.

[182] This is a low threshold and, in my opinion, Musicians is not even close to getting over the bar. The case it advanced for a triggering event for a goodwill impairment based on what Kinross knew or ought to have known, which case will not get better by examinations for discovery, has no possibility of success. There simply is no evidence that because of what Kinross demonstrably knew about its own drilling results in 2011, it ought to have turned its enthusiasm for the Tasiast mine into disappointment, depression, regret, and apology.

[183] Musicians' action is based on a theory of a case developed by Mr. Mak, an expert accounting expert. Kinross submits that Mr. Mak is not a credible expert witness because: (a) he opined on matters about the mining industry outside his area of expertise; (b) he engaged in extensive fact finding, which is not the role of an expert witness; and (c) he weighed evidence and drew unsupported conclusions based on suspicion and innuendo. Kinross relies on the fact that in *Gould v. Western Coal Corp., supra,* Mr. Mak was discredited as an expert witness. In that case, Justice Strathy found that Mr. Mak's evidence did not come close to the standard for acceptable expert evidence, was unsupported by the facts, was inconsistent with GAAP, and was nonsensical.

[184] I would not attribute any of these alleged faults on Mr. Mak. I am prepared to accept Mr. Mak as a believable and honest witness. His thesis that there was a triggering event calling for a 2011 write down of the Tasiast mine's goodwill is not inconsistent with GAAP or IFRS and I do not see how it can be said that he strayed outside his area of expertise. He did not engage in extensive fact finding; he rather analyzed the facts disclosed by Red Back Mining and Kinross about the baseline for the goodwill assessment and abut the reported results from the drilling programs. His evidence was not nonsensical. The problem with Mr. Mak's opinion evidence is not that he has been discredited as an expert witness, but rather that as an expert witness, he makes three mutually exclusive mechanical and analytical errors, each of which cause his argument that there was a triggering event in 2011 to implode.

[185] Mr. Mak's first mechanical and analytical error concerns his collection of data and his failure to note the difference between data from exploration drilling and data from expansion drilling. For Mr. Mak's theory of disappointed expectations to work the disappointment would have to reflect disappointment in the analysis of the data from exploration drilling. No such data was collected by Mr. Mak, whose report analyzes only expansion drilling.

[186] Moreover, the truth of the matter is that in 2010 and 2011 (and for that matter for 2012 and perhaps even to this day) no such exploration drilling data for the Tasiast mine was even available to be analyzed because the focus of the drilling program was on expansion drilling (not exploratory drilling) and because the feasibility study had not been completed. Apart from some exploratory drilling in the concluding months of 2010, for the Tasiast mine, Kinross focussed its attention in 2011 on expansion drilling.

[187] As Kinross had not completed a pre-feasibility study for the Tasiast expansion project, it was not possible for Kinross to have added to its Proven and Probable mineral reserves for the Tasiast expansion project. Therefore, as Mr. Mak acknowledged on cross-examination, the fact that Proven and Probable mineral reserves did not increase does not tell one anything about the exploration potential of the mine, which remains to be determined.

[188] The thesis of Musicians' misrepresentation action is that Kinross had fervently high hopes for new discoveries at the Tasiast mine and those hopes were dashed by the 2011 results. To this day, the thesis that Kinross's hopes were falsified hopes remains an open question. It may yet be the case that when exploratory drilling results are actually collected and actually analyzed, they will be found to be disappointing. However, at the time when Musicians launched its class action, it was premature to argue that Kinross's management ought to have written down the Tasiast mine's goodwill based on the results of its exploratory work. Any disappointment would have to have been based on disappointment about exploratory drilling, which is how new

discoveries of ore are found, not based on disappointment from expansion drilling, which is just a possible reclassification of already discovered ore bodies.

[189] Thus, Mr. Mak's mechanical and analytical error of not collecting analyzed exploratory drilling data causes his theory and Musicians' misrepresentation case to implode.

