

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

MARCIA LUZMILA RAMÍREZ PIEDRA,
JAIME POLIVIO PÉREZ LUCERO and
ISRAEL PÉREZ LUCERO

Plaintiffs
(Appellants)

and

COPPER MESA MINING CORPORATION,
WILLIAM STEARNS VAUGHAN, JOHN GAMMON and
TSX INC., TSX GROUP INC.

Defendants
(Respondents)

APPELLANTS' FACTUM
(Appeal of Order Striking Out Claims
Against TSX Defendants)

July 13, 2010

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PART I: THE APPELLANTS, THE COURT APPEALED FROM, AND THE RESULT IN THAT COURT

1. The Appellants, Marcia Luzmila Ramírez Piedra (“Marcia Ramírez”), Jaime Polivio Pérez Lucero (“Polivio Pérez”), and Israel Pérez Lucero (“Israel Pérez”), appeal the decision of the Honourable Mr. Justice Colin Campbell of the Superior Court of Justice (Commercial List), released May 7, 2010.
2. In that decision, the Court granted the motions of the defendants TSX Inc. and TSX Group Inc. (the “TSX Defendants”) to strike three related statements of claim as disclosing no reasonable cause of action. The Court granted these motions without leave to amend the statements of claim. The Appellants respectfully submit that the court erred in granting this motion and in refusing leave to amend.
3. The Appellants have a right of appeal to this Honourable Court from this motion as the Order striking the claim, denying leave to amend and dismissing the action is a final order of a judge of the Superior Court of Justice and no appeal lies to the Divisional Court from this Order.

PART II: OVERVIEW DESCRIBING NATURE OF CASE AND ISSUES

4. This appeal raises the question of whether it is plain, obvious and beyond doubt that TSX Inc. (“TSX”) did not owe a duty of care to the Plaintiffs to be mindful of their legitimate interests when it decided whether to list Copper Mesa Mining Corporation (“Copper Mesa”) on the Toronto Stock Exchange, in circumstances in which the TSX was aware that there was a serious risk that funds raised through the Toronto Stock Exchange would be used to fund human rights abuse.

5. In other words, is it so clear that the TSX cannot owe a duty of care to the Plaintiffs that it should be decided at this stage of the litigation by striking out the statement of claim?

***Anger v. Berkshire Investment Group Inc.* (2001), O.A.C. 301, [2001] O.J. No. 379 at para. 6 (cited to QL) [*Anger*]; Appellants' Book of Authorities at Tab 2 [Appellants' BOA].**

6. In spite of this low threshold, the motions judge dismissed the claim and denied leave to amend. With respect, these decisions constitute errors of law.

Reasons for Decision of the Honourable Mr. Justice Colin Campbell dated May 7, 2010 at para. 54 [Reasons]; Appeal Book and Compendium, Tab 5 at 31.

7. The appeal should be granted on the following grounds:
- (a) The test to strike out a claim as disclosing no cause of action is stringent. A claim will only be struck when it is plain, obvious and beyond doubt that it cannot succeed at trial.
 - (b) The pleadings set out the negligence of the TSX in sufficient detail to give rise to a *prima facie* duty of care. In particular, the pleadings show that the harm suffered was foreseeable, and that the relationship between the TSX and the Plaintiffs was proximate. The TSX was aware that there was a serious risk that capital raised through its exchange would, in fact, fund human rights abuse in specific, identifiable ways against specific persons, and yet decided to list Copper Mesa anyway.
 - (c) Policy concerns sufficient to negate a duty of care do not arise in this case. Rather, there are strong policy reasons to recognize a duty of care.
8. The stringent "plain, and obvious and beyond doubt" test is not met. There is a cause of action. The appeal should be granted.

9. The Plaintiffs are not proposing a broad duty in which the TSX would owe a duty of care to any person who comes into contact with any exchange listed issuer that might commit an unlawful act somewhere in the world. Nor are they proposing that the Toronto Stock Exchange should be under an obligation to control the behaviour of the companies they list.
10. The Plaintiffs are simply asking the court to acknowledge that, in this particular case, when the Toronto Stock exchange had actual knowledge of a serious and credible risk that the TSX's act of listing this particular junior mining corporation would precipitate serious human rights abuses in a particular location and in specific communities, the Toronto Stock Exchange was obliged to exercise some standard of care to reduce this risk. This standard of care may involve such modest measures as requiring corporations in certain high risk mining projects who operate in high risk countries to adopt some form of Corporate Social Responsibility guidelines.

PART III: SUMMARY OF FACTS RELEVANT TO ISSUES ON APPEAL

11. The material facts, as set out in the statement of claim, are as follows.¹
12. In 2005, a small, nascent junior mining exploration company now known as Copper Mesa Mining Corporation approached the TSX to purchase listing services. These services include listing Copper Mesa's shares on the Toronto Stock Exchange. The TSX's decision to list Copper Mesa on the Toronto Stock Exchange would have the

¹ For reasons related to the addition of parties, there are three closely related statements of claim in three related actions. The most recent claim (the 2009 Statement of Claim) was brought for the sake of convenience as a proposed consolidation of claims previously brought in the other two actions. The 2009 Statement of Claim includes all claims made in the 2007 and 2008 Actions and was intended to be used by all parties and the courts as a unified and consolidated document. Justice Campbell recognized the prudence of such an approach, and made reference only to the 2009 Statement of Claim in his judgment of first instance. For the purposes of this factum, reference will only be made to the 2009 Statement of Claim.

practical effect of providing access to \$10 million to Copper Mesa through an Initial Public Offering, and the potential to raise millions more through subsequent public offerings.

Statement of Claim dated March 3, 2009 (CV-09-373561) at paras. 22, 36, 37 [Statement of Claim 2009]; Appeal Book and Compendium, Tab 7 at 43, 47-48.

Ascendant Copper Corporation, Prospectus: Initial Public Offering, dated October 14, 2005, at 1 [Prospectus]; Appeal Book and Compendium, Tab 10 at 194 .²

13. When Copper Mesa sought a listing on the TSX, Copper Mesa had a working capital deficiency of almost a half a million dollars, and no prospect of raising funds elsewhere. Without a listing on the Toronto Stock Exchange and the capital that such a listing provided, any significant operations by Copper Mesa in the specific locale that it was targeting would have been impossible.

