IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Larouche v. PGM ResidualCo Holdings Inc.,* 2026 BCSC 674

Date: 20260416
Docket: S247632
Registry: Vancouver

Between:

Linda Larouche

Petitioner

And

PGM ResidualCo Holdings Inc.

Respondent

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	S. Nematollahi E. Karp
Counsel for the Respondent, PGM ResidualCo Holdings Inc.:	S. Boyle J. Hutchinson J. Green
Place and Dates of Hearing:	Vancouver, B.C. February 23 and 26-27, 2026
Place and Date of Judgment:	Vancouver, B.C. April 16, 2026

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OVERVIEW

[1] The petitioner, Linda Larouche, seeks leave of this Court to commence a "secondary market claim" pursuant to the *Securities Act*, R.S.B.C. 1996, c. 418 [*Sec. Act*].

[2] In broad terms, the allegations relate to the operations of an Ontario gold mine that was previously owned and operated by Pure Gold Mining Inc. ("Pure Gold").

[3] Earlier, the petitioner advanced (as plaintiff) a secondary market claim in a class action proceeding commenced in April 2022 (the "Class Action Proceeding"); however, in October 2024, that pleading was rejected by Justice Walker as a nullity since leave had not been sought or granted as required by the *Sec. Act* and the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]: *Larouche v. Pure Gold Mining Inc.*, 2024 BCSC 1889 [*Walker RFJ*] at paras. 47 and 122–123.

[4] In the *Walker RFJ*, the Court struck certain portions of the amended notice of civil claim ("ANOCC") in the Class Action Proceeding (including the secondary market claims) and directed the petitioner to deliver a further pleading for the remaining claims: *Walker RFJ* at para. 119.

[5] Since the release of the *Walker RFJ*, the petitioner's focus in the Class Action Proceeding has been considerably narrowed. Although she has not yet filed a further ANOCC, she now proposes to proceed in the Class Action Proceeding with respect to only the primary market claim and only against the defendant, PGM ResidualCo Holdings Inc. ("PGM"). In May 2025, the claims against Pure Gold, the insurers and the individual defendants were discontinued, although Pure Gold's insurers have agreed to treat PGM in place of Pure Gold: *Walker RFJ* at para. 8.

[6] Similarly, the focus of the proposed secondary market claims, as addressed in this leave application, are now only advanced against PGM, as set out in the petitioners' draft notice of civil claim. If leave is granted, the petitioner proposes to file a further ANOCC in the Class Action Proceeding to incorporate the secondary

market claims with the further amendments to the primary market claim that are intended to address the deficiencies in the ANOCC identified in the *Walker RFJ*.

[7] PGM opposes the leave application, advancing substantial arguments on both procedural and substantive grounds. PGM takes the position that there is no admissible evidence (or even if admissible, inadequate evidence) that would satisfy the test for leave. Further, PGM contends that the petitioner has not met the test for leave, resulting from pleading deficiencies of the secondary market claims and/or limitation issues.

BRIEF HISTORY OF THE SECONDARY MARKET CLAIMS

[8] A brief summary of the steps taken in the Class Action Proceeding and this proceeding in relation to the petitioner's secondary market claim—as relevant to the issues at this hearing—is as follows:

a) April 4, 2022: the notice of civil claim ("NOCC") is filed in the Class Action Proceeding. In Part 4: Legal Basis, there is very brief reference to a secondary market claim and that the plaintiff "will seek leave" to proceed in accordance with the *Sec. Act*;

b) October 2022-August 2023: Pure Gold filed for creditor protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. As a result, the Class Action Proceeding was stayed. In May 2023, West Red Lake Gold Mines Ltd. ("WRLG") acquired Pure Gold's mining interests under a "reverse vesting order" ("RVO") and the Court vested any liabilities for claims against Pure Gold in PGM;

c) August 25, 2023: the ANOCC is filed in the Class Action Proceeding, providing some details of the secondary market claim, and again stating that the plaintiff "will seek leave of the Court" in respect of those claims;

d) March 2024: the defendants in the Class Action Proceeding asserted that the secondary market claims in the ANOCC were a nullity as the plaintiff

had not sought or obtained leave to advance such a claim under the *Sec. Act*;

e) April-July 2024: the defendants filed an application to strike the ANOCC on the basis of pleading deficiencies and the failure to obtain leave to assert the secondary market claims. The plaintiff prepared and served (but did not file) a notice of application for leave in the Class Action Proceeding; in response, the defendants argued that leave must be granted in an originating proceeding (such as this petition) and not by way of an application within an existing proceeding;

f) October 15, 2024: the *Walker RFJ* was released finding that the pleading of the secondary market claims in the ANOCC was a nullity since leave was not granted;

g) November 6, 2024: this petition was filed seeking leave to file the secondary market claim. The only affidavits referred to in support are filed in the Class Action Proceeding;

h) December 2024: the respondents to the petition specifically pointed out to the petitioner's counsel that it is improper to simply refer to affidavits filed in another proceeding; and

i) November 27, 2025: this amended petition was filed seeking leave to file the secondary market claim against only PGM. Again, the pleading refers to affidavits filed in the Class Action Proceeding and also refers to two further affidavits that were filed in this petition proceeding.

SECONDARY MARKET CLAIMS AND LEAVE

[9] Secondary market claims are addressed in Part 16.1 of the *Sec. Act*.

[10] The requirement for leave is well established by BC authority: *Tietz v. Cryptobloc Technologies Corp*., 2021 BCSC 186 [*Tietz SC 186*] at paras. 8–13; 2021 BCSC 810 [*Tietz SC 810*] at paras. 6–8; 2021 BCSC 2275 [*Tietz SC 2275*] at

para. 47, rev'd in part, sub. nom. *Tietz v. Affinor Growers Inc*., 2022 BCCA 307 [*Tietz CA*] at para. 1.

[11] Section 1(1) of the *Sec. Act* defines "misrepresentation" and "material fact":

> "**misrepresentation**" means
>
> (a) an untrue statement of a material fact, or
>
> (b) an omission to state a material fact that is
>
> (i) required to be stated, or
>
> (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made
>
> "**material fact**" means,
>
> (a) when used in relation to a security issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the security; …

[12] As the Court observed in *Tietz SC 2275* at para. 24, the definition of misrepresentation "encompasses 'half-truths'", stating that an issuer cannot escape liability by only stating facts that are strictly speaking true, but which become misleading when considered alongside the omitted information.

[13] Further, this Court in *Tietz SC 2275* highlighted that whether a fact is "material" is a highly contextual and fact specific inquiry. The Court stated at paras. 26–27:

> … Omitted information is material if its inclusion would have "significantly altered the 'total mix' of information available" to the reasonable investor in making the investment decision …
>
> Specific evidence on the issue of materiality is not always necessary. The objective importance of the facts or omissions for the investment decision can, in appropriate cases, be inferred as a matter of common sense. …

[14] Justice Walker summarized secondary market claims in the *Walker RFJ* as follows:

> [31] Secondary market claims (per s. 140.3 of the *Sec. Act*) are also grounded on a misrepresentation. The ambit of liability is broad as it extends beyond a prospectus to a wide category of documents and public statements.
>
> [32] A secondary market claim is authorized by s. 140.3(1) of the *Sec. Act* when a "responsible issuer" or person with actual, implied, or apparent

> authority to act on behalf of the issuer releases "a document" (not limited to a prospectus) that contains a misrepresentation. A person who acquires or disposes of the issuer's security between the time when the document was released and the time when the misrepresentation was publicly corrected has a right of action for damages. Reliance is deemed.
>
> [33] "Document" is defined in s. 140.1 to mean any written communication, including those in electronic form (whether or not required by the *Sec. Act*) that is filed with the British Columbia Securities Commission ("Commission") or other government agency, as well as any other communication whose content would reasonably be expected to affect the market price or value of the security.
>
> [34] The right of action lies against, *inter alia*: (a) the responsible issuer and each of its directors at the time the document was released; …: *Sec. Act*, ss. 140.3(1)(a)-(d).
>
> [35] …. Finally, s. 140.3(4) creates a cause of action when an issuer fails to make a timely disclosure.
>
> [36] Of particular importance to one of the objections raised by the Ds&Os and Underwriters to the ANOCC, multiple misrepresentations having a common subject matter or content may, in an action and in the discretion of the court, be treated as a single misrepresentation: *Sec. Act*, s. 140.3(6).

[15] The petitioner alleges that Pure Gold made certain misrepresentations in six "core documents" issued between March 2021-November 2021. A "core document" is defined in s. 140.1 to mean specific documents which, in this case, include two prospectuses and four management discussion or analyses ("MD&As"). Accordingly, the specific defences in relation to any document that is not a "core document" do not apply: *Sec. Act*, ss. 140.4(1)-(4).

[16] Leave is required to commence an action advancing secondary market claims: s. 140.8 of the *Sec. Act*. The test is as follows:

> **140.8** (1) No action may be commenced under section 140.3 without leave of the court granted upon motion with notice to each defendant.
>
> (2) The court may grant leave only where it is satisfied that
>
> (a) the action is being brought in good faith, and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> (3) Upon an application under this section, the plaintiff and each defendant must serve and file with the court one or more affidavits setting forth the material facts upon which each intends to rely.
>
> (4) If an affidavit is filed with the court, a person who made the affidavit may be examined on it in accordance with the Supreme Court Civil Rules.

