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Barrick Gold Corporation: A golden opportunity to publicly correct s 138.1 of the Securities Act, or a significant change in the law?

Securities law class actions are now common in Ontario. However, courts are still addressing some of the core elements of the conceptual approach to such issues. The recent decision in the Ontario Court of Appeal in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v Barrick Gold Corporation* (“*Barrick Gold*”) is a highly significant decision in this area, particularly in its treatment of the “public correction” requirement for securities class actions.

By way of background, *Barrick Gold* was a proposed class action in which the plaintiffs alleged secondary market misrepresentations by Barrick Gold in relation to the Pascua-Lama gold mining project in Chile and Argentina. Barrick began working on the project in October 2009. In 2013, Barrick closed down the site on the basis that it was no longer financially viable and took a $5 billion write down.

The plaintiffs brought a proposed class action, alleging that Barrick had made a series of misrepresentations to the market. The plaintiffs’ secondary market misrepresentation claim was based on s 138.3(1) of the Ontario *Securities Act*, which provides as follows:

> **138.3** (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer’s security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages…

Secondary market misrepresentation class actions, unlike other class actions, face a preliminary merits analysis. In order to be granted leave, the plaintiffs must show: (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. That stage has been described as “more than a speedbump” but not “the Matterhorn”. It was within that framework that this decision was heard.

The decision under appeal was hard-fought. After several years of briefing, including an extensive evidentiary record exceeding 50,000 pages, the motions judge in this case dismissed the leave motion with respect to most of the alleged misrepresentations, permitting it to proceed only with respect to one particular misrepresentation.

The focus of the motions judge’s analysis relates to what has been called the public correction requirement. As noted above, s 138.3(1) of the *Securities Act* demarcates the end point of a liability period as “the time when the misrepresentation contained in the document was publicly corrected”.

The motions judge conducted his analysis on the assumption that the misrepresentations were false as alleged. Even assuming that, the motions judge held that the plaintiff’s claims were not actionable, since Barrick had made no public correction of any of the alleged misstatements. In so doing, the motions judge held that the public correction requirement was a constituent element of the cause of action for secondary market misrepresentation. On that basis, the motion was mostly dismissed.

The plaintiffs appealed to the Court of Appeal for Ontario. The Court of Appeal allowed the appeal, and took a very different approach from what the motions judge had taken. The most interesting part of the Court of Appeal’s decision related to the public correction requirement. Two key principles emerge from that decision.

First, the Court of Appeal held that the determination of whether there had been a public correction does not involve a “purely semantic and mechanical approach, nor can it be determined solely based on the text of any correction”. The Court of Appeal held that while it was not *per se* impermissible for the motions judge to assume as he did that the misrepresentations were false and consider the public corrections requirement in that context, that did not relieve the motions judge of the requirement to consider the full evidentiary context. The Court of Appeal held as follows:

> ... assuming the falsity of the alleged misrepresentation does not relieve a motion judge of the obligation to engage in a reasoned consideration of evidence of the context in which the alleged public correction was made

> and how the alleged public correction would be understood in the secondary market if the alleged public correction does not, on its face, reveal the existence of the alleged misrepresentation. In some cases, that may require the motion judge to consider evidence which also goes to the issue of whether there is a reasonable possibility that a trial court will find that there was a misrepresentation. Thus, caution is required. In some cases, assuming the falsity of the alleged misrepresentations – an approach driven by concerns of judicial economy – may prove a false economy. Judicial economy likely only outweighs the interests of an issuer and its shareholders in a finding as to whether there is a reasonable possibility that the trial court would find a misrepresentation and the risks entailed in assuming a misrepresentation when: the motion judge is faced with an overwhelming record; and the motion judge is confident that there is no material overlap between the evidence relevant to whether there is a misrepresentation, and the evidence of the context in which the alleged public correction was made and how the alleged public correction would be understood in the secondary market.

Second, the Court of Appeal rejected the motion judge's conclusion that the public correction requirement was "an additional safeguard against unfair and unmeritorious misrepresentation claims". In reaching that conclusion, the Court of Appeal relied heavily on a report known as the Allen Report, a 1995 report prepared by a Toronto Stock Exchange committee to address the state of continuous disclosure from market participants. The Allen Report paved the way for the current provisions of the *Securities Act*. The Court of Appeal noted three features of the Allen Report that were significant:

- The Allen Report appeared to have viewed the public correction requirement as a marker of damages so that damages calculations for secondary market claims can be standardized and predictable.
- The Allen Report appeared to have assumed that any misrepresentation that a company made would be corrected at some point. In the Court's words: "If the Committee intended to limit the proposed statute's applicability only to those misrepresentations later explicitly corrected, it is surprising that it did not so indicate in its otherwise extensively canvassed report."
- While the Allen Report did discuss various safeguards

> against unmeritorious litigation, the public correction requirement was not among them.

After considering the Allen Report, the Court of Appeal then provided its own analysis of the role of the public correction requirement:

> [71] First, recall that, at the leave stage, a consideration of whether there has been a public correction of a misrepresentation follows a finding that there is a reasonable possibility that it will be found at trial that the defendant has released a document or made a public oral statement containing a misrepresentation (or, in rare cases, the making of an assumption that there was a misrepresentation). <u>When that threshold has been cleared (or the misrepresentation assumed), the plaintiff's claim is potentially meritorious.</u> Where there is a reasonable possibility of a misrepresentation, the plaintiff's claim can hardly be characterized as a strike suit. <u>Furthermore, the clearing of the misrepresentation threshold, combined with the fact that the plaintiff brought an action, suggests that there was a public correction. The plaintiff must have learned of the misrepresentation somewhere.</u>

Two points are worth noting about this paragraph. First, the Court describes a "potentially meritorious" claim as one where a misrepresentation is either established or assumed.

Second, the final two sentences of this paragraph seem to imply that establishing a public correction is not a necessary requirement to establishing a cause of action. In effect, the Court's formulation seems to be that the combination of an established misrepresentation, as well as the fact that the claim was brought, necessarily means that the market must have learned about the misrepresentation in some respect.

This decision is highly significant in Canadian securities litigation and in secondary market class actions in particular. It sheds significant light on the Court's approach to the public correction requirement.

The general notion articulated by the Court of Appeal that an assessment of whether there was a public correction must take into account all of the evidence, rather than merely a reading of the text of the proposed correction, is reasonable as a general proposition. Any statement issued by a company is made within a particular context, so some understanding of that context must be necessary to an understanding of whether a statement by the company amounts to a public correction within the meaning of the Act. This approach seems to affirm the importance of the public correction requirement, while recognizing that it must be assessed contextually.

The Court of Appeal’s reasons could also be read to suggest that the public correction requirement is not an integral element of the statutory scheme that must be established for liability to be made out. This conclusion would be a significant development in securities law. Lower courts, based on the plain text of the Act, had generally treated the public correction requirement as an essential element of the cause of action. This would be a very significant conclusion, if it were followed.