[190] Mr. Mak's second mechanical and analytical error also concerns exploratory data. In his reports, in analyzing the drilling data that he says was disappointing, he only uses the data collected in 2011, which concerned in-fill drilling, and he ignores the known fact that Kinross did some exploratory drilling between September and year-end 2010. In other words, the base-line for the disappointment analysis was the measured and indicated ounces of gold at the time of the acquisition plus the inferred ounces. The raw measure of disappointment would be the extent to which those values had changed, but Mr. Mak in his calculations ignores the contribution of the 2010 year drilling program. Thus, in his initial report, Mr. Mak incorrectly states that subsequent to acquiring the Tasiast mine, Kinross' drilling tests failed to establish the existence of additional minerals. This is plainly wrong. Kinross added approximately 9 million additional ounces of estimated mineral resources following its acquisition of the mine.

[191] Thus, Mr. Mak's mechanical and analytical error of ignoring the 2010 drilling data causes his theory and Musicans' misrepresentation case to implode.

[192] Mr. Mak's third mechanical and analytical error concerns his analysis of the 2011 drilling program at the Tasiast mine, which he opines ought to have been regarded by Kinross's management as a big disappointment. As already noted above, the in-fill drilling is actually not pertinent to whether Kinross ought to have been disappointed about the prospects of new discoveries of ore at the mine site because it is expansion drilling not exploratory drilling, but assuming the data about in-fill drilling was pertinent, it is impossible to see how: (a) the positive results of the in-fill drilling program; and (b) Kinross's reassessment that what had originally been regarded as waste rock might be refined for ore and not just extracted for disposal, could be regarded as disappointing. The pessimistic Mr. Mak's argument appears to be that the good or positive results from the in-fill drilling was not good-enough and therefore bad and disappointing. This analysis is unsound. The positive in-fill drilling results were not a triggering event.

[193] Thus, Mr. Mak's mechanical and analytical error of analyzing positive results as being negative, one again, causes his theory and Musicans' misrepresentation case to implode. With three mutually exclusive major mechanical or analytical errors, there is, therefore, no factual basis for Musicians' goodwill impairment argument and no reasonable possibility that Musicians' claim could succeed at trial.

3. The Low-Grade Ore Misrepresentation

[194] Musicians alleges that Kinross's press release and Q2 2011 MD&A were misleading in reporting that recent drilling confirmed the presence of lower grade ore enveloping the main West Branch ore body that would be amenable to crushing and heap leaching. Musicians submits that this statement was misleading because, although Kinross had been aware of the existence of the low grade ore from the outset of its purchase of the mine, the statement implied that the presence of lower grade mineralization enveloping the main West Branch ore body was a new and recent discovery.

[195] There is no reasonable possibility that that Musicians might succeed on either a statutory or a common law action for negligent misrepresentation for the simple reason that there is nothing false in confirming the presence of lower grade ore enveloping the main West Branch and confirming the presence of lower grade ore cannot be taken to imply a new and recent discovery.

[196] Semantically, the alleged misrepresentation means precisely the opposite of what Musicians contends and imparts the meaning that no new load grade ore had been discovered but the existing load grade ore was being re-evaluated for its economic worth.

[197] The disclosed truth was that Kinross always knew about the low grade ore and was now considering whether it might make economic sense to process the low grade ore rather than to treat it as waste as had been the original plan. The priority and the focus of the mining plan for the Tasiast mine remained as it always was; that is, the priority was to extract the low grade ore that covered the anticipated high grade ore below it.

[198] Mr. Wilson, Musician's geologist witness, admitted on cross-examination that the common understanding of the word "confirmed" means "to confirm the existence of something that was already known about". Therefore, Kinross's statement does not imply, as Musicians contents, that the presence of lower grade sulphide mineralization was a new and recent discovery. Indeed, Musicians acknowledges, as it must, that the existence of the lower grade sulphide mineralization above the hoped for high grade ore had been previously publicly disclosed.

[199] The is no reasonable possibility that a trial court would conclude that a false statement was made by Kinross about the low grade ore enveloping the high grade ore, and there is nothing in the discovery process yet to take place that would change a tautologically and experientially true statement into a false statement.

[200] Thus, Musicians' action based on the Low-Grade Ore Misrepresentation has no chance of success.