Statement of Claim 2009, para. 38, 41; Appeal Book and Compendium, Tab 7 at 48-49.

Prospectus, at 1; Appeal Book and Compendium, Tab 10 at 194.

Business of the TSX

14. In 2000, the Toronto Stock Exchange underwent a significant change in structure and organization, converting from a not-for profit cooperative into a for-profit, commercially focused company. TSX Inc. is now a for-profit public company, incorporated under the

² The overwhelming preponderance of Ontario authorities hold that documents referred to and relied on in a Statement of Claim are, in effect, incorporated into the pleadings and are not evidence that would be precluded by Rule 21.01(1)(b). Copper Mesa's prospectus is specifically referred to and relied upon by the Plaintiffs in paragraphs 35, 36, 95, 112 of the Statement of Claim, and its contents may therefore be considered by this Court.

Web Offset Publications Ltd. v. Vickery (1999), 43 O.R. (3d) 802 at para. 3 (C.A); Appellants' BOA at Tab 21.

Wakeford v. Canada (Attorney General) 2001, 81 C.R.R. (2d) 342 at para. 7 (Ont. S.C.J); Appellants' BOA at Tab 20.

Ontario *Business Corporations Act*, that lists its own shares on the Toronto Stock Exchange.

***Harding v. First Associates Investments Inc.*, 2003 CanLii 48404 at paras. 16, 18, 154, 159 (Ont.Sup.Ct.J.); Appellants' BOA, Tab 8.**

Statement of Claim 2009 at para. 16; Appeal Book and Compendium, Tab 7 at 42.

***Recognition Order re: TSX Group Inc. and TSX Inc.*, (2005) 28 OSCB 7034, as amended by order of the Ontario Securities Commission on December 16, 2005; August 10, 2006; May 30, 2008 at Appendix I "Listing-Related Conditions" [TSX Recognition Order]; Appellants' BOA at Tab 23.**

15. The TSX's business includes selling listing services to corporations who wish to trade shares publicly on the Toronto Stock Exchange. Corporations pay both initial listing fees and maintenance fees to the TSX in order to have access to the TSX's securities market. The profits generated by the TSX through the sale of listing services are substantial.

Statement of Claim 2009 at paras. 128 (c), 131; Appeal Book and Compendium, Tab 7 at 78-79.

16. The TSX competes with other international stock exchanges for the business of corporations that are seeking public listings. The TSX has carved out a niche as the "best access in the world" for capital for junior mining exploration companies. As a result, almost 60% of the world's mining companies are listed either on the Toronto Stock Exchange or the TSX Venture Exchange, both of which are owned by the TSX.

Statement of Claim 2009 at paras. 39, 126; Appeal Book and Compendium, Tab 7 at 49, 77.

17. The TSX has sought to protect and extend its business and competitive advantage by advertising and promoting its services to mining companies that operate in "high risk" locations, including in countries with weak government institutions, high vulnerability to

conflict and violence, and where the risk of human rights abuse and other forms of harm is highest, such as the Democratic Republic of Congo.

Statement of Claim 2009 at paras. 40, 75 (d); Appeal Book and Compendium, Tab 7 at 49, 58.

18. The TSX currently does not take any steps whatsoever to attempt to ensure that the money raised as a result of their provision of listing services does not cause harm in developing countries. The TSX has no mechanism for dealing with human rights concerns, even if the TSX is aware that it is highly likely that listing a company will lead to human rights abuse in a particular location.

Statement of Claim 2009 at paras. 77-78; Appeal Book and Compendium, Tab 7 at 59.

TSX Inc. Decides to List Copper Mesa

19. As part of the process of seeking to become a listed company on the Toronto Stock Exchange, Copper Mesa was required to and did submit detailed information about the corporation and its operations in the form of a “Prospectus”. This document was extensively reviewed by the TSX prior to providing Copper Mesa with access to capital.

Statement of Claim 2009 at paras. 35-36; Appeal Book and Compendium, Tab 7 at 47-48.

20. The Prospectus outlines in detail the history of the conflict between Copper Mesa and the local community, takes specific note of the potential for future violence, and identifies the specific communities affected by both the violence and potential mining operations. This information was within the knowledge of the TSX.

Statement of Claim 2009 at para. 36; Appeal Book and Compendium, Tab 7 at 47-48.

Prospectus at 2, 9-14; Appeal Book and Compendium, Tab 10 at 195, 202-207.

21. The TSX knew that Copper Mesa's business was almost entirely focused on the exploration of one mining property in Ecuador known as the "Junín Property" or the "Junín Project". The Junín Project is located in a specific and limited geographical region of the Republic of Ecuador, and located on and immediately adjacent to several small villages that would be severely impacted by mining operations.

Prospectus at 7, 60-61; Appeal Book and Compendium, Tab 10 at 200, 253-254.

22. The TSX was aware that Copper Mesa faced considerable local opposition to its proposed Junín project from environmental groups, duly elected leaders of local and regional municipal councils, non-governmental organizations and individuals from within communities that would stand to be most directly impacted by the development of the Junín Project. Further, the TSX knew that this local community opposition was a major barrier to any exploration and mining activities in the region.

Statement of Claim 2009 at para. 36; Appeal Book and Compendium, Tab 7 at 47-48.

Prospectus at 1-2, 9-10, 58; Appeal Book and Compendium, Tab 10 at 194-195, 202-203, 251.

23. In response to this opposition, and prior to approaching TSX to seek listing services, Copper Mesa, through its agents, engaged in a campaign of intimidation, harassment, threats and violence aimed at silencing the widespread and sustained local opposition to mining. Copper Mesa's agents physically assaulted individuals who attended public anti-mining meetings, and issued death threats against leaders of the community opposition to the Junín project.

Statement of Claim 2009 at paras. 29-31; Appeal Book and Compendium, Tab 7 at 45-46.

