CITATION: MM Fund v. Americas Gold and Silver Corp., 2022 ONSC 6515
COURT FILE NO.: CV-21-00663826-00CP
DATE: 20221122

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MM FUND, Plaintiff

– and –

AMERICAS GOLD AND SILVER CORPORATION and DARREN BLASUTTI, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Eli Karp and Sajjad Nematollahi*, for the Plaintiff

Mark Gelowitz, Robert Carson, and Elie Farkas, for the Defendant

HEARD: September 14, 2022

MOTION FOR LEAVE / CERTIFICATION OF CLASS ACTION

[1] In August 2020, the Defendant, Americas Gold and Silver Corporation ("Americas Gold"), issued a prospectus, raised millions of dollars on the market, and went excavating for gold at its Relief Canyon property in Nevada. Less than a year later, in May 2021, Americas Gold announced that what's buried in Nevada will, for the most part, stay in Nevada.

[2] What were the odds?

I. Double motion, twin issues

[3] The Plaintiff, an investor in Americas Gold who has sued for compensation for its loss, brings two motions at once. Although the statutory bases for the motions differ, but they present the same fundamental question: is the evidentiary foundation in the record sufficient to proceed to the next stage of the action?

[4] The Plaintiff seeks leave to commence an action for secondary market misrepresentation under section 138.8 of the *Securities Act*, RSO 1990, c S 5 ("*OSA*"). As Defendants' counsel points

out, to obtain leave the Plaintiff must lead "credible evidence" to establish a reasonable possibility that the action will be resolved in the Plaintiff's favour. This threshold test "is designed to prevent an abuse of the court's process through the commencement of actions…based on speculation or suspicion rather than evidence": *Silver v Imax Corp*., [2009] OJ No 5573, at paras 330-331 (SCJ).

[5] The Plaintiff simultaneously seeks to certify the claim under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c 6 ("*CPA*"). As Defendants' counsel again points out, certification requires the Plaintiff to establish that there is "some basis in fact" to support the claim: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para 118. This threshold test "should not involve an assessment of the merits" of the claim, but it does require "that there be an evidentiary foundation…to support the certification criteria": *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 OR (3d) 252, at para 74 (Div Ct).

II. The facts and the claim

[6] Americas Gold is a Toronto-based mining company whose shares trade on the TSX and the NYSE.

[7] This shareholders' action arises out of representations made during the course of the excavation and development of a gold mine at Relief Canyon, located in Pershing County, Nevada. Relief Canyon was the most significant asset owned by Americas Gold at the relevant time. It is an open-pit mine that Americas Gold acquired in April 2019 and that was targeted for commencement of commercial production in the second quarter of 2020. After delays that Americas Gold attributed to "teething pains," it declared commercial production at Relief Canyon had commenced in January 2021.

[8] Between issuance of its initial prospectus in August 2020 and its follow-up prospectus in January 2021, Americas Gold raised $73.3 million from investors, including the Plaintiff. The funds were to be used for corporate purposes and more specifically, according to the company's Short Form Base Shelf Prospectus dated January 29, 2021, to advance Relief Canyon towards full commercial production.

[9] In a press release dated May 17, 2021, Americas Gold advised the market that it was testing a different extraction process at Relief Canyon, and that it was continuing to evaluate options to extract ore. Americas Gold also announced that it was undertaking an updated "pit mapping […] and extensive re-assaying program", targeted to finish late in the third quarter of 2021. The press release disclosed that Relief Canyon had been experiencing modelling, construction and operational deficiencies, which negatively impacted gold recovery and production at the mine.

[10] Specifically, the press release stated that the company had identified that "carbonaceous material existed within the pit and an 'unknown quantity' of it had been crushed, stacked and placed on the leach pad", thereby reducing the expected production of gold from the process that had been employed there. It explained:

> Phase 2 mining, which commenced in late Q4-2020/early Q1-2021, has demonstrated a more structurally complex area than initially interpreted, caused by

> additional faults and folds. Gold mineralization is strongly influenced by structural controls. The impact of the structural complexity, combined with the increased mining selectivity to reject carbonaceous material, has decreased ore availability in Q1-2021 and into Q2-2021.