4. The On-Schedule Misrepresentation

[201] The Amended Statement of Claim does not plead any misrepresentation about the schedule for the expansion project for the Tasiast mine. The court obviously cannot and should not grant leave for a misrepresentation claim that has not been pleaded.

[202] While it seems corny to say it, since this misrepresentation claim has not been pleaded there is no reasonable possibility that the claim will be resolved at trial in favour of Musicians.

[203] It appears that in advancing the On-Schedule Misrepresentation Claim stead, Musicians is relying on the fact that the US District Court for the Southern District of New York refused to dismiss similar allegations on a pleadings motion in a US proceeding. I do not see how the circumstances of a differently pleaded action in a different jurisdiction have any relevance to considering whether to grant leave in the case at bar.

[204] Finally, I agree with Kinross's submissions that it would be procedurally improper and unfair to allow Musicians to advance this claim for the leave motion.

5. Conclusion on Leave under the Ontario *Securities Act*

[205] I, therefore, conclude that Musicians' motion for leave to advance a statutory claim under Part XXIII.1 of the Ontario *Securities Act* should be dismissed.

G. CERTIFICATION

1. Introduction - Certification in a *Securities Act* Class Action

[206] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[207] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at paragraph 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[208] As I explain below, in my opinion, the normal certification criterion for a class action must be adapted or restructured to the circumstance that the plaintiff is advancing a class action claim using Part XXIII.1 of the Ontario *Securities Act.*

[209] The adaption or restructuring is twofold. First, if leave under the Ontario *Securities Act* is granted, it must necessarily follow that the plaintiff will have satisfied the first four of the five criteria for certification and very likely the plaintiff will be in a position to satisfy the fifth criterion (the representative plaintiff criterion) for both the Part XXIII.1 claim and also the associated common law negligence claim. (In the case at bar, a certification of the common law claim would be subject to the proviso that the reliance element of the common law claim must be proved at individual issues trials by those class members who wish to assert a claim for damages beyond the statutory caps on liability.)

[210] To oversimplify if leave is granted under Part XXIII.1 of the Ontario *Securities Act*, it follows that the court should certify a class action for both the statutory and the common law negligent misrepresentation claim.

[211] Second, if leave is not granted, then the action will not be certified for both the statutory claim and also the common law claim which, however, may proceed as an individual claim by the plaintiff.

[212] If leave is not granted under the Ontario *Securities Act*, the statutory claim obviously cannot be certified, and the common law claim will fail to satisfy three of the five certification criteria (class definition, common issues, and preferable procedure) largely for the reason that

there will be no basis in fact for these certification criterion and because the common law claim standing alone will not satisfy the preferable procedure criterion.

[213] To oversimplify, if leave is not granted under Part XXIII.1 of the Ontario *Securities Act* , then the motion for certification should be dismissed, but the plaintiff may continue with an individual action for common law negligence.

[214] These adaptions are a matter of common sense, are consistent with the jurisprudence about class action certification, and are a matter of rationalizing the screening mechanisms that are in play when a class action for a common law negligence claim is combined with a class action for the statutory cause of action under Part XXIII.1 of the Ontario *Securities Act*.

[215] As explicated earlier in these reasons for judgment, the leave test is a genuine substantive (merits based) screening test that, albeit with a low bar, tests the evidentiary basis of the plaintiff's case. It is a stricter test than the test for certification under the *Class Proceedings Act, 1992*, which apart from the cause of action criterion, is a procedural and not a merits-based test. Thus, if the plaintiff is able to satisfy the stricter screening test of the Ontario *Securities Act*, then (subject to perhaps refining the class definition or eliminating some proposed common issues that want for commonality or reviewing the details of the litigation plan), the plaintiff will have satisfied all of the comparatively less onerous criteria of the test for certification.

[216] In the case at bar, Kinross conceded that if Musicians satisfied the test for leave for the statutory claim, then subject to some refinements to the class definition, Musicians' statutory claim should be certified for a class action. Kinross, however, did not agree that the common law negligence claim could "bootstrap" itself to the certification of the statutory claim. I disagree, if the statutory claim passes muster, then with the proviso that reliance is an individual issue and not a common one, the negligence claim is an appropriate claim for certification as a class action.