24. The TSX was aware, through Copper Mesa's Prospectus, that "tensions surrounding potential exploration and mining work on the Junín property [had] risen, creating the potential for further escalating violence". The TSX also knew that various respected sources including law firms, Ecuadorian human rights organizations and Canadian non-governmental agencies had repeatedly accused Copper Mesa of engaging in various forms of violence and threats of violence against community leaders and other individuals.

Statement of Claim 2009 at para. 36; Appeal Book and Compendium, Tab 7 at 47-48.

Prospectus at 9-13; Appeal Book and Compendium, Tab 10 at 202-206.

25. The TSX was also aware that Copper Mesa had funded activities that "might be considered divisive and controversial", and had hired a former army general as its first head of community relations for the Junín property.

Prospectus at 13; Appeal Book and Compendium, Tab 10 at 206.

26. Further, members of communities near Junín were aware of the importance of a listing on the TSX, and the significant negative impact it could have on their lives. The TSX was contacted directly about these concerns by the local elected representative of the municipality in which the Junín Project is located. Mayor Auki Tituaña Males wrote to the TSX and specifically asked that it not list Copper Mesa on the Toronto Stock Exchange. The Mayor warned that Copper Mesa had "adopted a divisive strategy which provoked confrontations and could lead to the loss of lives." He also informed the TSX that a respected Ecuadorian human rights organization had documented and denounced human rights violations committed by Copper Mesa.

Statement of Claim 2009 at para. 34 (a); Appeal Book and Compendium, Tab 7 at 46-47.

27. Despite these warnings, the TSX listed Copper Mesa on the Toronto Stock Exchange on November 21, 2005. This initial listing raised just under \$10 million, which represented all of Copper Mesa's operating capital. During the material time, Copper Mesa raised a total of approximately US\$26.7 million through its listing on the Toronto Stock Exchange.

Statement of Claim 2009 at paras. 37, 41; Appeal Book and Compendium, Tab 7 at 48-49.

Impact of the TSX's Decision to List Copper Mesa

28. After listing, Copper Mesa, now with significant operating capital, extended its campaign of violence and intimidation. One month after listing on the Toronto Stock Exchange, money raised on the Toronto Stock Exchange was used to contract private security forces for use in the area around Junín. On November 1, 2006 armed members of the security forces used tear gas, guard dogs and machetes to attack individuals including children who were participating in a peaceful anti-mine protest.

Statement of Claim 2009 at paras. 43-45; Appeal Book and Compendium, Tab 7 at 50.

Marcia Ramírez, Polivio Pérez and Israel Pérez are Assaulted and Threatened

29. On December 2, 2006, security forces, hired with money raised on the Toronto Stock Exchange and armed with restricted weapons including shotguns, handguns and pepper-spray attacked and shot at a small group of unarmed men and women near the village of Junín who were protesting against mining in their community. In this attack, the security forces shot Israel Pérez in the leg, and pepper-sprayed Marcia Ramírez point-blank in the

face. This incident is depicted in the photographs attached to the Statement of Claim as Schedule A.

Statement of Claim 2009 at paras. 49-51; Appeal Book and Compendium, Tab 7 at 51.

30. In December 2006 and June 2007, individuals hired with money raised on the Toronto Stock Exchange issued death threats against Polivio Pérez. In July 2007, Polivio Perez was assaulted by individuals hired with money raised on the Toronto Stock Exchange.

Statement of Claim 2009 at paras. 54, 59-61; Appeal Book and Compendium, Tab 7 at 52-53.

PART IV: ISSUES AND THE LAW

31. The major issue raised by this appeal is whether the motions judge erred in finding that it was plain and obvious that the TSX defendants could not owe a duty of care to be mindful of the Plaintiffs legitimate interests when conducting their affairs.

Reasons at para. 38; Appeal Book and Compendium, Tab 5 at 28.

32. This is a question of law; the appropriate standard of review is correctness.
33. With respect, the motions judge erred in law in finding:
- (a) that it is plain and obvious that the TSX could not foresee the harm suffered by the plaintiffs;
 - (b) that it is plain and obvious that there was no relationship of sufficient proximity between the defendants and the plaintiffs that would require them to have been mindful of the Plaintiffs' interests when conducting their affairs; and

Reasons at paras. 35, 38; Appeal Book and Compendium, Tab 5 at 28.

34. The motions judge also erred by refusing leave to amend the statement of claim.

Reasons at para. 54; Appeal Book and Compendium, Tab 5 at 31.

The test on appeal

35. The test for striking out a Statement of Claim at the pleadings stage is a “stringent one with a difficult burden for the defendants to meet”. Pursuant to Rule 21.01(1)(b), a court should only strike a pleading if it is “plain and obvious, and beyond doubt” that the facts, taken as proved, do not disclose a reasonable cause of action. “If there is a *chance* that the plaintiff *might* succeed”, the plaintiff’s claim should not be struck out (emphasis added). Neither the novelty of the cause of action nor the potential for the defendant to mount a strong defence should prevent the claim from proceeding. “Only if the action is certain to fail because it contains a radical defect” should the claim be struck out.

***Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at paras. 32-33 (cited to QL); Appellants’ BOA at Tab 11.**

***Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* 2006, 82 O.R. (3d) 321 at para. 8 (C.A.); Appellants’ BOA at Tab 7.**

36. To determine whether the TSX owes a duty of care to the Plaintiffs, the court must apply the two-part *Cooper/Anns* Test.
37. Under the *Cooper/Anns* test, the court asks: (1) whether the TSX is in a relationship of sufficient proximity and foreseeability with the plaintiffs that a *prima facie* duty of care is owed; (2) if so whether there are any policy considerations that should negate or limit the duty of care.

***Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, [2007] S.C.J. No. 41 at para. 20 [*Hill*]; Appellants’ BOA at Tab 10.**

Issue #1: The pleadings disclose sufficient foreseeability

38. The motions judge found that:

[I]n order to foresee [the harm alleged], the TSX Defendants would have had to foresee political and business events in Ecuador which allegedly led to the unlawful conduct by agents of Copper Mesa. Such a chain of events was not foreseeable or reasonably foreseeable. The TSX Defendants could not be expected to reasonably foresee that some agent apparently hired by Copper Mesa in remote Ecuador might assault the Plaintiffs.

