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Ontario Superior Court denies leave and certification in proposed securities class action, provides guidance on plaintiffs' evidentiary burden and mining issuers' disclosure obligations

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On November 22, 2022, in *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515, the Ontario Superior Court of Justice dismissed a plaintiff's "double motion" for leave to commence a secondary market misrepresentation claim under the *Securities Act* (the OSA) and certification of a class proceeding under the *Class Proceedings Act* (the CPA). Justice Morgan dismissed each motion on the basis that the plaintiff failed to satisfy the applicable evidentiary threshold.

Justice Morgan's decision reaffirms that the leave and certification tests are meaningful screening mechanisms. It also provides useful guidance regarding the disclosure expectations for issuers, particularly those in the mining industry.

Background

Americas Gold and Silver Corp. (Americas) is a mining company whose shares trade on the TSX and NYSE. In April 2019, Americas acquired Relief Canyon, a gold mine in Nevada.

In May 2021, Americas issued its quarterly disclosure, informing the market that it was testing a different extraction process at Relief Canyon and that the mine had been experiencing modelling, construction and operational issues. Americas took impairment and write-off charges totaling $78.6 million.

The plaintiff commenced a proposed class action, alleging that the adverse news contained in the May 2021 disclosure revealed material facts that Americas knew and should have disclosed in prospectuses in August 2020 and January 2021. The plaintiff sought leave to pursue a secondary market misrepresentation claim under section 138.8 of the OSA and certification of various claims, including primary market misrepresentation under section 130 of the OSA and common law negligence and negligent misrepresentation.

Dismissal of the leave motion

The key issue on the leave motion was whether the plaintiff had adduced evidence to demonstrate a "reasonable possibility" that it would succeed at trial. Justice Morgan emphasized that a plaintiff must adduce "credible evidence" to support its claim. The evidence must show the actual misrepresentation rather than the consequences of an alleged misrepresentation; in other words, a plaintiff must do more than adduce evidence of a drop in share price and ask the Court to "reason backwards" to presume a prior

misrepresentation.

Justice Morgan explained that, because the plaintiff alleged that Americas failed to disclose material facts, the plaintiff was required to show that those facts were known when the prospectuses were issued – i.e., that those facts were not still "buried in the ground".

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.[1]

Justice Morgan found that there was no "blatant, on its face" contradiction between Americas' May 2021 disclosures and its earlier prospectuses. The prospectuses described the mining site and surface geology, while the May 2021 disclosure described what was subsequently revealed underground. The plaintiff did not offer any expert evidence, or any other evidence, to support the plaintiff's interpretation of the respective disclosures.

Based on his reading of the disclosures, Justice Morgan found that the prospectuses did "precisely what one would expect them to do in the circumstances" by disclosing that there were challenges at the mine that were being investigated. The subsequent May 2021 disclosure was a further technical update. For Justice Morgan, "[t]he entire disclosure sequence … followed a pattern that anyone would expect it to follow as the exploration of the mine site moved forward."[2] There was no credible evidence that the plaintiff had a reasonable possibility of succeeding on its secondary market misrepresentation claim. The motion for leave was therefore dismissed.

Dismissal of the certification motion

Justice Morgan also declined to certify any of the plaintiff's remaining causes of action, finding that the plaintiff had failed to demonstrate "some basis in fact" for its asserted claims — a precondition to satisfying the commonality criterion under clause 5(1)(c) of the CPA.

Justice Morgan confirmed that, for an actionable misrepresentation by omission, the alleged material facts must have at least been "knowable" prior to the impugned omission. Facts that "do not yet exist or are, literally, underground" cannot form the basis of a viable misrepresentation claim.[3]

On the record before him, Justice Morgan could find no basis in fact for the plaintiff's foundational claim: that the information contained in the May 2021 release was known or knowable at the time that Americas' prospectuses were issued. It followed that "if this cornerstone crumbles, the rest of the edifice likewise cannot stand as a class proceeding."[4]

Key takeaways

Justice Morgan's decision is a helpful reminder that both the leave and certification thresholds impose meaningful evidentiary burdens upon putative representative plaintiffs. These burdens will not be satisfied by a mere decline in an issuer's share price.

The decision also provides useful guidance on the standard of disclosure expected of issuers, particularly those in the mining industry, and confirms the common sense proposition that

an issuer is not expected to disclose “unknown things buried in the ground”.[5]

Osler represented Americas Gold and Silver Corp. in the action, with a team led by Mark Gelowitz, Robert Carson and Elie Farkas.

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[1] *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515, para. 26.

[2] *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515, para. 32.

[3] *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515, para. 54(a).

[4] *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515, para. 55.

[5] *MM Fund v. Americas Gold and Silver Corp.*, 2022 ONSC 6515, para. 26.