[11] For the first quarter of 2021, Americas Gold disclosed that Relief Canyon had produced only 1,346 gold equivalent ounces. Its first quarter Interim Financials stated that these "[i]mpairment indicators were identified during the three-month period ended March 31, 2021 from gold production of the Relief Canyon mine", and that Americas Gold had prepared an updated model for the Relief Canyon mine as of March 31, 2021.

[12] Ultimately, Americas Gold reported that Relief Canyon was unable to achieve sustainable production levels, and in a News Release dated August 16, 2021 announced that it had suspended mining operations at Relief Canyon. Consequently, Americas Gold took impairment and write-off charges against the value of its assets and inventory in the amount of $78.6 million. Stock market records produced by the Plaintiff show that the price went from $4.5 per share on August 1, 2020 to $1.5 per share on August 29, 2021.

[13] The Statement of Claim alleges that the adverse news contained in the May 17, 2021 disclosure revealed material facts that Americas Gold knew and should have disclosed earlier. Specifically, the Plaintiff alleges that these facts should have been disclosed in the prospectuses that Americas Gold filed in August 2020 and January 2021.

[14] In their factum, Plaintiff's counsel allege that the Defendants had prior knowledge of the problems they ultimately had to disclose to the public. They characterize the May 17, 2021 disclosure as an "acknowledge[ment] that material adverse facts existed as at the time of each Prospectus" and an acknowledgement that "at all times during the Class Period, Relief Canyon had been experiencing severe modelling, construction and operational deficiencies".

[15] The Defendants take issue with this characterization. In their factum, Defendants' counsel submit that the Plaintiff "has done nothing more than: (i) identify an instance in May 2021 in which Americas Gold provided an update on developments at the Relief Canyon mine; and (ii) note that Americas Gold share price declined after this point in time."

[16] It is the Defendants' view that the Plaintiff, in bringing this claim, would require the Court to make a significant inferential leap and to speculate that prospectuses issued by Americas Gold months earlier omitted to state material facts that were only later disclosed in May 2021. The Defendants submit that one needs expertise in the industry to understand whether the geological phenomena described in the May 2021 disclosure were previously evident or were at least suggested by the surface formations at Relief Canyon, and whether the Defendants ought to have known prior to May 2021 that the Relief Canyon mine would be unable to achieve sustainable gold production.

[17] Defendants' counsel point out that the Plaintiffs have not put forward any geologist or other expert witness to explain the scientific ramifications of what was described in the prospectuses and in the May 17, 2021 press release. They submit that as a consequence there is no evidence

indicating that the material facts that emerged in the press release were or could have been known at an earlier date. Since the facts that the Defendants are alleged to have known were underground, it is their view that expert evidence is needed to explain why one would have expected a mining company to be in a position to make any disclosure at an earlier stage.

[18] Defendants' counsel contend that the omission of any such expert evidence is fatal to the motion for leave under section 138.8 of the *OSA*.

III. The test for leave

[19] On a motion for leave to commence a secondary market misrepresentation claim under Part XXIII.1 of the *OSA*, the Plaintiff must establish (a) that the action is brought in good faith; and (b) that there is a reasonable possibility that the Plaintiff will prevail at trial. Moreover, leave to proceed must be obtained for each alleged misrepresentation: *Paniccia v MDC Partners Inc.*, 2018 ONSC 3470, at para 86.

[20] The leave requirement is more than a mere formality. It has been characterized by the Supreme Court of Canada as a "robust deterrent screening mechanism", for which it is necessary to "undertake a reasoned consideration of the evidence to ensure that the action has some merit": *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 (CanLII), [2015] 2 SCR 106, at paras 38-39.