Reasons at para. 35; Appeal Book and Compendium, Tab 5 at 28.

39. This is an error in law. Reasonable foreseeability does not require the defendant to be able to foresee a particular chain of events. As this Court has held, one need not envisage the precise concatenation of circumstances which led to the harm, provided that the general harm is reasonably foreseeable.

Bingley v. Morrison Fuels (2009), 95 O.R. (3d) 191 at paras. 20, 22 (C.A.); Appellants' BOA at Tab 3.

40. In the case at bar, and on the facts pleaded the general harm that occurred was readily foreseeable to the TSX.

41. The pleadings disclose that at the time the TSX decided to list Copper Mesa, the TSX was aware of facts which indicated that, if Copper Mesa were listed, harm to persons such as the Plaintiffs was likely. Many of these facts were included in Copper Mesa's Prospectus, which was extensively reviewed and approved by the TSX as a condition precedent to listing Copper Mesa.

42. For example, the TSX knew that Copper Mesa was a fledgling company that operated in one specific geographic location around the village of Junín. The TSX knew that Copper Mesa was entirely depended upon a listing on the Toronto Stock Exchange to raise the capital needed to operate. The TSX knew that, throughout this time, Copper Mesa faced

sustained and widespread opposition from the few small communities located near the Junín project. Further, the TSX knew that Copper Mesa had been accused by various sources of engaging in specific incidents of threats and violence intended to eliminate this opposition in and around Junín, and that there was the “potential for further escalating to violence”.

See above at paras. 19-28.

43. The TSX was also specifically warned of the potential for future violence by the duly elected leader of the local community who specifically wrote to the TSX to ask them not to list Copper Mesa on their exchange.

See above at paras. 19-27.

44. The frequent mention in the Prospectus of the conflict in the community, reference to specific incidents of past violence committed by Copper Mesa at this location, and the specific warnings of future violence in this locale should have raised “red flags” at the TSX that listing Copper Mesa on the Toronto Stock Exchange would enable future acts of violence of the sort that were committed against Marcia Ramírez, Israel Pérez, and Polivio Pérez.
45. Given that Copper Mesa had a known history of using violent tactics to confront community opposition, it was reasonably foreseeable that providing the company with access to millions of dollars through a public listing would enable that company to continue and extend the use of threats and violence.

Issue #2: The pleadings disclose sufficient proximity

46. The motions judge found that “[t]here is no relationship, let alone one of sufficient proximity, to impose an obligation on the TSX Defendants to be mindful of the Plaintiffs’ interests when conducting their affairs.” The motions judge based that finding on the fact that “[t]he Plaintiffs do not participate in Canadian capital markets and are not investors or shareholders in Copper Mesa.” With respect, this is an error in law. The pleadings disclose factors and a clear factual nexus which strongly indicate that there is a relationship of sufficient proximity.

Reasons at para. 38; Appeal Book and Compendium, Tab 5 at 28.

47. In making this finding, the motions judge appeared to rely, in part, on the reasoning contained in *Morgis v. Thomson Kernaghan & Co.* and other similar cases of “regulatory negligence”.

Reasons at para. 39; Appeal Book and Compendium, Tab 5 at 28.

48. These “regulatory negligence” cases are distinguishable from the case at bar. This is not a case of “regulatory negligence” but rather a case of negligently providing a service that subsequently and foreseeably harmed a third party who was within the contemplation of the defendant.

49. In *Cooper v. Hobart*, and in *Morgis v. Thomson Kernaghan & Co.*, the defendants were both clearly being sued for negligently performing regulatory duties. In those cases, the defendants were created for the purpose of regulating and were acting as regulators when the alleged negligent omissions occurred. The duties of care alleged in those cases were fundamentally regulatory duties. That is not the situation here.

***Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76 at paras. 1, 49 [Cooper]; Appellants' BOA at Tab 6.**

***Morgis v. Thomson Kernaghan & Co.* (2003), 65 O.R. (3d) 321, [2003] O.J. No. 2504 321 at paras. 1, 11 (C.A); Appellants' BOA at Tab 14.**

50. The relationship of concern in both *Cooper* and *Morgis* was between a regulator and investors who had invested money with a company that was overseen by that regulator. In those cases, the investor argued that the regulator had done a poor job of overseeing the conduct of companies that fell under the regulator's mandate, and specifically had failed to take steps to protect the investor from sustaining economic loss.

***Cooper, ibid.* at paras. 1, 20; Appellants' BOA at Tab 6.**

***Morgis, ibid.* paras. 13, 16; Appellants' BOA at Tab 14.**

51. If the Plaintiffs in this case were investors and were making a claim against the TSX for failure to prevent economic loss, this case would be analogous to *Cooper* and *Morgis*. They are not.
52. In this case, however, the TSX is not being sued as a regulator. The Plaintiffs have not alleged, as was the case in *Cooper* and *Morgis*, that the TSX owes any duties to the Plaintiffs in any regulatory capacity, or that the TSX failed to adequately exercise its regulatory mandate such that it caused harm to the Plaintiffs.
53. Rather, the TSX is being sued for the act of engaging in for-profit business services in a manner that caused harm to the Plaintiffs. This takes the analysis duty of care analysis out of the 'regulatory negligence' framework provided by *Cooper* and *Morgis*, and into the standard duty of care analysis that is conducted to determine whether one party owes a duty to another.

54. The Plaintiffs acknowledge that TSX operates within a statutory context. In order to “carry on business as a stock exchange”, for example, the TSX must be “recognized” by the Ontario Securities Commission. Further, the TSX must follow certain securities rules and must impose certain securities rules on the companies that list shares on the TSX.

Securities Act, R.S.O. 1990, c. S.5, s. 21(1).

TSX Recognition Order, *supra*; Appellants’ BOA at Tab 23.