> (5) A copy of the application for leave to proceed and any affidavits filed with the court must be sent to the commission when filed

[17] As observed in the *Walker RFJ*, the gatekeeping function of the leave requirement is important to weed out claims that have little prospect of success:

> [43] In *Tietz SC 186*, Justice Wilkinson explained that the requirement for leave under the Sec. Act, which is similar to securities legislation in Québec and Ontario, is "a robust screening mechanism which requires the plaintiff to show that there is a reasonable or realistic chance that the claim will succeed." She found the reasons of the Supreme Court of Canada in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 at para. 39, discussing the leave requirement in Ontario's securities legislation, informed the leave requirement in the Sec. Act. Her comments below are instructive for the Ds&Os' application to strike the secondary market claim portions of the ANOCC:
>
> > [12] Leave of the court is not a formal or nominal requirement. It is a robust deterrent screening mechanism which requires a plaintiff to show that there is a reasonable or realistic chance that the claim will succeed. The leading authority setting out the test for leave is *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18. *Theratechnologies* considered the test for leave in the context of the Quebec securities legislation. This test has since been applied in the context of the Ontario securities legislation: *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras. 122, 212. At para. 39 in *Theratechnologies*, Justice Abella, writing for a unanimous Court, explained:
> >
> > > [39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success - and the time and expense they impose - are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.

> [13] Because of the similarities between the wording in the Quebec and Ontario legislative provisions and their legislative histories and those of British Columbia, I am persuaded that the test for leave set out in *Theratechnologies* is equally applicable to the leave provisions under the *Act* in British Columbia.

See also *Tietz SC 2275* at paras. 19-20, 49-56.

[Emphasis in original]

THE PETITIONER'S SECONDARY MARKET CLAIMS

[18] The petitioners' proposed secondary market claims are described in the amended petition and are also contained within a draft NOCC attached to the petitioners' argument in Schedule "A".

[19] The "Overview" of the claim in the proposed pleading and the defined "Misrepresentation" (para. 1) is as follows:

> This action alleges that the disclosure documents of [Pure Gold] issued between March 31, 2021 and March 28, 2022, inclusive ("Class Period") contained a misrepresentation in that:
>
> a) they affirmatively misrepresented that PureGold's sole material project, PureGold Mine, was capable and on track to achieve full production capacity and sustainable production which, during the Class Period, it was not; and/or
>
> b) they omitted to disclose that:
>
> i. PureGold Mine suffered from severe mining planning and operational challenges, which resulted in a persistent shortage of access to high-grade ore; and
>
> ii. PureGold faced an existential liquidity crisis;
>
> (hereinafter, the "Misrepresentation").

[20] The petitioner alleges that the "Misrepresentation" was contained in six documents, which for these purposes can be collapsed into four documents (with some minor edits and a highlighted issuance date), as follows (collectively, the "Documents"):

1. **Documents #1/2**: Pure Gold's MD&A for the fiscal year ending December 31, 2020, released and filed on SEDAR on March 31, 2021, together with the accompanying Certifications of Annual Filings (the "March 2021 Annual Disclosure").

(The statements in the March 2021 Annual Disclosure are alleged to have been confirmed as true in a Final Short Form Prospectus dated April 28, 2021);

2. **Document #3**: Pure Gold's MD&A for the first quarter 2021 ending March 31, 2021, released and filed on SEDAR on May 14, 2021, together with the accompanying Certifications of Interim Filings (the "May 2021 Disclosure");
3. **Documents #4/5**: Pure Gold's MD&A for the second quarter 2021 ending June 30, 2021, released and filed on SEDAR on August 13, 2021, together with the accompanying Certifications of Interim Filings (the "August 2021 Disclosure").

   (The statements in March 2021 Annual Disclosure and August 2021 Disclosure are alleged to have been confirmed as true in a Final Short Form Prospectus dated September 21, 2021); and
4. **Document #6**: Pure Gold's MD&A for the third quarter 2021 ending September 30, 2021, released and filed on SEDAR on November 12, 2021, together with the accompanying Certifications of Interim Filings (the "November 2021 Disclosure").

[21] Further, in the proposed pleading, the petitioner sets out specific "representations" that are said to be found in the Documents, which are also alleged to be false or misleading and amount to the defined "Misrepresentation" (which are discussed in more detail below).

[22] Finally, the petitioner alleges that Pure Gold issued a corrective disclosure on March 28, 2022 when a news release was posted on SEDAR titled "PureGold Mine Operations Update and 2022 Corporate Outlook".

[23] The petitioner points to what she says was the ensuing plummeting of Pure Gold's share price after the corrective disclosure on March 28, 2022.

ISSUES

[24] The arguments of the parties raise the following issues:

a) What evidence is admissible on this leave application or, if admissible, for what purpose?

b) Has Ms. Larouche satisfied the specific leave requirements under s. 140.8 of the *Sec. Act*, including:

   i. Is there a cause of action and is the proposed claim brought in good faith?

   ii. Is there a reasonable prospect the action will succeed, based on:

      a. The pleading and evidence issues?; and/or

      b. The limitation issue?

c) If leave is granted, should it be granted *nunc pro tunc*?

EVIDENTIARY ISSUES

[25] As above, s. 140.8(3) of the *Sec. Act* provides that the applicant/petitioner seeking leave *must* "serve and file with the court one or more affidavits setting forth the material facts upon which [she] intends to rely". If any such affidavits are filed, s. 140.8(4) allows the responding party to cross-examine the affiant.

[26] PGM takes the position that Ms. Larouche has failed to file any or sufficient evidence in this proceeding to establish the leave requirements under s. 140.8.

i) What is the "Evidence"?

[27] The petitioner seeks to rely on a number of affidavits in support of her leave application that have not been filed in this proceeding (after abandoning any reliance on some affidavits that are before me). The affidavits upon which the petitioner seeks to rely include many, if not most, of the affidavits filed in the Class Action Proceeding that were before Walker J. at the earlier hearing, being:

a) The Affidavit of Linda Larouche affirmed June 28, 2024 (the "Larouche Affidavit");

b) The Affidavits #1, #3 and #4 of Taek Soo Shin, affirmed April 3, May 13 and June 26, 2024 respectively:

i. Affidavit #1 refers to Pure Gold's corporate filings in 2022 (including what is termed the "corrective disclosure") and later filings in the *CCAA* proceedings including an affidavit of Pure Gold's representative and a monitor's report;

ii. Affidavit #3 refers to emails to the petitioner's counsel from various persons and WRLG's press releases from September 2023 and April 2024; and

iii. Affidavit #4 attaches various 2024 emails from unidentified persons to petitioner's counsel, a YouTube video transcript, a WRLG press release in June 2024 and evidence of share prices in 2021-2022; and

c) The Affidavit #1 of Yiota Petrakis affirmed April 8, 2024 which attaches the Documents (and other documents) and which are said to contain the "Misrepresentation" (the "Petrakis Affidavit").

(collectively, the "Class Action Affidavits").

[28] The petitioner has filed only three affidavits in this proceeding:

a) Affidavit #1 of Teresa Closs, affirmed December 18, 2025 (the "Closs Affidavit") (which I am told simply repeats the evidence in the Affidavit #1 of Ms. Closs affirmed January 17, 2024 filed in the Class Action Proceeding and which is not relied upon on this application);

b) Affidavit #1 of Mr. Shin affirmed March 14, 2025, in which Mr. Shin simply states that the petitioner "shall rely" on the Class Action Affidavits on the leave application; and

c) Affidavit #2 of Mr. Shin affirmed February 13, 2026 attaching various emails regarding cross-examination on affidavits.

[29] PGM has filed two affidavits in this proceeding, being an affidavit attaching correspondence between counsel in the November-December 2024 timeframe regarding the evidence issue and another affidavit attaching certain uncontroversial documents from the proceedings.

ii) Which of the "Evidence" is Admissible and if so, for what purpose?

[30] PGM asserts that, since none of the Class Action Affidavits have been filed in this action, they cannot be considered on this leave application. In particular, PGM asserts that the failure of the petitioner to file any affidavit is fatal.

[31] The petitioner seems to suggest that it was not mandatory that she file and serve any affidavits in this proceeding. She argues that it is perfectly acceptable to simply refer to affidavits filed in another proceeding (such as the Class Action Proceeding) or, at worst, that there is "no authority" disavowing adopting that procedure. Finally, she is accusing PGM of engaging in "procedural and technical maneuvering" in raising this issue.

[32] I do not agree. The starting (if not ending) point is found in s. 140.8(3) of the *Sec. Act*, which *requires* that the plaintiff serve and "file" with the court one or more affidavits setting forth the material facts upon which she intends to rely.

[33] PGM cites two authorities that confirm what can almost be considered a common sense proposition – namely, that the evidence upon which a party seeks to rely must be filed in the proceeding to which that evidence relates.