[21] More to the point, there must be credible evidence supporting the claim and a plausible analysis of the statutory provisions on which it is based. The record must contain enough evidence to persuade the Court that there is a reasonable possibility that the action will be resolved in the Plaintiff's favour: *Ibid.*, at para 39. The burden is on the Plaintiff to establish that the claim is based on more than speculation; accordingly, the motion record must contain evidence that the alleged misrepresentation caused the Plaintiff's loss: *Silver v. Imax Corporation*, 2009 CanLII 72342, at paras 330-331 (SCJ). Failing that, the Defendants need not file a substantive response: *Abdula v. Canadian Solar Inc.*, 2014 ONSC 5167, at para 64.

[22] Most importantly, the evidence must allow the Court to reason forward, not backward. That is, the evidence must be such that it establishes the actual misrepresentation rather than the consequences of an alleged misrepresentation. The Court of Appeal has made the point that backward reasoning – i.e. presuming a material misrepresentation on the basis of evidence of a drop in share price – does not meet the test for leave. The Plaintiff must lead evidence that ties the decline in share price to the misrepresentation or omission in question: *Wong v. Pretium Resources Inc.*, 2022 ONCA 549, at para 107.

[23] I pause here to note that the hurdle posed by section 138.8 of the *OSA* requires evidence, but it does not specifically require expert evidence to be put forward in every case. There are cases in which the factual evidence in the record is sufficient to establish that an actionable misrepresentation has occurred.

[24] For example, in *Gowanlock v. Auxly Cannabis Group Inc.*, 2021 ONSC 4205, the defendant, a nascent cannabis producer, had stated in a published Management Discussion and

Analysis document that the construction of its cultivation facility was well underway when in fact it had not even begun. A public correction was then issued, prompting the share price to plummet. No expert report was produced by the plaintiff because none was needed to understand the claim. The issue was not whether something analogous to "carbonaceous material" was found at some subterranean level at the site and what that might mean for the defendant's business; rather, the issue was that a building had been promised and none had been built. The meaning could not have been clearer.

[25] It is important to note that the case at bar is a material facts case, not a material change case. The Plaintiff does not argue that the Defendants failed to update changes in their public disclosure statements, but rather that they failed to disclose facts that existed at the time their prospectus was issued. As a starting point, therefore, the Plaintiff must prove not that something was discovered later that made the Relief Canyon site non-viable and that should then have been disclosed; rather, it must show that there was something that was known at the time the prospectus was issued that made the project non-viable.

[26] It stands to reason that one does not commit a misrepresentation by omitting that which was not known. The inquiry does not ask whether there were unknown things buried in the ground that could make the mine less profitable than predicted. That kind of omission does not amount to an omission of a fact that existed at the time the prospectus was issued, and thus was not a fact that had to be disclosed. In this context, the May 2021 public statement – which Plaintiff's counsel characterize as a "correction" – along with the precipitous drop in share price for Americas Gold – do not speak for themselves. They do not on their face reveal to the non-expert what a mining company would have known or not known at the outset or from the surface of the mine.

[27] For this reason, courts have determined that the analysis of material misrepresentation entails looking beyond the text of the relevant documents or press statements. The analysis "requires an examination of the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market": *Badesha v. Cronos Group*, 2021 ONSC 4346, at para 51, rev'd on other grounds 2022 ONCA 663.

[28] The allegation that is at the heart of this claim is not one of a blatant, on its face contraction between the May 2021 disclosures and Americas Gold's August 2020 and January 2021 prospectuses. The prospectuses described the mining site and the surface geology; the May 2021 disclosure described what was revealed underground. The relationship between these two statements is not apparent to the naked eye without the aid of expert testimony explaining what it all means. As the Court of Appeal instructed in *Rahimi v. SouthGobi Resources Ltd*., 2017 ONCA 719, at para 66, a court cannot simply assume that specialized knowledge that is simply a matter of common sense and thus ignore or dispense with professional elucidation of the matter.