[217] Practically speaking, the above analysis means that if leave is granted for the statutory claim, the issues common to the statutory claim and the common law claim will be the subject matter of the common issues trial and the matter of individual reliance for the common law claim will be decided at individual issues trials for those class members who are not satisfied with the capped recovery of damages for the statutory claim. (Of course, there will be no need for individual issues trials if the defendant is successful at the common issues trial.)

[218] In making these adaptions to the approach to certification of an action in which there is a statutory claim under Part XXIII.1 of the Ontario *Securities Act*, it must be kept in mind that the evidentiary footprint, save for the issue of reliance (which I will discuss later in these reasons for decision) for the statutory action and the common law action will essentially be the same. If the plaintiff is granted leave for the statutory claim, it would and should naturally follow that there is some basis in fact for each of the certification criterion for the common law claim.

[219] Conversely, it would and should naturally follow that if leave is denied that there would be no basis in fact for the certification criterion.

[220] I will adopt this restructuring in discussing the certification criterion for Musicians' proposed class action and thus it follows that because I have refused leave for the statutory claim, it follows that Musicians' motion for certification should be dismissed.

[221] However, because Musicians may appeal my decision, I assert that if I had granted leave for the statutory claim, I would have certified a class action for both the statutory claim and the common law negligence claim.

[222] Further, because Musicians may appeal my decision, it is necessary for me to comment about each of the certification criterion. Assuming that leave had been granted for the statutory claim there would be some details or refinements necessary with respect to some of the certification criteria.

[223] I note here that under s. 8 of the *Class Proceedings Act, 1992*, where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings. I permit Musicians' action to proceed as a common law action for negligent misrepresentation as against the Kinross Defendants.

2. The Cause of Action Criterion

[224] The first criterion for certification is whether the plaintiff's pleading discloses a cause of action. Musicians advance three claims: (1) a statutory claim for misrepresentations pursuant to subsections 138.3(1) and (2) of the Ontario *Securities Act*; (2) a statutory claim for a failure to make timely disclosure of material changes pursuant to subsection 138.3(4) of the Act; and a claim for common law negligent misrepresentation.

[225] I have already decided not to grant leave with respect to the statutory claims under Part XXIII.1 of the Ontario *Securities Act*, and it follows that these claims cannot satisfy the cause of action criterion. The question then narrows to whether the common law negligent misrepresentation claim satisfies the cause of action criterion. For the reasons that follow, I find that the common law negligence claim satisfies the cause of action criterion.

[226] As noted above, Kinross submits that Musicians have failed to plead a common law negligence claim because the Amended Statement of Claim wants for a pleading of the reliance and causation constituent elements of the tort. Kinross goes on to assert that leave to amend to properly plead the tort should not be granted and, therefore, the s. 5(1)(a) (cause of action) criterion for certification is not satisfied.

[227] For the reasons I expressed in *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, I agree with Kinross's argument up to its submission that leave to amend should not be granted, at which point, I part company with Kinross.

[228] In my opinion, I think a claim for misrepresentation with a pleading that includes all the constituent elements of the tort is eminently possible, and if the claim were properly pleaded, it would satisfy the cause of action criterion for certification. Therefore, for the purposes of this motion, I am going to assume that Musicians has pleaded a conventional negligent misrepresentation action on behalf of the class members.

[229] For the reasons I expressed in *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc., supra,* I do not accept that there is a new way to plead negligent misrepresentation so that it can be pleaded based on the notion that reliance can be imputed by the circumstances that class members inherently rely on representations contained in corporate disclosures or from the mere act of purchasing or acquiring shares or from the fact that corporations are obliged to make timely disclosure of all material facts to comply with securities law and to prepare financial statements and other filings in accordance with GAAP or IFRS.

[230] For the purposes of this certification motion, therefore, I am going to assume that Musicians can deliver a properly pleaded cause of action for negligent misrepresentation and can, therefore, satisfy the first criterion for certification.

3. Identifiable Class

[231] The second criterion for certification is that there is an identifiable class.