[34] The issue was considered somewhat tangentially in *Ecoasis Developments LLP v. Sanovest Holdings Ltd.*, 2024 BCSC 635 in the context of whether the evidence adduced in another action that was not ordered to be tried at the same time would be allowed in the three joined actions. Associate Judge Nielsen refused that relief, accepting the respondents' submission at para. 22 that there was "no independent rule or jurisprudence which allows a party to wholesale import evidence from one action to another".

[35] There are, of course, means by which evidence introduced in other proceedings can be "imported" into another action. Firstly, the parties can agree on that procedure. Secondly, the court can order that relief when actions are joined or consolidated for trial. Thirdly, a common procedure is to have the original affiant attach a copy of their affidavit to a new affidavit in the proceeding and swear or affirm that its contents are true.

[36] None of those means were employed here where Mr. Shin simply refers to relying on the listed Class Action Affidavits, many of which are not even his own affidavits.

[37] In *Dang v. Canada (Attorney General)*, 2025 BCSC 1143 [*Dang*], Justice Giaschi addressed whether a person simply attaching other affidavits was the proper procedure on a certification application. Giaschi J. pointed that such evidence would be presumptively inadmissible as hearsay if tendered for the truth of its contents unless it was demonstrated that attaching that evidence was both necessary and had a sufficient threshold reliability (para. 71).

[38] In *Dang* at paras. 81–84, the Court rejected this evidence generally since it arose from an improper procedure and was inadmissible and, in any event, was not accompanied by any explanation as to why it was necessary to do so (citing in part *Tietz SC 810* at paras. 23, 28–29).

[39] Accordingly, even if Mr. Shin had simply attached the Class Action Affidavits to an affidavit filed in this action, that would not have been proper in terms of introducing that evidence in this proceeding without any explanation being provided. Since Mr. Shin appears to remain gainfully employed by the petitioner's counsel's law firm even now, his Class Action Affidavits could clearly have been replicated in this proceeding.

[40] Mr. Shin's Affidavits #1, 3 and 4 contain some publicly available documents, but many of those documents also contain inadmissible double, if not triple, hearsay. The petitioner seems to be suggesting that the statements in WRLG's press

releases are true. She also seemingly places considerable reliance on Chris Haubrich's affidavit in the *CCAA* proceedings (attached to Affidavit #1) and Gwen Preston's YouTube presentation (attached to Affidavit #4) where the petitioner seeks to rely on those statements for the truth of the statements (discussed in more detail below); however, that evidence is not properly before me on this application as even hearsay evidence and there is no explanation why it is not. More importantly, the circumstance of that evidence provides no context in which the reliability of those statements can be considered: *Dang* at para. 86.

[41] Similarly, in *Tietz SC 810* at paras. 24–25, the applicants seeking leave attempted to argue in favour of simply attaching to an affidavit other affidavits in support (there, from a person who gave evidence by affidavit in a proceeding before the BC Securities Commission (the "Commission")) resulting in hearsay and double hearsay. The applicants argued that it was not for the truth of the statement, but evidence of the record that was before the Commission to demonstrate what evidence would be available at trial. Justice Wilkinson rejected this argument, stating in part:

> [26] However, in my view, seeking to admit the evidence for that purpose is essentially seeking to admit the evidence for the truth of it. Otherwise, how else could I consider it as being the specific evidence that the petitioners will be able to obtain and submit as evidence at trial to prove their claims? It is clear from the Securities Commission's decisions what type of documentation and evidence they had before them. For the petitioners to try and put that specific material before me now in the form that they have placed it, that is, as double and triple hearsay, is simply not an acceptable form of admissible evidence.

[42] I acknowledge that the leave application is not for a final order and that hearsay is not presumptively inadmissible and may be properly considered on this application: *Tietz CA* at para. 89, cited in the *Walker RFJ* at para. 98. However, if such evidence is before the Court and not presumptively inadmissible, the Court must still approach such evidence on a principled basis, including considering necessity and reliability and whether the requirements of the *SCCR* (Rule 22-2(13)) are met: see *Dang* at paras. 71, 75–78, 86 and 90; *Tietz SC 810* at para. 33.

[43] The petitioner relies on *Lavictoire v. Schwarz*, 2025 BCSC 2565, where Justice Francis, as she then was, was considering whether to consider affidavit evidence from doctors in a summary trial relating to a will dispute where those affidavits had earlier been sworn and filed in a related committeeship proceeding. In that case, the affidavits had simply been included in the application record. At paras. 54–55, the Court concluded that this evidence was admissible as "other evidence" under Rule 22-1(4)(e), citing that the affidavits were authentic and properly sworn.

[44] In my view, *Lavictoire* does not assist the petitioner here. The Court did not consider *Dang* and the other cases cited in that case, such as *Carter v. Canada (Attorney General)*, 2011 BCSC 1371; *Leifso v. BevCanna Enterprises Inc.*, 2023 BCSC 579; and *Tietz SC 810*. In any event, no double hearsay issues arose in that case and the admission of that evidence was found to satisfy the principled exception relating not to necessity, but reliability (para. 65).

[45] The petitioner also points to *Tietz CA* at paras. 31–32 and 34 which addressed the admissibility of an affidavit—the Brusatore affidavit—which this Court (*Tietz v. Cryptobloc Technologies Corp.,* 2021 BCSC 190 [*Tietz SC 190*] at para. 33) had dismissed it as being inadmissible, since it had only been attached to another affidavit.

[46] The *Tietz SC 190* ruling in this Court regarding the Brusatore affidavit was overturned on appeal (*Tietz CA* at paras. 63, 85–89), but the decision was based on circumstances that do not exist here. Firstly, the Court of Appeal found that it was an admission against interest. Secondly, the affidavit had been sworn by Brusatore—a party—for the proceeding in question, but had not been filed, which is not the case here in respect of the Class Action Affidavits. As such, the Brusatore affidavit was found to be hearsay, but admissible based on a principled consideration of such evidence, including that it was probative of the issue (paras. 92–96).

[47] Finally, the petitioner refers to *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 13–14 for the proposition that evidence from one proceeding can be filed in another proceeding. This submission misses the point. The point here is that the

petitioner could have sought to introduce the Class Action Affidavits in this proceeding, but she did not. Simply referring to evidence in another proceeding is not sufficient.

[48] No explanation exists for the absence of Ms. Larouche's evidence in this proceeding, let alone any sworn or affirmed evidence that the contents of the Larouche Affidavit are true. I fail to see how Mr. Shin can indirectly introduce her evidence via the Larouche Affidavit—including by simply stating that it would be relied upon—since he does not purport to have any knowledge as to her statements in that affidavit: *Dang* at para. 85.

[49] The Petrakis Affidavit attaches the Documents, which are Pure Gold's public filings. I do not understand PGM to advance considerable objection to that evidence (similarly, Mr. Shin's Affidavit #1 in the Class Action proceeding attaches this type of document at Exhibits "A"-"G").

[50] This is not the case where, for example, a self-represented party is trying their best to follow proper procedure, but fails to do so because of inexperience and the Court affords some accommodation in that respect. The petitioner has counsel who is experienced in litigating before BC's courts. During argument, the petitioner's counsel vaguely suggested that these affidavits were not filed because of "economic" reasons, yet no details were provided and it is difficult to see that this argument has any merit in any event.

[51] I do not agree with the petitioner that this failure to follow proper procedures has no consequences. I agree that PGM's counsel was technically aware of the Class Action Affidavits by reason of their prior retainer in the Class Action Proceeding (albeit not for PGM who was not a party). However, that circumstance does not excuse a failure by counsel to abide by proper procedures by filing that evidence in this proceeding if the petitioner wished to rely on them.

[52] For the most part, the petitioner argued that PGM is obstreperous in advancing this objection where it had failed to identify any prejudice since they had notice of the Class Action Affidavits all along.

[53] In November 2024, the petitioners' counsel asked if PGM's counsel wished to cross examine any of his affiants, pursuant to s. 140.8(4) of the *Sec. Act*. The answer was no, with respect to any cross-examination in the petition proceedings. I accept that PGM's response was based on its continued position that the Class Action Affidavits were inadmissible. It would have been inconsistent to seek to cross-examine on this evidence in that event.

[54] In December 2024, PGM's counsel restated to petitioner's counsel that he had not delivered any supporting evidence regarding the leave application since he could not rely on the Class Action Affidavits, which had filed in a separate proceeding. The response of petitioner's counsel was to question why this point was raised and contend that no prejudice arose as a result. With respect, this turned the onus onto PGM to address the matter, rather than the petitioner explaining why she chose this route.

[55] In summary, to endorse the approach of the petitioners on this issue is to endorse a completely unprincipled basis upon which to allow the Class Action Affidavits to be "admitted" for the purpose of this application. These Affidavits have not been filed in this proceeding and are not admissible. Even if they were before the Court attached to another affidavit, they are replete with inadmissible hearsay without any explanation that would justify their admission on a principled basis.

[56] Accordingly, none of the Class Action Affidavits are to be considered on this application, save for the publications issued by Pure Gold (the "Documents"), which are attached to the Petrakis Affidavit.