[29] Plaintiff's counsel argues that the facts disclosed by Americas Gold in May 2021 were not only knowable, but were known at the time it issued its two prospectuses in August 2020 and January 2021. In making this claim, counsel points to p. 140 of the August 2020 prospectus, which discusses the potential for problems lurking at the Relief Canyon site:

> The Company is targeting commercial production by the end of Q4 – 2020. As of August 14, 2020, Relief Canyon had sold approximately 1,565 ounces of gold and 5,512 ounces of silver. While the Company was successful in meeting several important commissioning targets, including initial construction capital and planned mining and crushing rates, gold extraction has been slower than planned. While Relief Canyon has experienced start-up challenges typical to a heap leach operation, there are a number of factors impacting gold extraction, notably: "the metallurgical characteristics of the initial material stacked on the leach pad sourced from the existing three pits, inconsistent operating practices, solution application rathes on the leach pad, and the failure of the radial stacker. The Company and its consultants have undertaken an analysis of recent performance and have implemented a number of procedural changes to address these issues, including improved ore control, increased training, standardization of operating practices and reagent optimization.

[30] This suggestion of challenges that have not yet been fully identified was followed-up, and discussed in an updated fashion, at p. 229 of the January 2021 prospectus. There, Americas Gold explained the ways in which the funds raised by the past year's public offering had been utilized in assessing the challenges and investigating the mine's viability:

> The net proceeds of the August 2020 Offering that were re-allocated to development costs to achieve commercial production at Relief Canyon were predominantly utilized in connection with payments to the mining contractor, reagents, diesel, equipment lessors, drilling and explosives, consultants, employee-related expenses, and other operating costs. The achievement of commercial production is a capital intensive process, and Relief Canyon experienced start-up challenges typical of a heap leach operation as well as a structural failure to its large radial stacker which resulted in reduced stacking rates from the use of a temporary stacker until the large radial stacker returned to operations in early December 2020. In response to certain of these challenges the Company and its consultants undertook an analysis of the operation's performance and implemented a number of procedural changes to address these challenges, including improved ore control, increased training, standardization of operating practices and reagent optimization… These challenges ultimately resulted in additional time and development-related costs to bring Relief Canyon to commercial production.

[31] Reading these passages in the two prospectuses, it is difficult to understand what the Plaintiff's complaint really is. In my view, the two excerpts referenced by Plaintiff's counsel do precisely what one would expect them to do in the circumstances – i.e. they disclose that there are challenges underground, and describe the methods in which the company is engaged in investigating these challenges. The prospectuses do not seem to hide anything from the reader, nor do they (or could they) reveal the more extensive difficulties discovered, and disclosed, several months after their publication.

[32] What followed in May 2021 – the announcement that "carbonaceous material existed within the pit" which "demonstrated a more structurally complex area than initially interpreted" –

was a further technical update. It was not a contradiction of what came before it, nor was it a late-in-the-day disclosure of something previously known. The entire disclosure sequence, from August 2020 to January 2021 to May 2021, followed a pattern that anyone would expect it to follow as the exploration of the mine site moved forward.

[33] It may be trite to say, but the challenge of determining the viability of a new mining project is that the value lies underground. If it were obvious all along where the gold is and how to extract it from the earth, it would lack the rarity that gives it much of its value. It takes time to unearth, and the disclosure that accompanies such a project proceeds in stages as one digs – i.e. as the truth about the mine and the precious metal within it is physically revealed.

[34] The claim at bar does not state that Americas Gold's prior financial statements have been, or need to be, restated. The focus is on its recording impairment charges in the first quarter of 2021, reflecting the information contained in the May 2021 public statement. However, it is well established that the Plaintiff does not satisfy its burden on a leave motion by pointing to a decline in share price following an impairment: *O'Brien v. Maxar Technologies Inc*., 2022 ONSC 1572, at paras 98, 127. Absent credible evidence that the impairment was indicative of a prior misrepresentation, the fact of the impairment does not establish a reasonable possibility of success: *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864, at paras 165, 169-70, 182, 185-93, aff'd 2014 ONCA 901, at paras 62-75.