[232] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[233] In the case at bar, if I had granted leave for the statutory claim, then I would have found the class definition proposed by Musicians to be satisfactory. However, in not granting leave, it follows that there is no basis in fact for Musicians' statutory claim and also its common law claim that has the same evidentiary footprint.

[234] Musicians proposed the following class definition.

> all persons or entities, other than Excluded Persons, who purchased or otherwise acquired Kinross shares during the period from May 3, 2011 through and including January 16, 2012 ("Class Period")
>
> > (i) on the Toronto Stock Exchange or other secondary market in Canada; or
> >
> > (ii) who are resident of Canada or were resident of Canada at the time of acquisition (collectively, the "Class" or "Class Members");
>
> and who held some or all of those shares on January 16, 2012.
>
> Excluded from the Class are the Defendants, the officers and directors of Kinross during relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which the Defendants have or had a controlling interest (the "Excluded Persons").

[235] Kinross originally objected to Canadian investors who purchased shares over the New York Stock Exchange (NYSE) being included in the Canadian class action largely because these proposed class members are already members of the American class action. During the argument of the motion, Kinross withdrew this objection.

[236] If I had granted leave for Musicians to pursue the statutory claim under Part XXIII.1 of the Ontario *Securities Act,* I would have concluded that the proposed class definition satisfied the second criterion for certification.

4. Common Issues

[237] For an issue to be a common issue, it must be a substantial ingredient of each Class member's claim and its resolution must be necessary to the resolution of each Class member's claim: *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158 at paragraph 18.

[238] As noted above, Kinross acknowledged that if leave for the statutory claim was granted, the certification criterion for the statutory claim would also be satisfied. For the reasons that I expressed above, I would extend that concession to the common law negligence claim.

[239] In other words, if I would have granted leave for the statutory claims, I would have concluded that Musicians' satisfied the common issues requirement for certification for all its claims with two exceptions, noted below.

[240] Musicians proposed the following common issues:

> (a) did the Defendants make representations that were untrue, inaccurate or misleading, including omissions, and if so, what are the misrepresentations, who made these representations, when, where and how?
>
> (b) if the answer to (a) is yes, do the misrepresentations constitute misrepresentations within the meaning of the *OSA* or the equivalent provisions of securities legislation in other provinces?
>
> (c) did the Defendants fail to make timely disclosure within the meaning of the *OSA* or the equivalent provisions of securities legislation in other provinces?
>
> (d) if the answer to (b) or (c) is yes,
>
> > (i) when and by what means were the misrepresentations publicly corrected or in the case of failure to make timely disclosure, when and by what means was the disclosure made?
> >
> > (ii) did the individual Defendants authorize, permit or acquiesce in the release of documents containing the misrepresentations, in the making of a public oral statement containing misrepresentations or in the failure to make timely disclosure?
> >
> > (iii) for public oral statements containing such misrepresentations, did the person who made the statement do so with actual implied or apparent authority to speak on behalf of Kinross?
> >
> > (iv) for the misrepresentations in non-core document or in a public oral statement, did the Defendants know of the misrepresentations at the time they were made? If not, did the Defendants deliberately avoid acquiring such knowledge or were they guilty of gross misconduct in connection with the misrepresentations?
> >
> > (v) before the release of the documents and the public oral statements containing misrepresentations and before the failure to make timely disclosure first occurred, did the Defendants conduct or cause to be conducted a "reasonable investigation" in accordance with subsection 138.4(6) of the *OSA* or the equivalent provisions of securities legislation in other provinces?
> >
> > (vi) at the time of the release of the document and public oral statements containing misrepresentations or at any time for a failure to make timely disclosure, as they case may be, did the Defendants have reasonable grounds to believe that the documents or oral statement contained the misrepresentations or that the failure to make timely disclosure would occur?
>
> (e) if the answer to (a) is yes, did the Defendants owe a duty of care to the class members?
>
> (f) if the answer to (e) is yes, did the Defendants act negligently in making the misrepresentations?
>
> (g) If the answer to (f) is yes, can each class members' reliance be inferred from the fact of the class member having acquired Kinross shares in an efficient market?