[57] I have considered whether to exercise my discretion to adjourn this application to allow the petitioner to place the evidence in the Class Action Affidavits

properly before the Court to allow this application to be considered in light of that evidence.

[58] In my view, that is not appropriate. The petitioner and her counsel were given ample notice of this issue and ample time to correct it. They did not. An adjournment of this application will result in further delay and cost, where there has already been considerable delay and cost, even from October 2024, when the *Walker RFJ* was released. In all the circumstances, it is not in the interests of justice to delay the matter further.

LEAVE REQUIREMENTS

[59] The petitioner must provide evidence that she has a reasonable possibility of success at trial with regard to each allegation of misrepresentation.

[60] As set out in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18:

> [38] … the threshold should be more than a "speed bump", and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.
>
> [39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success - and the time and expense they impose - are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.
>
> [Emphasis added.]

[61] *Lundin Mining Corp. v. Markowich*, 2025 SCC 39 [*Lundin Mining*] provides a more recent analysis of the leave requirement for secondary market claims. Key points from *Lundin Mining* in the context of this application include:

a) Disclosure of information to investors is an important statutory goal of securities legislation that helps maintain a “level playing field” between investors and issuers and promotes the efficiency of capital markets (paras. 34–37);

b) A leave application involves “a preliminary merits test” which involves the petitioner offering both a plausible analysis of the applicable legislative provisions, and some “credible evidence in support of the claim”. The Court is expected to “undertake a reasoned consideration of the evidence to ensure that the action has some merit” without lapsing into a “mini-trial” (paras.106–107);

c) An application of the test “is more stringent than the test for authorization or certification of a class action” and it “calls for ‘a qualitative evaluation of the proposed action’”, which “must have more than a mere possibility of success … There must be a ‘reasonable or realistic chance that the action will succeed’”. The test represents “a relatively low merits-based threshold’ that does not require proof on the balance of probabilities that the action will succeed at trial” (paras. 109–110); and

d) Given that only the petitioner has offered evidence here, the petitioner’s evidence must not only be “credible”, but also “sufficient” to demonstrate a realistic or reasonable chance that the action will succeed at trial. The Court may engage in a limited weighing of the evidence considering both the credibility and reliability of that evidence. The Court must be mindful that the petitioner has not had the benefit of documentary production or oral discovery and, as a result, the court must, to some extent, consider evidence that is not before the court (paras. 111–114).

[62] The petitioner bears the onus of satisfying the leave requirements under s. 140.8: *Tietz SC 2275* at para. 36.

[63] The petitioner argues that the claim advanced is “typical” of secondary market claims which have been accepted by the courts. She argues that the record is “clear” from the evidence presented at this hearing that there were “existential deficiencies” in planning and liquidity that caused the collapse of Pure Gold.

[64] The petitioner further argues that PGM has not presented any evidence to contradict or challenge that evidence. Yet, PGM bears no onus at this hearing, and in my view, nothing can be taken by the fact that PGM did not present any contrary evidence to challenge the petitioner’s claims: *Tietz SC 2275* at para. 55.

[65] As discussed below, I have in the alternative addressed the leave issues even considering the Class Action Affidavits. Otherwise, the only admissible evidence filed by the petitioner is the Closs Affidavit, which does not satisfy the leave test for the reasons set out below.

a) Is there a cause of action / Is the proposed claim brought in good faith?

[66] Even if I had admitted the Larouche Affidavit (which I have not), there is no evidence to be found in it that Ms. Larouche, as the proposed representative plaintiff in the Class Action Proceeding, has a secondary market claim that is being brought in good faith. For obvious reasons, this argument could also legitimately be considered in terms of whether there is evidence of a reasonably successful claim under the second branch of the leave test.

[67] Section 140.8 requires that there be a reasonable possibility that the action will be resolved at trial in favour of *the plaintiff*. Failure to establish a right of action on a leave application is fatal: *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416 at para. 57; aff’d 2012 BCCA 456 [*Round BCCA*] at paras. 55–56.

[68] In para. 6 of her Affidavit, Ms. Larouche states that:

> During the Class Period [then March 2021-October 2022 per the ANOCC], I purchased 10,600 shares of PureGold based on the company's promises at the time that it was on track to bring its gold mine to operation and generate significant value for its investors.

[69] Ms. Larouche provides no evidence as to whether the purchased shares were acquired on the primary market or the secondary market, or both. The petitioner's counsel argues that this must be read in conjunction with the November 2021 Disclosure (Document #6) on p. 301 in terms of how Pure Gold was raising money through the issuance of share in 2021 (such as private placements). He suggests that "none of these apply" such that the only logical inference from that description in that document is that Ms. Larouche must have purchased shares on the secondary market.

[70] I do not find this argument persuasive. Firstly, counsel's statement is evidence, not submissions. Further, this argument involves many leaps of logic that are not appropriate or grounded in the evidence. It is not "credible evidence" that the petitioner has a right of action with respect to a secondary market claim: *Tietz SC 2275* at para. 56.

[71] Ms. Larouche's evidence also raises the possibility that, if she purchased Pure Gold shares on the secondary market, she did so *after* March 28, 2022 (and before October 2022) – in other words, after the current Class Period set out in the proposed claim.

[72] The petitioner also points to various emails by persons to her counsel's office expressing support and/or an interest in participating in the Class Action Proceeding. The authors of these emails are not identified and the contents of those emails are therefore unattributed hearsay and inadmissible (leaving aside that they are inadmissible as only being attached to Mr. Shin's Affidavits #3 and #4 filed in the Class Action Proceeding).

[73] Leaving aside the difficulties regarding the lack of evidence in the Larouche Affidavit, I would have found that the Larouche Affidavit does establish that she is seeking to bring the secondary market claims in good faith, based on her intention to

seek an economically viable remedy for the entire class and to promote accountability and integrity of the capital markets: *Tietz SC 2275* at paras. 50–51, 101.

b) Is there a reasonable prospect the action will succeed?

[74] PGM asserts that Ms. Larouche has failed to satisfy the leave requirements in that she has failed to provide a proper pleading of the proposed secondary market claim and she has not provided any, or alternatively, adequate, evidence to establish those requirements.

[75] Finally, PGM asserts that most of the claims are in any event statute barred, leading to the further conclusion that no reasonable prospect of success exists for those claims.

i. The Pleading and Evidence Issues

[76] As did counsel, I will address the pleading issue along with the evidentiary issues in terms of whether the petitioner has established that there is a reasonable prospect that the claim will succeed.

[77] In the *Walker RFJ*, Walker J. set out the well-known requirements for pleadings at paras. 50–58. I need not repeat any of what was set out, save to emphasize that particulars of misrepresentations must be stated in the pleading (para. 51(h) citing Rule 3-7(18)) and that material facts must be clearly pleaded (paras. 54–55).

[78] PGM emphasizes the critical nature of pleading material facts in support, supported by many comments found in *Qualcomm Incorporated v. Barroqueiro*, 2025 BCCA 65 at paras. 36, 102, 116, 121, 136, 143 and 148–150: that a defendant is not required to divine the claims being made against them or guess what they are alleged to have done; a plaintiff must plead material facts in sufficient detail to “tell the defendant who, when, where, how and what gave rise to its liability”; bare allegations that are incapable of proof and are based on speculation or assumptions are not material facts; the court will not infer facts from bald legal conclusions; and,

merely pleading the essential elements of a cause of action is insufficient; material facts need to be pleaded to support those elements.

[79] PGM points to Walker J.'s comments in the *Walker RFJ* in terms of the deficiencies of the secondary market allegations, which by that time had been flushed out to some degree in the ANOCC:

> [71] The difficulty is that while allegedly misleading representations concerning PGM's alleged "severe cash and liquidity constraints" can, in a general sense, be gleaned from the ANOCC, the material facts concerning PGM's alleged operational deficiencies cannot, leaving the reader to wonder what constitutes all of the material facts supporting this aspect of the claim. I was told in oral submissions that at this juncture, Ms. Larouche is unable to identify the precise nature of every operational deficiency until examinations for discovery are completed. Ms. Larouche correctly pointed out that material facts may be pleaded as they become known: see Rule 3-7(20). At present, what I can glean from reading the ANOCC is that PGM's operational deficiencies that should have been disclosed prior to or during the class period are that PGM lacked a proper "definition drilling program", commenced drilling at the wrong end of the mineral deposit, and failed to follow the recommendations set out in a technical report. According to the ANOCC, these deficiencies resulted in a persistent shortage of access to high-grade ore, adversely impacted production, and caused increased costs, all resulting in a liquidity crisis; all of which allegedly should have been disclosed.