[35] Furthermore, the record before me does not contain evidence that the May 2021 disclosure constituted a "corrective disclosure". On its face, it appears to be an announcement of the discovery of new facts – i.e. facts that identify a structural complexity in the Relief Canyon ore body – or a change in circumstances – i.e. adjustments to the mine plan. It certainly does not expressly, or even implicitly, acknowledge the existence of any misrepresentation.

[36] In order to come to that conclusion, I would have to "engage in a reasoned consideration of evidence of the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market": *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, at para 51. As Defendants' counsel observes, this requires "evidence, opinion, and argument, and also an analysis of the perceived or effective meaning of the words in the secondary market, which once again is not a mechanical exercise, but rather one that involves evidence": *Ibid*., at para 50. As already indicated, the Plaintiff has adduced no evidence that would permit me to undertake such an analysis.

[37] Given the lack of a proper evidentiary basis for the claim, the test for leave under section 138.8 of the *OSA* has not been met. The secondary market misrepresentation claim cannot proceed.

IV. The test for certification

[38] The Plaintiff also brings common law and primary market misrepresentation claim. Those claims do not require leave to proceed under section 138.8 of the *OSA*. But in order for the action to proceed as a class action, it requires certification under section 5(1) of the *CPA*.

[39] The test for certification is well-known and set out as a multi-step analysis in section 5(1)(a) through (e) of the *CPA*, as follows:

> 5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
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> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[40] Most of these steps are uncontroversial in a claim of this nature. As against the corporate Defendant, there are certainly recognized cause of actions in misrepresentation based on both the *OSA* and common law. I would, however, agree with Defendants' counsel that there is no viable cause of action as against the individual Defendant, who is alleged to have acted in his corporate capacity only.

[41] There is an identifiable class of shareholders who held shares during the relevant dates. Moreover, the Plaintiff has a viable litigation plan and has no apparent conflict with other class members. Furthermore, on access to justice and judicial economy grounds a class action would be the preferred proceeding in a shareholders action like this if all other hurdles can be jumped; however, as discussed below, the "some basis in fact" analysis, which is crucial to the consideration of the common issues, also has impact on preferability: *AIC Limited v. Fischer*, [2013] 3 SCR 949l, at para 48; *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at paras 99, 123.

[42] Defendants' counsel has pointed out that the Plaintiff is improperly named; it is a trust, and so the proper entity to serve as Plaintiff would be the trustee. The trust itself does not have capacity to sue and be sued. Plaintiff's counsel has acknowledged this error and has committed to correcting it if and when the action proceeds any further. Since this formal defect can be readily cured, I would not let it form an impediment to certification.

[43] For present purposes, the controversial issue for certification is section 5(1)(c) – whether the claims have common issues that will advance the proceeding if considered in common. This can only occur if, first and foremost, there is "some basis in fact" for the asserted claims: *Pro-Sys, supra*, at para 118.

[44] The following are the common issues as proposed by the Plaintiff. I have left out the common issues relating to secondary market misrepresentation, since those claims have not been granted leave to proceed.

GENERAL

1. Did Americas Gold release the prospectuses?

2. If the answer to (1) is yes, did any of the Prospectuses contain one or more misrepresentations?

3. If the answer to (2) is yes, which prospectus contained what misrepresentation(s)?

4. If the answer to (2) is yes, when and how the misrepresentations in the prospectuses were publicly corrected?

PRIMARY MARKET LIABILITY

5. If the answer to (2) is yes, are either of the Defendants liable under section 130 of the Securities Act and, if necessary, the equivalent provisions of other jurisdictions' securities legislation?

6. If the answer to (2) is yes, are either of the Defendants liable in common law negligence simpliciter and/or common law negligent misrepresentation?

7. If the answer to either (5) and/or (6) is yes, to whom are the Defendants liable, and what is the proper measure of the damages or compensation to be paid by them?