55. However, unlike the defendants in *Morgis* and *Cooper*, the TSX is not currently organized primarily for the purposes of regulation. Rather, the TSX is organized under the *Business Corporations Act* as a private, for-profit corporation whose core business includes selling listing services to corporations. The TSX makes significant profits through the sale of its listing services. The TSX was operating as a business in the case at bar.

Statement of Claim 2009 at paras. 16, 128 (c); Appeal Book and Compendium, Tab 7 at 42, 78.

56. There is also an outstanding question regarding whether the TSX has retained a significant regulatory function. Under securities regulation, the TSX is permitted to and does delegate its regulatory obligations to other independent self-regulatory organizations, including the Investment Industry Regulatory Organization of Canada (“IIROC”).

Recognition Order re: Investment Industry Regulatory Organization of Canada (IIROC), Ontario Security Commission, June 1, 2008 [IIROC Recognition Order]; Appellants’ BOA at Tab 22.

TSX Recognition Order, *supra* at item 13, as varied May 30, 2008; Appellants’ BOA at Tab 23.

57. The statement of claim as presently worded does not specifically address the distinction between for-profit business activities and regulatory activities and the extent to which the TSX engages in either.
58. The Plaintiffs propose to amend the pleadings, if permitted, to specifically assert material facts which demonstrate that the TSX, since demutualization, has increasingly transformed itself from a quasi-governmental regulatory body into a commercially-focused, for-profit corporation, and has taken specific and extensive steps to delegate its regulatory functions to other independent bodies.
59. If given leave to amend, the plaintiffs would plead the following:
- 16.1 Since reorganizing as a for-profit corporation, the Toronto Stock Exchange has increasingly adopted a commercial focus. In the TSX's Prospectus, prepared at the time of TSX's Initial Public Offering in 2002, the TSX states that its corporate objective is "to achieve profitable growth and to maximize shareholder returns". One of its principle business strategies is to "seek to attract additional listings of global mining and other natural resource companies by capitalizing on its international reputation as a leading marketplace for those companies."
- 16.2 The Prospectus also notes that TSX derives substantial revenue through providing listing services to its customers in return for initial listing fees, sustaining fees and additional listing fees.
- 16.3 In 2009, the TSX Groups' reported revenue was \$556.3 million, with \$142.1 deriving from selling listing services.
- 16.4 When the TSX became a for profit-corporation, commentators raised concerns about a conflict of interest between the TSX's role as a provider of trading services on the one hand and in its role as a regulator on the other. To address concerns regarding potential conflicts of interest, TSX's transferred many of its regulation functions to an independent self regulatory organization in 2002. These regulatory functions are now held by IIROC. On a page on the TSX's website entitled "Market Regulation", the TSX states:
- To ensure effective and independent marketplace integrity, Toronto Stock Exchange and TSX Venture Exchange outsource market surveillance and participant discipline to an independent third party: Investment Industry Regulatory Organization of Canada (IIROC), which monitors all trading on both exchanges. . . . With IIROC handling both surveillance and participant discipline, TSX Markets' professionals are able to fully focus on providing exceptional trading products and service.

60. In any event, the duties that the TSX may owe as a regulator do not automatically negate all the duties the TSX can and does owe through common law or other statutes. As a corporation under the Ontario *Business Corporations Act*, the TSX is a legal person, and like any corporation that sells services, it can owe independent common law duties of care to customers, employees and third parties. These duties do not depend upon any statute or governance mandate.

Proximity on the facts of this case

61. The factors which satisfy the requirement of proximity are diverse and depend on the circumstances of the case. There is no single rule or factor or definitive list that can be applied in every case. Proximity may be usefully viewed not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors.

Hill, supra at para. 24; Appellants' BOA at Tab 10.

62. The proximity analysis is not concerned with how intimate the plaintiff and defendant were, or their physical proximity, but rather is concerned with whether the actions and omissions of the alleged wrongdoer have an effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.

Hill, supra at para. 29; Appellants' BOA at Tab 10.

63. Factors indicating proximity on the facts of this case include the TSX's knowledge of a specific risk to a narrow class of individuals, the TSX's role in creating and extending that risk, and direct contact between the TSX and the local community.

1. TSX's knowledge of a risk to a narrow class of individuals

64. The Supreme Court has held that defendant's knowledge of specific context is an important factor in establishing proximity.

***Jordan House Ltd. v. Menow*, [1974] S.C.R. 239 at 250; Appellants' BOA at Tab 12.**

65. Through information provided to the Toronto Stock Exchange in Copper Mesa's Prospectus, the Toronto Stock Exchange knew of the narrow class of individuals who were at risk. The Prospectus is replete with references to "persons within some of the local communities" who were opposed to the Junín Project. The Prospectus notes that it had been alleged that Copper Mesa targeted "anti-mining groups or individuals" with "abuse and threats". As such, the Prospectus defines a narrow class of "at risk" individuals that numbered no more than a few hundred persons.

Prospectus at paras. 1-2, 9-10, 12-13, 58; Appeal Book and Compendium, Tab 10 at 194-195, 202-203, 205-206, 251.

Statement of Claim 2009 at paras. 35-36, 75 (a),(b); Appeal Book and Compendium, Tab 7 at 47-48, 57.

66. The TSX, therefore, knew of more than merely a general risk to a general population, but was aware of a specific risk to a specific and small class of individuals that includes the Plaintiffs. Marcia Ramírez, Polivio Pérez and Israel Pérez are leaders in the local opposition against mining, and residents of two of the six small villages that would be most impacted by mining.

Statement of Claim 2009 at paras. 13-15, 135; Appeal Book and Compendium, Tab 7 at 41-42, 80.

Prospectus at 60; Appeal Book and Compendium, Tab 10 at 253.

67. Both the Prospectus and the letter from the Mayor of Cotacachi warned of past human rights abuse and about the serious risk of future abuse. These warnings provided a "red

flag” that providing access funds to this particular company would put a narrow class of individuals at risk.

2. TSX’s participation in creating and extending the risk

68. The act of listing Copper Mesa was a necessary precondition that triggered and enabled the harms inflicted on Marcia Ramírez, Polivio Pérez and Israel Pérez.
69. When Copper Mesa submitted their final Prospectus for approval in 2005, Copper Mesa was a nascent corporation with a working capital deficiency of almost half a million dollars and no prospect of raising more funds. Copper Mesa was completely dependant on financing provided through the Toronto Stock Exchange to continue operations.