[80] Walker J. also pointed to another pleading deficiency relating to whether there was one or multiple misrepresentations:

> [63] Compounding the confusion in Part 1 is that nothing is tied to liability for a misrepresentation in a prospectus, core document, document, or public statement provided for in the *Sec. Act.* Without an understanding of the provisions of the *Sec. Act*, the pleading appears to contain inconsistent allegations.
>
> [64] By way of example, para. 2 of Part 1 alleges that PGM's "disclosure documents" (which are undefined) issued during the relevant timeframe (March 31, 2021 – October 31, 2021, defined in the ANOCC as the "class period") contained "a misrepresentation". The reader is left with the impression that the claim concerns a singular misrepresentation. Yet, in the preceding paragraph of the ANOCC, the allegation is framed in the plural, stating the class proceeding "arises out of the Defendants' false and misleading statements and representations in the disclosure documents [also not defined] of [PGM] issued between March 31, 2021 and October 31, 2022, inclusive…"
>
> [65] Without more, these two paragraphs of Part 1 appear inconsistent and, upon reading the rest of the pleading, inconsistent with allegations

> elsewhere referring to false and misleading representations framed in the plural, thus offending the prohibition against inconsistent pleadings.

[81] Presumably, the petitioner has sought to correct the above issues in the proposed NOCC. She describes the “Misrepresentation” (defined in the “Overview”), but then goes on to set out other “representations” in the Documents, which are alleged to be “false or misleading and amounted to the Misrepresentation”. I can only assume that this way of pleading would allow the Court to possibly treat them all as a single misrepresentation as per the *Waker RFJ* at para. 36, citing s. 140.3(6) of the *Sec. Act*.

[82] There are pleading issues even with the “Overview” “Misrepresentation” found in para. 1 of the proposed pleading. It is questionable whether the allegation that there were “severe mining planning and operational challenges” is even a statement of fact, as opposed to opinion. The proposed claim does not identify specific “material facts” that were allegedly omitted from the disclosure, when they allegedly should have been disclosed, or why. For example, the proposed pleading does not even include the allegations about dilution or not knowing where to mine the ore, as were advanced orally before Waker J. (*Walker RFJ* at para. 71 above) and as are addressed to some degree in the Closs Affidavit. The allegation of an “existential” liquidity crisis is also a matter of opinion or judgment, as opposed to fact.

[83] The petitioner relies on *10010524 Manitoba Inc. v. Rosso*, 2025 BCSC 2282 for the proposition that a statement of opinion can amount to a misrepresentation claim. With respect, the statutory regime under the *Sec. Act* requires that the “misrepresentation” be a statement or omission of a “material fact”, not opinion. Further, this decision is distinguishable, in that the Court at paras. 36-37 concluded that there were in fact statements that could be construed as statements of past or existing facts rather than opinion.

A. The Documents

[84] The petitioner’s counsel’s submissions did not address the alleged false or misleading statements in the Documents (paras. 12–26 of the proposed pleading) by

a review of the Documents themselves, either from the point of view of pleading requirements or the evidence.

[85] PGM's counsel did address the pleadings in relation to the Documents in detail and the results summarized below are telling.

Documents #1/2:

[86] The petitioner pleads (para. 13) that the March 2021 Annual Disclosure was false and misleading in various respects:

a) that "several construction and exploration steps" had been completed by December 2020 (para. 13), but there is no pleading of the material facts to state what had not been completed; and

b) that it was "trending positively toward achieving commercial production", which was expected in the second quarter of 2021, when no such statement can be found in the document. Even so, there are no material facts set out as to why this was untrue.

[87] The pleading (para. 14) alleges that Pure Gold's management was affirmatively observing that operations were "trending positively toward reaching design capacity, including by reference to "ongoing production at a steady or increasing level" including by way of "mineral recoveries achieving the expected production level".

[88] In fact, the document stated that Pure Gold was ramping up production until declaring commercial production, which was expected in the second quarter of 2021, a declaration that was to be based on reaching certain milestones or factors indicating an appropriate operating capacity. The pleading (para. 14) misrepresents those factors as representations of fact that were untrue.

[89] In addition, the March 2021 Annual Disclosure clearly refers to issues that the petitioner alleges were omitted. The document refers to gold production during the first quarter of 2021 not meeting expectations, including from "dilution" (upon which

Ms. Closs comments). As a direct result of the shortfall in gold production, Pure Gold said that it faced “short-term liquidity issues”. Pure Gold said that these operational issues in early 2021 meant there was a need for additional liquidity and that it was seeking out financing.

[90] The Final Short Form Prospectus dated April 28, 2021 (Document #2), which confirmed the facts in the March 2021 Annual Disclosure (Document #1), also further confirmed that Pure Gold expected to continue to incur losses in seeking to reach commercial production and that gold production had not met expectations in early 2021. The document also included cautionary language that there was no assurance that even reaching commercial production would avoid further problems resulting in unprofitable operations and the need for further funds.

[91] In summary, the pleading utterly fails to state what material facts (as opposed to opinion) in this document are alleged to have been untrue and material to the market. The pleading itself contains a misrepresentation of what the document actually says. Finally, the pleading ignores clear references to matters in the document—such as operational issues, shortfalls in gold production and liquidity issues—that the petitioner says were “omitted”.

Document #3:

[92] The petitioner’s pleading in relation to the May 2021 Disclosure invites similar comments as above.

[93] There is an allegation (para. 21) that Pure Gold said it had achieved “significant operational improvements” including “significant improvements in grade and tonnes mined and milled”. Those statements in Document #3 are alleged to be false, but there are no details or material facts about how they were false.

[94] The pleading (para. 22) about completing “construction and exploration steps” at the mine seems to be a repetition of what was stated in relation to Document #1 (para. 13) and appears to have been included in error.

[95] Paragraph 23 of the pleading is a repetition of what was stated in para. 14 in relation to Document #1 and is also a misrepresentation as to the substance of what is stated in Document #3. In Document #3, Pure Gold states that it would continue to ramp up production toward commercial production, and the pleading again misrepresents the factors that bear on that ultimate assessment as statements of fact that are untrue.

[96] In fact, in this document, Pure Gold refers to gold production in the first quarter of 2021 as not meeting expectations, including from dilution. Pure Gold also states that as a result, it was accessing low-grade stockpiles to use (as was commented upon by Ms. Closs in her affidavit).

[97] Also, Pure Gold clearly refers to having short-term liquidity issues at this time.

Documents #4/5:

[98] Pure Gold's August 2021 Disclosure included reference to declaring commercial production on August 1, 2021. The following statement was also made:

> … PureGold Mine was determined to be substantially complete and ready for its intended use; had the ability to sustain ongoing production at a steady or increasing level with the ability to operate at its design capacity; had mineral recoveries at expected production levels and; had several months of testing of the mine plan and equipment, completed.

[99] However, the pleading (para. 27) baldly asserts that these statements were false or misleading. There is no pleading of any material fact as relevant to why those statements were false or misleading. As I will discuss below, there is also no evidence on that point.

[100] The August 2021 Disclosure also clearly warns that if its forecasted production targets were not met, Pure Gold could face short-term liquidity issues and would need to raise additional funds. They included a further comment that there was no guarantee that cash on hand and revenues would be sufficient to meet obligations for at least the next 12 months. Finally, Pure Gold referred to seeking additional financing although there were no assurances that this would succeed,

leading to “material uncertainties” casting doubt on its ability to continue to meet its obligations.

[101] The statements in the March 2021 Annual Disclosure (Document #1) and August 2021 Disclosure (Document #4) are alleged to have been confirmed as true in a Final Short Form Prospectus dated September 21, 2021 (Document #5). This Prospectus also clearly stated that Pure Gold had negative cash flow from operations and that it had significant cash requirements to meet its exploration and development commitments, and other cash needs.

Document #6:

[102] The pleading in relation to Pure Gold’s November 2021 Disclosure is curious. Similar to the mistakes regarding Document #3 (paras. 22 and 23), the only alleged misrepresentation (para. 34) is just a repetition of what was alleged in para. 27 in relation to the August 2021 Disclosure (Document #4) (and reproduced in the quote above). No such statements are found in this document.

[103] No other allegations are found in the pleading in relation to Document #6.

[104] To the contrary, Pure Gold reported that ore milled and gold production were “both significantly below plan” leading to lower ore totals and issues with unplanned dilution.

[105] Further, Pure Gold reported on its finances, including its ongoing losses. As it did in August 2021 (Document #4), Pure Gold included a further comment that there was no guarantee that cash on hand and revenues would be sufficient to meet obligations for at least the next 12 months. Finally, Pure Gold referred to seeking additional financing although there were no assurances that this would succeed, leading to “material uncertainties” casting doubt on its ability to continue to meet its obligations.

[106] In summary, there is little, if any, any support in the Documents for the petitioner’s “Overview” allegation that Pure Gold misrepresented that the mine was

"capable and on track to achieve full production capacity and sustainable production which, during the Class Period [March 2021-March 2022], it was not". The proposed pleading, to the extent that it provides any material facts, does not even make any reference to what counsel advised Walker J. as being the alleged deficiencies (*Waker RFJ* at para. 71) – being that "PGM lacked a proper 'definition drilling program', commenced drilling at the wrong end of the mineral deposit, and failed to follow the recommendations set out in a technical report".