OTHER MATTERS

8. Can some or all of the damages of the Class be calculated in the aggregate pursuant to section 24 of the CPA?

9. If the answer to (15) is yes, what is the aggregated damages to be awarded to the Class?

10. Is Americas Gold vicariously liable for the acts and/or omissions of Darren Blasutti and of its other directors, officers, agents, employees and representatives?

11. Should the Defendants pay for the costs of administering the recovery? If so, how much should the Defendants pay?

> 12. If the Court determines that either of the Defendants are liable and should pay compensation to the Class, and if the Court considers that the participation of the Class Members or any of them is required: (a) are any directions necessary; (b) should any special procedural steps be authorized; (c) should any special rules relating to the admission of evidence and means of proof be made; and (d) what directions, procedural steps, or evidentiary rules ought to be given or authorized.

[45] As a general matter, a "common issue" is one which "is necessary to the resolution of each class member's claim": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para 39. Moreover, the Court must be satisfied that the evidence demonstrates that there is at least some basis in fact for the proposed common issues: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para 25. This analysis entails more than "a bare assertion in the pleadings" that the common issues have evidentiary support: *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443 at para. 79.

[46] The *CPA* certification motion and the *OSA* leave motion have been brought together here, and so both rely on the same factual record. As a matter of logic alone, that leaves the Plaintiff with an uphill battle on certification since in the leave motion the record has been found to lack sufficient evidence to indicate that the claim will be successful at trial.

[47] That said, the Court of Appeal has instructed that "[i]t does not automatically follow from the denial of leave for the statutory claims that there will be no basis in fact for all of the class definition, common issues and preferable procedure certification criteria": *Kinross, supra*, at para 97. The focus on a certification motion is essentially on the form rather than the merits of the action. The court's function is to determine whether the claim is suitable to proceed as a class proceeding: *Fischer, supra*, at paras 39-42; *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401, at para 50 (Ont CA).

[48] Accordingly, the "some basis in fact" analysis that is essential to class action certification must proceed even where a leave motion has made an initial negative determination about the factual record. As the Court of Appeal put it, "[t]he fact that the court, on a leave motion, has determined that the statutory claims have no reasonable possibility of success and that the evidence supporting the statutory and common law actions would essentially be the same does not mean that there is not some basis in fact": *Kinross*, at para 99.

[49] With all of that, certification under the *CPA* and leave under the *OSA* have been described as serving a similar function – to keep out unmeritorious claims. As the Divisional Court has explained, it is integral to the court's gatekeeping function that "some factual basis – in the form of admissible evidence – to support the allegation[s]": *Williams v. Canon Canada Inc.*, 2012 ONSC 3692, at para 23.

[50] The standard for certification is not an especially high one, but it does require the Court to move beyond mere "symbolic scrutiny" of the claim: *Lin v. Airbnb, Inc.*, 2019 FC 1563, at para 33. Using a metaphor that seems appropriate to the case at bar, Perell J. stated in *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487, at para 134, rev'd in part on other grounds, 2018 ONSC 6487 (Div Ct), that "while the standard is low, it is not subterranean."

[51] As part of the evidentiary requirement, the courts have also scrutinized certification records to ensure that there is a plausible methodology for assessing damages. As the Supreme Court of Canada has said, the evidence – generally that of an expert witness – must be "sufficiently credible or plausible to establish some basis in fact" to support the claim: *Pro-Sys*, at para 118. Calculating damages in a shareholders' class action is generally not a methodologically difficult task, since the pre-existing share price and the diminished share price are readily available and the difference is easily calculated.

[52] But the fact is that the area of analysis that most frequently requires expert evidence must be analyzed for its plausibility. Unless it is "glaringly obvious…that the presence of the…Defect…reduced the value", a plausible method of connecting the alleged misrepresentation to the class members' loss is a threshold requirement for certification: *MacKinnon v. Volkswagen Group Canada Inc*., 2022 ONSC 5501, at para 16 (Div Ct), quoting *Williams v. Toyota Motor Corporation*, 2022 FCA 344, at para 173.