**Statement of Claim 2009 at paras. 38, 41; Appeal Book and Compendium, Tab 7 at 48-49.
Prospectus at 1; Appeal Book and Compendium, Tab 10 at 194.**

70. Soon after completing the IPO, Copper Mesa used the funds raised through Toronto Stock Exchange to hire security forces, and to continue and extend the campaign of intimidation, threats and harassment and violence against those who opposed the Junín Project, including by assaulting and threatening the Plaintiffs.

Statement of Claim 2009 at paras. 43-46, 49-54, 59-60; Appeal Book and Compendium, Tab 7 at 50-53.

3. Direct Contact with Community Representative

71. Mayor Tituaña, the duly elected municipal leader of the area around Junín wrote a letter to the TSX asking it not to list Copper Mesa on the TSX. Mayor Tituaña informed the TSX that a respected Ecuadorian human rights organization called the Ecumenical Commission for Human Rights had documented and denounced human rights violations

caused by Copper Mesa. Mayor Tituaña also warned the TSX that Copper Mesa had created serious internal conflicts and confrontations that could lead to the loss of lives.

Statement of Claim 2009 at 34 (a); Appeal Book and Compendium, Tab 7 at 46-47.

72. The community clearly expected that the TSX would be mindful of their legitimate interests when making decisions that would impact them.
73. Moreover, this direct contact between the duly elected leader of the local municipality in which Copper Mesa's operations were located and the TSX established an actual, though limited, relationship between the TSX and the community.

Proximity Factors confirming it is 'just and fair' to impose liability

74. As the Supreme Court has noted, "proximity" itself is nothing more than a label expressing that, in a particular situation, it is just and fair to recognize that the Defendants have a legal obligation to be mindful of the Plaintiff's legitimate interests in conducting their affairs.

Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, [1997] S.C.J. No 51 at paras. 23-24 [Hercules]; Appellants' BOA at Tab 9.

75. In addition to the factors listed above, there are other, broader factors that indicate that in the circumstances, it is just and fair to impose a duty on the TSX to take reasonable care.
76. The TSX provides the best access in the world for capital for junior mining exploration companies. As part of the process of competing with other stock exchanges for business, TSX specifically markets itself to companies who operate in "high risk" states, such as the Democratic Republic of Congo, that are prone to conflict and violence, where the risk

of human rights abuse is high, and where the ability of the state to either protect its citizens from harm or to provide remedies once harms occur is low.

Statement of Claim 2009 at paras. 39, 40; Appeal Book and Compendium, Tab 7 at 49.

77. The TSX, however, does not employ any safeguards whatsoever to prevent the funds it provides to corporations from being used to finance serious human rights abuse.

Statement of Claim 2009 at para. 77; Appeal Book and Compendium, Tab 7 at 59.

78. In other words, the TSX actively courts the risk that it may be complicit in financing human rights abuse, and yet does not take any precautions to attempt to limit or to control that risk.

79. The Supreme Court has held that the existence of an economic incentive to engage in behaviour that is potentially harmful will support the imposition of a duty of care.

***Childs v. Desmoreaux*, [2006] 1 S.C.R. 643, [2006] S.C.J. No. 18 at para. 22; Appellants' BOA at Tab 5.**

80. The TSX benefits financially from listing corporations on its stock exchange, and has an economic interest to both attract and list as many corporations as possible without regard for harms of the sort suffered by the Plaintiffs.

Statement of Claim 2009 at paras. 126-129; Appeal Book and Compendium, Tab 7 at 77-79.

81. Finally, the Supreme Court has found that when a relationship engages critical or important interests, such interests support the finding of a proximate relationship. In this case, the Plaintiffs' important human rights interests are at stake, including the right to security of the person, bodily integrity, and freedom from intimidation and threats to their

lives. The Plaintiffs, in this case, were personally and physically attacked, and were made to feel unsafe in their own communities

***Hill, supra* at para. 34; Appellants' BOA at Tab 10.**

Statement of Claim 2009 at paras. 82-83; Appeal Book and Compendium, Tab 7 at 60.

Policy Considerations

82. Stage two of the *Cooper/Anns* test arises once a *prima facie* duty of care is found. At this stage, the court considers whether there are “residual policy considerations” which ought to negate or limit the *prima facie* duty of care.

***Hill, supra* at para. 20; Appellants' BOA at Tab 10.**

83. The motions judge stated that he was “not satisfied there are any policy considerations that would at this stage argue in favor of extending liability.” The motions judge does not appear to deal with any policy considerations that could negate a *prima facie* duty of care, and did not appear to rely upon policy considerations when dismissing the claim. In any event, policy considerations form an important part of the *Cooper/Anns* Test and as such, will be dealt with here.

Reasons at para. 52; Appeal Book and Compendium, Tab 5 at 31.

84. Two speculative policy concerns that militate against finding a duty of care were raised in the proceedings below. First, the concern that recognizing a duty of care would lead to conflicting duties, and second, the possibility that recognizing a duty of care would lead to indeterminate liability.

85. These policy concerns do not arise in this case as pleaded. Even if they did arise, they would not be sufficient to negate a *prima facie* duty of care.

86. The court should not entertain merely speculative policy concerns. If a policy consideration is to override a *prima facie* duty of care, a real potential for negative consequences must be apparent.

***Hill, supra* at paras. 43, 48; Appellants' BOA at Tab 10.**

87. Further, the Ontario Court of Appeal has cautioned that courts should be circumspect in determining so early in an action that residual policy considerations make it plain and obvious that there is no duty of care. It is to be remembered that the defendants bear the evidentiary burden of showing countervailing policy considerations sufficient to negate a *prima facie* duty of care.

***Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143, [2007] O.J. No. 2443 at para. 45; Appellants' BOA at Tab 16.**

88. Finally, significant policy considerations, including the need to protect fundamental human rights, support recognizing a duty of care.