B. The Corrective Disclosure

[107] The petitioner alleges that Pure Gold issued a "corrective disclosure" on March 28, 2022. The petitioner describes key aspects of the alleged corrective disclosure as:

> In 2021, the milling facilities at the PureGold Mine demonstrated capability of operating consistently and reliably at and above the design capacity of 800 tdp on multiple occasions. The regulatory process to increase the permitted mill capacity to 1000 tpd is well advanced. Despite strong performance, gold production at the Puregold Mine in 2021 fell short of design capacity due to challenges in maintaining access to enough high-confidence, high grade stopes to provides high-grade ore to the mill. A persistent shortage of high-grade ore from underground resulted in less than full utilization of the mill and at various time led to blending of low-grade development material and stockpiles which also reduced the overall feed grade to the mill. …
>
> …
>
> At the date of this news release, the Company's cash balance is approximately $9 million. The Company expects it will need to seek additional financing in the next 30 days to fund operations and to service the interest on its debt. … If such additional financing is not received in the short term, PureGold will not be able to meet its obligation s as they become due resulting in a default under its debt obligations.
>
> [Emphasis added.]

[108] In *Tietz SC 2275* at para. 42, the Court adopted a set of characteristics or criteria from Ontario to determine if there had been a "corrective disclosure":

> (i) There must be some linkage or connection between the alleged misrepresentation and the alleged public correction;
>
> (ii) The public correction must share the same subject matter and, in some way, relate back to the misrepresentation;

> (iii) The public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact, or an omission to state a material fact [though it need not specifically identify them].

[109] The petitioner argues strenuously that the sharp drop in the market price of Pure Gold's shares is evidence of the materiality of the facts in the corrective disclosure, citing *Miller v. FSD Pharma, Inc.*, 2020 ONSC 4054 at para. 69; *Gowanlock v. Auxly Cannabis Group Inc.*, 2021 ONSC 4205 at paras. 39–40; and *Dziedziejko v. Canopy Growth*, 2025 ONSC 6766 at paras 81–82.

[110] The petitioner also argues that the logical inference is that the corrective disclosure "corrected" what was misrepresented or omitted in the earlier disclosure in the Documents.

[111] I agree that materiality can possibly be established as a matter of common sense: *Tietz CA* at para. 150.

[112] Yet the above issues—that the mine was falling short of gold production capacity in 2021 and that Pure Gold had short-term liquidity issues—were both reported throughout 2021 in the Documents. In that sense, no "common sense" connection arises with respect to the market drop in late March 2022.

[113] PGM places significant reliance on the decision in *MM Fund v. Americas Gold and Silver Corp*., 2022 ONSC 6515 [*MM Fund*].

[114] *MM Fund* bears a striking resemblance to the fact in this case. Americas Gold raised significant funds while excavating for gold in Nevada. An investor sued Americas Gold alleging a secondary market claim for misrepresentation in certain prospectuses that ultimately led to a May 2021 press release that disclosed difficulties in production, similar to what is alleged here:

> [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".

[115] As experienced by Pure Gold in March 2022, there was a significant market correction in the Americas Gold share price after the May 2021 press release. Justice Morgan in *MM Fund* makes the important point—equally applicable here—that a share drop alone does not logically itself lead to the result that a misrepresentation occurred:

> [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.
>
> …
>
> [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.
>
> [Emphasis added.]

[116] Similarly, Pure Gold's March 28, 2022 press release—said to be the "corrective disclosure"—does not speak for itself. The petitioner must provide the material facts that she says existed at the time of the issuance of the Documents, but were not disclosed – or what material facts were positively misrepresented in the Documents.

[117] As Morgan J. stated in *MM Fund*, the relationship between the Documents and the "corrective disclosure" is not apparent to the Court without expert evidence on matters of mining:

> [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.
>
> [Emphasis added.]

[118] In this case, the Documents are replete with technical mining terms—such as the word "stopes"—that are not accompanied by any evidence as to their meaning. The petitioner argues that this case has nothing to do with "stopes"; however, this term is used regularly in the Documents in relation to discussions of production issues, including dilution. In that sense, to the extent that the petitioner alleges that the Documents contain misrepresentations in relation to mining operations and mine plans, the Court is completely in the dark as to how to relate the statements in the Documents to what is said to be the corrective disclosure, without expert evidence on that matter.

[119] Here, the proposed pleading provides no material facts as to what "severe planning and operational challenges" were present over the Class Period and what material facts are relied upon in asserting an "existential liquidity crisis"—both of

which are alleged to have been omitted in the Documents—and which can be "linked" or "relate back" to what is stated to be the "corrective disclosure".

[120] In summary, there is an insufficient basis for the petitioner's argument that the alleged corrective disclosure stands as evidence of the "Misrepresentation" described in the proposed pleading.

C. The Evidence

[121] Leaving aside the question of whether the Documents support the allegations in the pleadings, there are many issues concerning the evidence asserted by the petitioner as supporting her claim.

[122] Even accepting the evidence of Mr. Shin in the Class Action Affidavits, the evidence to which the petitioner refers largely relates to the circumstances post-March 2022, consistent with the "backward reasoning" discussed and disapproved of in *MM Fund*:

a) October 2022: after unsuccessfully seeking out a potential sale or investment solution from July-September 2022, in October 2022, Pure Gold announced that it was suspending operations and placing the mine on care and maintenance. Pure Gold cited reasons for doing so, being low cash balances, a working capital deficit and inability to obtain further financing. Days later, Pure Gold filed under the *CCAA*;

b) May 2023: the monitor in the *CCAA* proceedings filed its Sixth Report commenting on the second sales process that it undertook throughout Spring 2023. The monitor ultimately advanced a sale of the mining assets and tax attributes to WRLG pursuant to a RVO as the best available in the circumstances;

c) June 2023: Pure Gold's shares were delisted on the TSX;

d) September 2023: the CEO of WRLG sent a communication to its shareholders stating in part that:

> The previous operator was under-capitalized. Debt repayment obligations forced the company into a quick-to-cash-flow mine model that was ultimately expensive and inefficient.

e) April 2024: WRLG issued a press release reiterating the above statement in September 2023 and adding that it "[led] to sub-economic production";

f) April-June 2024: various emails from unidentified persons to the petitioners' counsel providing "commentary" and seemingly providing support for a class action proceeding;

g) June 2024: a transcript of an interview with Gwen Preston, Vice President of Investor Relations at WRLG, that was posted on YouTube. Ms. Preston refers to speaking to various former employees of Pure Gold who reflected their "experience" and that there was "mismanagement" and that they did not drill properly; and

h) June 2024: a WRLG press release that also commented on Pure Gold's lack of a proper drilling method that led to "dilution" and lack of "operating expertise".

[123] The petitioner argues that the materiality of the disclosure in March 2022 is supported by the above circumstances, arising from:

> … the actual impact of the underpinning facts and circumstances on PureGold's business and operations, which collapsed and ultimately filed for insolvency, and its assets were acquired at a tiny fraction of their reported fair market value

[124] This is not a persuasive argument. I agree that Pure Gold did not fare well in the time leading up to the *CCAA* filing in October 2022, although the documents before me indicate that Pure Gold was wholly unsuccessful in obtaining any further financing to continue its operations including after March 2022. However, the lack of financing or challenges to obtain financing had been highlighted in most, if not all, of the Documents as a potential issue that could affect operations. It was not suddenly disclosed in March 2022 when the "corrective disclosure" was made. I do not agree

that I can infer the materiality of the impugned statements to the market as a result of events that occurred months, if not years, afterward as a matter of common sense.

[125] The petitioner also refers to the monitor's sixth report dated in May 2023 in the *CCAA* proceedings as supporting that a misrepresentation existed in the Documents. Her counsel argues that the monitor concluded that Pure Gold had no value as a viable and sustainable mining operation, however, the report says no such thing. Further, I fail to see any linkage or relevance between the results of a sale process undertaken in insolvency proceedings years after the Documents were issued to any statements or omissions in the Documents, in terms of supporting that the Documents contained any misrepresentation. There may be any number of reasons why there was little interest in Pure Gold's assets in 2023 that arose through that process, and those may be completely unrelated to the petitioner's allegations about planning and operational difficulties years prior in 2021.

[126] Perhaps the most compelling direct and contemporaneous evidence advanced by the petitioner is found in the affidavit of Pure Gold's Vice President of Business Development and Chief Financial Officer, Chris Haubrich. As above, this affidavit is not properly before me in the evidence since it was merely attached to one of Mr. Shin's affidavits in the Class Action Proceeding, and neither was filed in this proceeding.

[127] In any event, Mr. Haubrich's affidavit was filed in the *CCAA* proceedings in October 2022. He referred to the mine facing "significant operational challenges in 2021", that gold production fell materially short of feasibility and design capacity and that costs were significantly higher than forecast, which resulted in Pure Gold consequently facing "significant short-term liquidity challenges". Contrary to what is asserted by the petitioner, Mr. Haubrich does not say that any of this information was incorrectly reported to the market or omitted in the Documents and was only disclosed in March 2022. In fact, Mr. Haubrich's evidence is largely consistent with what is revealed in the Documents throughout 2021.

[128] Similarly, the petitioner's reliance on WRLG's documents and the statements of its representatives is misplaced. Her argument relies on a purely hindsight-based analysis, which I accept per *MM Fund* is not appropriate. Further, the statements of Ms. Preston and any author of the press releases are inadmissible hearsay where they relate the comments or opinions of others, and where there is no basis upon which to consider the reliability and credibility of their statements. This evidence is hardly reliable or admissible as unattributed hearsay (leaving aside the fact that this evidence is not properly before me).