[53] As explained in the leave to proceed analysis above, the connection between the Defendants' prospectuses and the eventual drop in shareholder value is anything but "glaringly obvious". In fact, the Court of Appeal has indicated that there would be no misrepresentation at all if the chronology of the Defendant's knowledge of the problem and disclosure of the problem were out of sync – knowledge must proceed disclosure: *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104, at para 104.

[54] The Court emphasized that the timing of a defendant's knowledge of an omission is crucial to any analysis of a securities misrepresentation case. It stressed that the *OSA* defines a misleading representation or omission as one that misleads the reader "in light of the circumstances in which it was made": *Ibid*. In an observation that foreshadows the Plaintiff's claim here, the Court stressed that, "The 'circumstances in which it was made' do not include circumstances which arose after the statement was made": *Ibid*.

(a) In other words, what the Court of Appeal refers to as the "chronology problem" requires an actionable misrepresentation to have at least been knowable prior to the impugned misrepresentation by omission: *Ibid*., at para 101. A corporate defendant and its executives can be liable for misrepresentation by omission if they were not aware of facts that they negligently omitted to disclose; there are matters that the company does not know but should know, and it may be liable for losses caused by the failure to disclose them. But no case has said that a failure to disclose facts that are unknowable because they do not yet exist or are, literally, underground, can form the basis of a viable misrepresentation claim.

[55] Given the nature of the claim and the lack of expert geological evidence to help understand the technicalities of mining exploration, there is no basis in fact for the most foundational of the Plaintiff's claims. The entire pleading is premised on an assumption that what later became unearthed in the exploration process was already known or knowable at the outset. The very first series of proposed questions – "…did any of the Prospectuses contain one or more misrepresentations?" – is unanswerable on the current state of the record. And if this cornerstone of the claim crumbles, the rest of the edifice likewise cannot stand as a class proceeding.

[56] To be clear, the evidentiary standard required for certification under section 5(1) of the *CPA* is lower than that required for leave under section 138.8 of the *OSA*. It is possible, for example, that expert evidence submitted on behalf of a plaintiff, though contested by a defendant, might satisfy the *CPA*'s "some basis in fact" standard although it does not rise to the *OSA*'s reasonable possibility of success standard. After all, the Supreme Court has emphasized "the importance of not allowing the requirement to establish 'some basis in fact' to lead to a more fulsome assessment of contested facts going to the merits of the case: *Fischer*, at para 42.

[57] In the present case, however, the record contains factual evidence that requires an expert to interpret but no expert evidence to weigh at all. Without *any* evidence demonstrating that there was an omission in Americas Gold's prospectuses or in its other public statements, there is no basis in fact on which the common issues can stand. Without common issues, the entire certification exercise becomes meaningless; the issues cannot really be addressed in common, and a class action cannot possibly represent the preferable procedure: *Kinross*, at para 123.

[58] Americas Gold may have thought its Nevada property had, almost literally, an ace in the hole. Its extraction was then found to be unsustainable and the share price fell, but the record contains no basis in fact for the allegation that this was knowable in advance. Not every investment is a gold mine; sometimes investors are, unfortunately but fairly, dealt a bad hand.

V. Disposition

[59] The secondary market claims pleaded by the Plaintiff do not meet the threshold of presenting credible evidence that establishes a reasonable possibility that the action will be resolved in the Plaintiff's favour. The motion for leave under section 138.8 of the *OSA* is dismissed.

[60] The primary market and common law claims pleaded by the Plaintiff do not meet the threshold of presenting some basis in fact for the claims of liability. The motion for certification under section 5(1) of the *CPA* is dismissed.

[61] The parties may make written submissions on costs. I would ask counsel for the Defendants to send brief written submissions by email to my assistant within two weeks of the date hereof, and for counsel for the Plaintiff to send equally brief submissions by email to my assistant within two weeks thereafter.

Date: November 22, 2022 Morgan J.