No conflicting duties

89. In the proceedings below, the TSX argued that recognizing a duty of care to be mindful of the Plaintiffs' legitimate interests would conflict with the TSX's duty to investors. This argument fails for three reasons.
90. First, the TSX, as with any corporation, owes duties to multiple sources. Corporations through their boards of directors will owe duties to shareholders, creditors, employees and third parties. Corporations will also sometimes owe duties through statute. These duties do not necessarily always point in the same direction. That the duties owed sometimes conflict does not mean that particular duties should not be recognized. It may be necessary to recognize, and then balance conflicting duties.

[C]onflict or potential conflict does not in itself negate a prima facie duty of care; the conflict must be between the novel duty proposed and an “overarching public duty”, and it must pose a real potential for negative policy considerations.

Hill, supra at para. 40; Appellants’ BOA at Tab 10.

91. Second, it is not clear that the proposed duty to the Plaintiffs would actually conflict with any duty that the TSX may owe to investors. Rather, recognizing a duty of care to the Plaintiffs may actually support whatever duties the TSX owes to the investing public. For instance, incorporating human rights considerations into listing decisions could reduce the instances of conflict between listed companies and local communities. This, in turn, could reduce the risks to which investors are exposed. Recognizing new duties that are supportive of existing duties may have positive policy ramifications.

Hill, supra at paras. 43, 47; Appellants’ BOA at Tab 10.

92. Third, and as noted above, the nature of the duties the TSX owes to the investing public is not clear. As explained above, and in contrast to the cases of *Cooper* and *Morgis*, the TSX has delegated much of its role as regulator to independent regulatory organizations such as IIROC.

IIROC Recognition Order, supra; Appellants’ BOA at Tab 22.

TSX Recognition Order, supra at item 13 as varied on May 30, 2008; Appellants’ BOA at Tab 23.

No uncontrollable liability

93. This case, which involves a claim for physical harm, is not a case that raises insurmountable concerns regarding liability in an indeterminate amount for an indeterminate time to an indeterminate class.

94. The Plaintiffs submit that there is a principled basis in this case on which to draw the line between those to whom the duty is owed and those to whom it is not. Concerns of indeterminate liability do not arise because the scope of potential liability can adequately be circumscribed on the particular facts of the case.

Hercules, supra at para. 44; Appellants' BOA at Tab 9.

95. The Plaintiffs emphasize that they are not seeking a broad duty of care in which the TSX would owe a duty of care to any person who comes into contact with any Exchange listed issuer that might commit an unlawful act somewhere in the world.
96. Rather, Plaintiffs only seek a duty of care in circumstances where, as here, the TSX has considerable knowledge regarding a specific risk facing a limited and previously identified class of individuals that was likely to result from their decision to list a corporation. Foreseeability and proximity can be used to control liability.

Hercules, supra at 37; Appellants' BOA at Tab 9.

97. Importantly, the TSX can readily circumscribe their potential liability by exercising an appropriate standard of care. For example, the TSX could have required those who operate in industries and in countries associated with a high incidence of human rights abuse to sign on to and participate in corporate social responsibility governance frameworks as a precondition to listing. This modest step is already taken by all major Canadian banks as a condition precedent to providing project finance.

Statement of Claim at para. 78; Appeal Book and Compendium, Tab 7 at 59.

98. In any event, if the TSX Defendants are concerned about liability that cannot be limited in the ways described above, that will be for the TSX to establish at trial. Without some demonstrated evidentiary foundation, the TSX Defendants' concern remains speculative.

***Sauer, supra* at para. 45-47; Appellants' BOA at Tab 16.**

Policy considerations regarding the protection of human rights support recognizing a duty of Care

99. Finally, there are significant policy reasons that suggest that a duty of care should be recognized in the present circumstances.
100. Canada, through the Canadian *Charter of Rights and Freedoms*, and through the adoption of international human rights instruments such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, has indicated strong state support for the promotion and protection of human rights.
101. In 2005 the Parliamentary Standing Committee on Foreign Affairs and International Trade presented a report to the Government of Canada in which it outlined concerns regarding the systemic involvement of Canadian mining companies in human rights violations in developing countries. Many of these companies raise their operating capital on the Toronto Stock Exchange.

Statement of Claim 2009 at para. 66-65; Appeal Book and Compendium, Tab 7 at 54.

102. Accountability mechanisms that could protect against human rights violations by Canadian corporations that operate abroad, however, are lacking.
103. The Honourable Mr. Justice Ian Binnie of the Supreme Court of Canada has described the problem succinctly:

The root cause of the business and human rights predicament lies in the **governance gaps created by globalization**—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. **These governance gaps provide the permissive environment for wrongful acts by**

companies of all kinds without adequate sanctioning or reparation. [emphasis added]

Justice Ian Binnie, “Legal Redress for Corporate Participation in International Human Rights Abuses: a Progress Report” (2009) 38:4 *The Brief* 44 [Legal Redress] at 45; Appellants’ BOA at Tab 24.

104. Part of this governance problem is created by the ease with which corporations can raise large amounts of capital on the Toronto Stock Exchange for use in countries where the risk of corporate involvement in human rights abuse is high.
105. According to Justice Binnie, the governance problem is the result of the combined effect of several factors including the “ever-expanding reach of global trade, concomitant global interdependency, the increasing economic influence of transnational companies, and the increasing political influence of such companies in war-torn and economically depressed countries in which the latent risk of human rights abuse is highest.”

Justice Ian Binnie, “Legal Redress” at 45; Appellants’ BOA at Tab 24.

106. He further notes that the host states of transnational corporations, “often have little incentive to regulate”, and even when they do, “the political influence of transnational companies particularly in conflict-ridden and economically underdeveloped countries, may be such that a state has little real power to impose its will.”

Justice Ian Binnie, “Legal Redress” at 45; Appellants’ BOA at Tab 24.

107. The Plaintiffs have pleaded that the Toronto Stock Exchange specifically markets itself to companies who are operating in countries with weak governmental institutions, where there is a high risk of conflict and violence, and where the latent risk of human rights abuse is highest. The Toronto Stock Exchange has argued that it should be able to continue to provide access to funding for use in such contexts without having to even

consider the legitimate human rights interests of those whose lives will be impacted by those decisions.