[129] In addition, WRLG's and Ms. Preston's statements were made in circumstances where WRLG may have had any number of motivations to make those statements, including in relation to promoting their own prospects in the market. That WRLG were embarking on a planning process in 2023/2024 to open the mine does not translate into support for the proposition, as the petitioner alleges that, in 2021-2022, Pure Gold was not "capable and on track to achieve full production capacity and sustainable production" and that Pure Gold was not "suffering from severe mining planning and operational challenges".

[130] Ms. Closs in her Affidavit #1 filed in this proceeding says that in January 2021, when she started at Pure Gold, she noticed "planning and operational deficiencies" that negatively affected gold production. Ms. Closs states that Pure Gold did not have a proper plan to effectively access portions of the mine with high quality gold deposits, resulting in "dilution". She says this resulted in Pure Gold being unable to consistently extract high-grade ores from the mine to feed the mill, which adversely affected production. She says that by mid-2021, gold composition was so low that she was asked by management to work on an old muck pile in case it contained ores with better gold composition. She says that by Summer 2021, it was apparent to her that Pure Gold would experience a "serious setback" with respect to planned gold production at the mine. Finally, Ms. Closs refers to "operational and managerial shortcomings" that affected worker performance.

[131] However, in my view, Ms. Closs' evidence is questionable in terms of establishing a foundation for this claim. Ms. Closs was a former employee of Pure Gold who worked as a remote scoop operator (aka a "remote mucker"). In essence, she operated a remote control device to access ore and place it into a bucket, which was then loaded onto trucks which would then deliver the ore to the mill for processing. She provides no foundation for her views as to what Pure Gold was doing in terms of its operations and plans, its management expertise and its operating results, particularly given her own stated limited role in the operations.

[132] To the extent that Ms. Closs' affidavits are statements of fact—such as that there was "dilution" that negatively affected gold production—those facts were reported in the Documents (i.e., Documents #1 and #6).

[133] In addition, I agree with PGM's counsel that the Closs Affidavit contains opinion evidence, such as whether Pure Gold had a "proper" plan to operate and whether there were "operational and managerial shortcomings". Ms. Closs does not indicate any expert qualifications to provide evidence on these issues.

[134] I agree with PGM that Ms. Closs' evidence can hardly be described as lay opinion evidence: *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042 at paras. 16–18. Her conclusions cannot be said to arise from everyday inferences or ordinary experience arising from observed fact, in light of her very specialized role at Pure Gold (moving ore from a pile into a truck), particularly her statements about the failings of Pure Gold to have a "proper" mining plan and whether there were "operational and managerial shortcomings". To put it another way, there is no evidence that Ms. Closs had the experiential capacity to make the sweeping statements that she does. I agree with PGM that these are specialized and technical issues which would normally be supported by expert evidence.

[135] PGM cites *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686 at para. 22, where the court stated that expert evidence is not unusual on an application such as this. I agree that there may be circumstances where expert evidence is not necessary; however, the subject matter of the Closs Affidavit points in the direction

of expert evidence being required and no other evidence is before me in support of her statements.

[136] In summary, even if I had accepted the Class Action Affidavits are being admissible (which I have not) and even accepting the Closs Affidavit as admissible on this application, the petitioner has failed to adduce any or sufficient credible evidence to establish a reasonable prospect of success for her claims.

ii. The Limitation Issue

[137] PGM says that the most decisive reason why most of the allegations in the proposed claim have no merit is because they are statute barred.

[138] The petitioner says that any limitation issue is arguable and, in any event, should be left for resolution when the claim is heard on its merits. Her argument would have had greater strength if certain factual issues were yet to be determined at any trial, as relevant to the limitation issue. However, in this case, the facts as relevant to the limitation issue are uncontroversial. As such, in my view, it is appropriate to determine the limitation issue within the context of deciding whether those affected claims could reasonably succeed.

[139] Section 140.94 of the *Sec. Act* provides for a three-year limitation period in respect of a “misrepresentation” in a “document”, as alleged here:

> **140.94** (1) No action may be commenced under section 140.3,
>
> (a) in the case of a misrepresentation in a document, later than the earlier of
>
> (i) 3 years after the date on which the document containing the misrepresentation was first released, and
>
> (ii) 6 months after the issuance of a news release disclosing that leave has been granted to commence an action under section 140.3 or under comparable legislation in the other provinces in respect of the same misrepresentation,
>
> …
>
> (2) If an application is filed with a court under section 140.8, the limitation period under subsection (1) of this section is suspended on the date of the filing and resumes running,
>
> (a) if the court grants leave or dismisses the application and

> (i) an appeal of the court's decision has been filed, on the latest date that any appeals of the matter have been disposed of, or
>
> (ii) an appeal of the court's decision is not filed, on the date that the time to file an appeal of the decision expires, or
>
> (b) on the date that the application is abandoned or discontinued.

[140] The petitioner concedes that, arising from the *Walker RFJ*, the allegation of a secondary market claim without leave was a nullity and of no effect for limitation purposes: *Hayes Forest Services Ltd. v. Krawczyk*, 2005 BCCA 17 at para. 11. This was stated more forcefully in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [*Green*]. At paras. 8 and 48 of *Green*, the Court found that pleading an intention to seek leave does not amount to the assertion of a secondary market claim under the Ontario legislation or the commencement of a class proceeding for that statutory cause of action. I agree that this reasoning has equal force in BC.

[141] Both parties agree that the starting point under the *Sec. Act* is when leave was sought for the purpose of stopping the limitation clock. That starting point is therefore November 6, 2024, when the petition seeking leave was filed in this proceeding.

[142] Accordingly, under the *Sec. Act*, no cause of action arises in the period before November 6, 2021, which relates to Documents #1-5 that were issued in that timeframe and are alleged to include the Misrepresentation. The only document that was issued after November 6, 2021 was the November 2021 Disclosure issued on November 12, 2021 (Document #6).

[143] Nevertheless, the petitioner argues that the limitation period for a class proceeding under the *Sec. Act* was suspended as of the date of the filing of the NOCC (April 2022), arising from the *Class Proceeding Act*, R.S.B.C. 1996, c. 50 [*CPA*]. She therefore argues that it still remains open to her to advance the secondary market claims that arose before November 12, 2021 given that suspension, even through the allegations in the NOCC/ANOCC were declared a nullity.

[144] Limitation periods for class proceedings are addressed in s. 39 of the *CPA*. In addition, s. 38.1 of the *CPA* was added in 2004. Those sections (with headings) provide:

> **Limitation period for a cause of action not included in a class proceeding**
>
> **38.1** (1) If a person has a cause of action, a limitation period applicable to that cause of action is suspended for the period referred to in subsection (2) in the event that
>
> (a) an application is made for an order certifying a proceeding as a class proceeding,
>
> (b) when the proceeding referred to in paragraph (a) is commenced, it is reasonable to assume that, if the proceeding were to be certified,
>
> (i) the cause of action would be asserted in the proceeding, and
>
> (ii) the person would be included as a member of the class on whose behalf the cause of action would be asserted, and
>
> (c) the court makes an order that
>
> (i) the application referred to in subsection (1) (a) be dismissed,
>
> (ii) the cause of action must not be asserted in the proceeding, or
>
> (iii) the person is not a member of the class for which the proceeding may be certified.
>
> (2) In the circumstances set out in subsection (1), the limitation period applicable to a cause of action referred to in that subsection is suspended for the period beginning on the commencement of the proceeding and ending on the date on which
>
> (a) the time for appeal of an order referred to in subsection (1) (c) expires without an appeal being commenced, or
>
> (b) any appeal of an order referred to in subsection (1) (c) is finally disposed of.
>
> **Limitation periods**
>
> **39** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when any of the following occurs:
>
> (a) the member opts out of the class proceeding;
>
> (b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;

> (c) a decertification order is made under section 10;
>
> (d) the class proceeding is dismissed without an adjudication on the merits;
>
> (e) the class proceeding is discontinued or abandoned with the approval of the court;
>
> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
>
> (2) If there is a right of appeal in respect of an event described in subsection (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

[145] The petitioner relies on the heading of s. 38.1—"Limitation period for a cause of action *not included in a class proceeding*—to argue that the effect of s. 38.1 is to suspend the limitation period for any causes of action not included in any putative class action (whether because leave has not been obtained or otherwise) such that they may yet be added to the class proceeding *at any time prior to the actual certification*.

[146] Here, the petitioner filed an application for certification on July 4, 2024, however, not for the secondary market claims, which at that time were a nullity.

[147] In my view, the petitioner's argument is without merit.

[148] Firstly, the petitioner has not cited any authority to support such an interpretation of s. 38.1 of the *CPA*.

[149] Secondly, the heading of s. 38.1 is not part of the enactment and must be considered to be for editorial and reference purposes only: *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 11(1).