(h) can the amount of damages for negligent misrepresentation or the statutory claims under Part XXIII.1 of the *OSA* or the equivalent provisions of securities legislation in other provinces be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

(i) what are the applicable limits on damages, if any, for each Defendant under section 138.7 of the *OSA* or the equivalent provisions of securities legislation in other provinces?

(j) for each Defendant found liable for claims under Part XXIII.1 of the *OSA* or the equivalent provisions of securities legislation in other provinces, what is the Defendant's respective responsibility for assessed damages?

(k) is Kinross vicariously liable or otherwise responsible for the acts of the individual Defendants?

[241] Given that the commonality of these questions was never contested, with two exceptions, I would certify all of the proposed questions.

[242] In *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, I expressed the view that reliance is a constituent elements of the tort of the negligent misrepresentation and it is an individual and not a common issue. I disagree with the notion that reliance can be inferred for a group. It is an individual matter that requires individual inquiry. It follows that I disagree with the commonality of proposed question (g) and I disagree with the idea that amount of damages for negligent misrepresentation can be determined on a aggregate basis as suggested by question (h). Therefore, had I determined that leave should be granted, I would not have certified question (g) and I would have struck the words "negligent misrepresentation or" from question (h).

5. Preferable Procedure

[243] Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at paragraph 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[244] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paragraphs 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[245] While conceding that there would be a class action for the statutory claim, Kinross's position was that a class action was not the preferable procedure for the common law negligence claim if the common law negligence claim was the only claim left standing after the leave motion for the statutory claim.

[246] As I explained above, in my view, if leave is not granted for the statutory claim then there is no basis in fact for the common law negligence claim which has the same evidentiary footprint. In other words, in circumstances where most of the constituent element of the common law negligence claim are scrutinized by a genuine merits test and are found wanting, it is not necessary to determine whether a class action is the preferable procedure because there will be no basis in fact for the common issues.

[247] I, therefore, conclude that, in the case at bar, the preferable procedure criterion is not satisfied.

[248] I note again that had I granted leave for the statutory claims under the Ontario *Securities Act*, I would have also certified the common law action for a class proceeding under the *Class Proceedings Act, 1992*. I am not, however, to be taken to have decided what would have happened to a common law negligent misrepresentation claim in circumstances where the test in Part XXIII.1 of the Ontario *Securities Act* was not engaged at all.

6. Representative Plaintiff

[249] Having conceded that Musicians would be an appropriate representative plaintiff for the statutory claim under Part XXIII.1 of the Ontario *Securities Act*, Kinross must be taken to have conceded that Musicians satisfied the representative plaintiff criterion for the common law claim, which is also my conclusion.

[250] Therefore, had leave been granted under the Ontario *Securities Act*, the representative plaintiff criterion also would have been satisfied for both the statutory and also the common law claim.

7. Conclusion on Certification

[251] For the above reasons, and with the above described adjustments to the common issues, had I granted leave for the statutory claim under the Ontario *Securities Act*, I would have certified both the statutory claim and the common law claim as appropriate for a class action under the *Class Proceedings Act, 1992*.

[252] However, I did not grant leave for the statutory claims and I, therefore, do not certify the common law class as a class action under the *Class Proceedings Act, 1992*.

H. CONCLUSION

[253] For the above reasons, Musicians' motion should be dismissed.

[254] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Kinross's submissions within 20 days of the release of these Reasons for Decision followed by Musicians' submissions within a further 20 days.

Perell, J.

Released: NOVEMBER 5, 2013

CITATION: *Bayens v. Kinross Gold Corp.* , 2013 ONSC 6864
COURT FILE NO.: CV-12-448651CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

E. EDDY BAYENS, JOHN SINCLAIR, LUC FORTIN, PIERRE RACICOT and STANLEY SHORTT, in their capacity as TRUSTEES OF THE MUSICIANS' PENSION FUND OF CANADA

Plaintiffs

- and -

KINROSS GOLD CORPORATION, TYE W. BURT, PAUL H. BARRY, GLEN J. MASTERMAN and KENNETH G. THOMAS

Defendants

REASONS FOR DECISION

Perell, J.

Released: November 5, 2013.