Statement of Claim 2009 at para. 40; Appeal Book and Compendium, Tab 7 at 49.

108. Recognizing a duty of care on the facts of this case is consistent with and furthers Canada's commitment to the promotion and protection of human rights.

Issue #3: In the alternative, leave to amend should be granted

109. The motions judge further erred by refusing the Plaintiffs leave to amend their statement of claim. He did not provide reasons for this refusal.
110. It is very rare that a case will be decided at the pleadings stage without allowing the plaintiff either the opportunity to correct its statement of claim or to establish the claim at trial. Because the consequences of denying leave to amend is to deprive the plaintiff altogether of their right to litigate the particular issues, the court of appeal has held that leave to amend should only be refused when a pleading contains a radical defect incapable of being cured by amendment.

Taylor v. Tamboril Cigar Company (2005), CanLII 35678 at para. 4 (O.C.A); Appellants' BOA at Tab 17.

Indal Metals v. Jordan Construction Management Inc. (1994), 29 C.P.C (3d) 361 at para. 13 (O.C.J.); Appellants' BOA at Tab 13.

PART V: ORDER SOUGHT

111. The Appellants seek that the Order striking out the claims in and dismissing Action Nos. CV-10-8577-00CL, CV-10-8576-00CL, CV-10-8575-00CL, be set aside and that an Order be granted dismissing the motions to strike brought by the TSX Defendants.
112. The Appellants seek their costs for:

- (a) this appeal on a substantial indemnity basis; and
- (b) the Motion to Strike below on a substantial indemnity basis;

together with post-judgment interest thereon pursuant to s. 129 of the *Courts of Justice Act*.

113. The Appellants also seek such further and other relief as counsel may request and that seems just to this Honourable Court.

All of which is respectfully submitted this 13th day of July, 2009.

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CERTIFICATE RE: ORIGINAL RECORD AND TIME ESTIMATE

I, **MURRAY KLIPPENSTEIN**, lawyer for the Appellants, certify that:

1. An Order under subrule 61.09(2) (original records and exhibits) is not required; and
2. the Appellants estimate that 1.5 hours will be required for the Appellants' oral argument, not including reply.

July 13, 2010

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SCHEDULE “A” – LIST OF AUTHORITIES

- Anger v. Berkshire Investment Group Inc.* (2001), O.A.C. 301, [2001] O.J. No. 379 (C.A.) (QL).
- Bingley v. Morrison Fuels* (2009), 95 O.R. (3d) 191 (C.A.).
- Childs v. Desmoreaux*, [2006] 1 S.C.R. 643, [2006] S.C.J. No. 18 (QL).
- Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76 (QL).
- Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* 2006, 82 O.R. (3d) 321 (C.A.).
- Harding v. First Associates Investments Inc.*, 2003 CanLii 48404 (Ont.Sup.Ct.J.) (CanLii).
- Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No 51 (QL)
- Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, [2007] S.C.J. No. 41 (QL).
- Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (QL).
- Jordan House Ltd. v. Menow*, [1974] S.C.R. 239.
- Indal Metals v. Jordan Construction Management Inc.* (1994), 29 C.P.C (3d) 361, [1994] O.J. No. 1616 (O.C.J.) (QL).
- Morgis v. Thomson Kernaghan & Co.* (2003), 65 O.R. (3d) 321, [2003] O.J. No. 2504 (C.A) (QL).
- Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143, [2007] O.J. No. 2443 (QL).
- Taylor v. Tamboril Cigar Company*, 2005 CanLII 35678 (O.C.A) (CanLii).
- Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (S.C.).
- Wakeford v. Canada (Attorney General)* (2001), 81 C.R.R. (2d) 342 (Sup. Ct.); appeal dismissed (2001), 156 O.A.C. 385 (C.A.).
- Recognition Order re: TSX Group Inc. and TSX Inc.*, (2005) 28 OSCB 7034, as amended by order of the Ontario Securities Commission on December 16, 2005; August 10, 2006; May 30, 2008.
- Recognition Order re: Investment Industry Regulatory Organization of Canada (IIROC)*, Ontario Security Commission, June 1, 2008
- Justice Ian Binnie, “Legal Redress for Corporate Participation in International Human Rights Abuses: a Progress Report” (2009) 38:4 *The Brief* 44.

SCHEDULE “B” – TEXT OF STATUTES AND REGULATIONS

R.R.O. Regulation 194

RULES OF CIVIL PROCEDURE

...

RULE 21

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

- (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
- (b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

Securities Act, R.S.O. 1990, c. S.5 at s. 21

...

Stock exchanges

21. (1) No person or company shall carry on business as a stock exchange in Ontario unless recognized by the Commission under this section. 1994, c. 11, s. 358.

Recognition

- (2) The Commission may, on the application of a person or company proposing to carry on business as a stock exchange in Ontario, recognize the person or company if the Commission is satisfied that to do so would be in the public interest. 1994, c. 11, s. 358.

Same

- (3) A recognition under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose. 1994, c. 11, s. 358.

Standards and conduct

- (4) A recognized stock exchange shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices. 1994, c. 11, s. 358.

Commission’s powers

- (5) The Commission may, if it appears to be in the public interest, make any decision with respect to,
 - (a) the manner in which a recognized stock exchange carries on business;
 - (b) the trading of securities on or through the facilities of a recognized stock exchange;
 - (c) any security listed or posted for trading on a recognized stock exchange;
 - (d) issuers, whose securities are listed or posted for trading on a recognized stock exchange, to ensure that they comply with Ontario securities law; and

(e) any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange. 1994, c. 11, s. 358.

...

MARCIA LUZMILA RAMÍREZ PIEDRA et al.
Plaintiffs (Appellants)

v.

COPPER MESA MINING CORPORATION et al.
Defendants (Respondents)

Court File Nos. C52250

**COURT OF APPEAL
FOR ONTARIO**

Proceeding commenced at Toronto

**APPELLANTS' FACTUM
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