[150] Thirdly, I consider that such an interpretation flies in the face of the well-accepted reasons why limitation periods exist, including for the purpose of notifying a defendant that such a claim is being advanced and to allow a defendant to prepare a defence. As set out in *Green*:

> [57] This Court has generally recognized that limitation periods have three purposes known as the certainty, evidentiary and diligence rationales: *Novak*

> *v. Bond*, 1999 CanLII 685 (SCC), [1999] 1 S.C.R. 808, at paras. 64-67, per McLachlin J.; *M. (K.) v. M. (H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6, at pp. 29-31, per La Forest J. Limitation periods serve "(1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion": P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123.
>
> [Emphasis added]

[151] I fail to see how allowing any class action claimant to potentially wait until certification to suddenly disclose any further causes of action they are pursuing (and are authorized to pursue) sits well within these purposes. For example, how would any defendant know exactly what claims are being advanced in terms of marshalling evidence? How would this prompt claimants to bring forward their claims in a diligent manner?

[152] Again, it must be emphasized that the NOCC/ANOCC did not advance any secondary market claim as both were a nullity.

[153] Fourthly, PGM argues, and I agree, that ss. 38.1 and 39 of the *CPA* must be read in a harmonious manner to give effect to the Legislature's intentions. It is telling that the petitioner does not refer at all to s. 39 of the *CPA*, but rather seeks to isolate her interpretation of s. 38.1 from s. 39 completely.

[154] Section 39 of the *CPA* has existed since that legislation was enacted. As set out, it provides for a suspension of the limitation period once certification is granted until and if any of the events in (a)-(f) occur.

[155] Section 38.1 of the *CPA* was added in 2004. I agree with PGM that this provision fills a gap in the period of time leading to certification that was not otherwise addressed in s. 39. The obvious difficulty is that time could elapse after the commencement of the action and prior to a certification hearing, during which time class members could be prejudiced if causes of action become statute barred.

[156] I agree with PGM that the reasonable interpretation of s. 38.1 is that the suspension of a cause of action "asserted" in the class proceeding starts from the

commencement of the proceeding, *provided* that an application for certification is filed in the proceeding (s. 38.1(1)(a)).

[157] In addition, the suspension only arises if, under s. 38.1(1)(b)(i), it would be reasonable to assume that the cause of action would be certified because it was part of a proper pleading from the commencement of the action for which the certification was sought – in other words, "asserted" (*Green* at para. 53). For example, if the application for certification is brought, but it is not certified or the cause of action is not included in the certification, then s. 38.1(1)(c) and 38.1(2) operate to suspend the limitation period for that cause of action, which would allow any person to then file their own action and benefit from that suspension. If certification is granted, s. 39 of the *CPA* then further suspends the limitation period from that time.

[158] In that vein, in my view, to the extent that it is relevant, the heading of s. 38.1 really only refers to claims that are properly plead, but not yet certified pursuant to a filed application for certification, as not being "included" in a class proceeding.

[159] In my view, s. 38.1 of the *CPA* does not suspend the limitation period for claims that are not "asserted" in a class proceeding, such as the petitioner's secondary market claim in the NOCC/ANOCC, which was filed without leave and which was found to be a nullity. Only a properly filed application for leave to commence such an action could result in a suspension pending a filed certification application being considered.

[160] In conclusion, I find that the effect of s. 140.94 of the *Sec. Act* is a complete bar to any cause of action of the petitioner with respect to any document disclosure prior to November 6, 2021. To that extent, I cannot conclude that the petitioner has any reasonable prospect of success in advancing her claims with respect to the disclosures found in Documents #1-5, save for the last MD&A, being the November 2021 Disclosure (Document #6).

SHOULD ANY LEAVE BE GRANTED *NUNC PRO TUNC*?

[161] In the petition, the petitioner sought leave to be granted *nunc pro tunc* from April 4, 2022 (when the NOCC was filed), or such other date as would be appropriate. In argument, the petitioners' counsel seemingly resiled from seeking that relief, while also advancing reasons why it should be granted. PGM opposes any such relief if leave is to be granted.

[162] *Green* is a complete answer to any suggestion that a *nunc pro tunc* order should be granted for any cause of action that had expired by November 6, 2024. In *Green*, the Court refused to grant leave *nunc pro tunc* with respect to any claims that arose before the expiry of the limitation period (paras. 92, 110 and 111), a point that was reinforced in *Su v. Hougen Co. Ltd.*, 2025 BCCA 164 [*Su*] at para. 49.

[163] Granting a *nunc pro tunc* order in these circumstances would defeat the purpose of the limitation legislation in the *Sec. Act*: *Green* at paras. 93 and 100.

[164] In any event, even if any causes of action had not clearly expired, none of the circumstances here would support an exercise of the Court's discretion to save the petitioner from the consequences of decisions made in advancing this claim, having in mind the usual circumstances relevant to those issues: *Green* at para. 90, *Su* at para. 48.

[165] The petitioner asserts that prior to the release of the *Walker RFJ*, the practice in BC was "divided" in terms of whether a petition was required to seek leave or if a plaintiff could seek leave in an application in an extant proceeding. She points to *Tietz* where the parties agreed on the procedure and no issue arose. However, in *Tietz SC 2275*, leave was sought in a petition and the Court did grant it *nunc pro tunc* to the date of the filing of the allegations in the class proceeding based on there being no prejudice (unlike this case). No other case authority in support of this argument was provided.

[166] The *SCCR* that applies in terms of the proper procedure was or should have been well-known to the petitioner's counsel well before even the filing of the NOCC:

Walker RFJ at paras. 87–89. In addition, the petitioner would have been well aware of the *Green* decision from 2015 when the Class Action Proceeding was filed in April 2022, as it related to the consequences of simply asserting a secondary market claim in an extant proceeding without leave.

[167] The fact of the *CCAA* proceedings is also no excuse for not seeking leave well before now and through the proper procedure. Paragraph 15 of the initial order stayed any proceedings against Pure Gold; however, that stay could be lifted with the consent of Pure Gold and the monitor or by the Court. The petitioner did not seek either. Further, para. 16 of the initial order allowed the petitioner to file a petition to protect claims that might be barred by any limitation period, which was not done. In any event, the *CCAA* proceedings ended in August 2023.

[168] In early March 2024, the defendants' counsel specifically brought this issue to the attention of plaintiff's counsel and asserted that it was a nullity, which did not result in any action on the part of plaintiff's counsel to seek leave by filing a petition. Needless to say, if a petition had been filed then seeking leave, all of the Documents would be in play as having been issued within three years of that date. To that extent, even if it was an irregularity, the failure to seek leave properly was intentional and did not arise from any delay caused by the Court. It can hardly be said that PGM is attempting to preserve a "windfall limitation defence" in these circumstances, as the petitioner argues.

[169] Even after the issue was flagged to plaintiff's counsel, the proper procedures were not followed. Instead of filing a petition to seek leave, as required by the *SCCR*, and as asserted by the defendants, the petitioner prepared and served a notice of application in the Class Action Proceeding (to which the defendants objected). This is not a case where the petitioner was drawn into thinking that no objection to her chosen procedure would be made. The NOCC and ANOCC did alert the defendants to the fact that the petitioner would seek leave; however, it did not state how or when that leave would be sought. In fact, the defendants acted

promptly to identify the procedural error in early 2024 when the problem could have been fixed.

[170] In my view, the delay between March 2024-November 2024—when many of these claims expired under s. 140.94 of the *Sec. Act*—and the ensuing prejudice to any class member, can only be laid at the feet of petitioner's counsel. It was that counsel who undertook a flawed strategy, by ignoring the requirements under the *Sec. Act* and the *SCCR* after they were specifically pointed out to them: *Walker RFJ* at para. 114–115 and 118. Yet, counsel rolled the dice and lost, and only now seeks to backdate any leave to be granted, which would effectively excuse them from a failure to follow the proper procedure. This is similar to the discussion in *Green* at paras. 99–100 and 104, where the Court disapproved of rewarding the failings of counsel's specific litigation strategies by the use of a *nunc pro tunc* order.

[171] The comments of the Court of Appeal in *Su* are apt:

> [68] I am not persuaded by this submission. Limitation periods are part of the legal landscape. Their drastic effect can be avoided by the timely filing of applications and suits. As the judge outlined in her reasons, parties faced with the impending expiry of a limitation period have options to expedite applications for leave and to ensure they receive a decision in a timely way. *Nunc pro tunc* orders are to be used sparingly and cannot be assumed to be available to remedy delay in meeting statutory requirements.

[172] In argument, petitioner's counsel acknowledged that the only benefit to a *nunc pro tunc* order would be to defeat the legitimate arguments of PGM in terms of the limitation issue and the substantive legal rights that arise here: *Green* at para. 62. These circumstances are substantially different than those before the Court in *Tietz SC 2275* at paras. 366–368, where no prejudice arose from granting the order *nunc pro tunc*.

[173] In the above circumstances, in my view, even if leave was granted, it would be inappropriate to exercise my discretion to defeat any such arguments that PGM may advance based on any substantive rights obtained in that respect that arose solely through the petitioner's own delay.

DISPOSITION

[174] The petitioner's application for leave is dismissed. PGM is entitled to it costs on Scale B, payable after assessment or otherwise as may be agreed by the parties: *Round BCCA* at paras. 61–63.

"Fitzpatrick J."