

**CITATION:** Przybylska v. Gatos Silver, Inc., 2024 ONSC 87  
**COURT FILE NO.:** CV-22-00676682-00CP  
**DATE:** 20240105

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** IZABELA PRZYBYLSKA, Plaintiff

– and –

GATOS SILVER, INC., STEPHEN ORR, ROGER JOHNSON, PHILIP PYLE, TETRA TECH, INC., GUILLERMO DANTE RAMÍREZ-RODRÍGUEZ, KIRA LYN JOHNSON, THE ELECTRUM GROUP LLC, ELECTRUM SILVER US LLC, ELECTRUM SILVER US II LLC, BMO NESBITT BURNS INC., GOLDMAN SACHS CANADA INC., RBC DOMINION SECURITIES INC., CANACCORD GENUITY CORP. and CIBC WORLD MARKETS INC., Defendants

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Anthony O'Brien and Tyler Planeta*, for the Plaintiff

*Paul Martin and Sarah Armstrong*, for the Defendants, Gatos Silver, Inc., Stephen Orr, Roger Johnson, and Philip Pyle

*Tom Curry, Brian Kolenda, and Aoife Qujnn*, for the Defendants, Electrum Group LLC, Electrum Silver US LLP, and Electrum Silver US II LL

*Cheryl Woodin*, for the Defendants, Tetra Tech Inc., Guillermo Dante Ramirez-Rodriguez, and Kira Lyn Johnson

*Aoife Quinn*, for the Defendants, The Electrum Group LLC, Electrum Silver US LLC, Electrum Silver US II LLC

*Wendy Berman and Brittany Cerqua*, for the Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp., and CIBC World Markets Inc.

**HEARD:** January 4, 2024

**MOTION FOR LEAVE, CERTIFICATION, AND PARTIAL DISCONTINUANCE**

[1] The parties have reached a tentative partial settlement in this securities class action. In advance of the settlement approval motion, the Plaintiff seeks orders granting leave to proceed

against Tetra Tech, Inc. (“Tetra Tech”) under Part XXIII.1, section 138.8(1) of the *Securities Act*, RSO 1990, c S.5, as amended (“OSA”), granting leave to discontinue her common law negligence simpliciter and negligent misrepresentation claims against Tetra Tech, and certifying the action as a class proceeding against Tetra Tech under the *Class Proceedings Act, 1992*, SO 1992, c 6 (“CPA”).

[2] The Plaintiff commenced the action on February 9, 2022. She alleges that Gatos Silver, Inc. (“Gatos”), a reporting issuer, publicly disclosed that the mineral reserve statement for its sole producing mine was affected by error and, in the result, materially overstated. The Plaintiff alleges that she bought shares in Gatos before its disclosure about the overstated mineral reserve, under a prospectus issued in July 2021.

[3] Tetra Tech is a provider of consulting and engineering services that prepared the technical report in which the alleged overstated mineral reserve was presented. The Statement of Claim alleges that the overstated mineral reserve in the technical report was incorporated in Gatos’s offering and continuous disclosure documents released throughout the class period. The Plaintiff goes on to allege that statements Gatos made about the mineral reserve estimate in connection with its prospectus distributions and in its continuous disclosure filings were misrepresentations.

[4] Tetra Tech consented to Gatos’s use of the technical report, and certified that Gatos’s prospectuses fairly and accurately represented the technical report. The Claim sets out that these misrepresentations caused the Plaintiff and putative class members loss for which they are entitled to damages.

[5] The Plaintiff further alleges that two related expert defendants employed by Tetra Tech, the Defendants, Guillermo Dante Ramírez-Rodríguez and Kira Lyn Johnson, directly prepared and approved the mineral reserve statement, supervised its preparation, or had other substantive involvement in its preparation. The Statement of Claim asserts that Tetra Tech, together with Ramírez-Rodríguez and Johnson, are liable for damages for misrepresentation in the primary and secondary securities markets, under the OSA, and at common law.

[6] On December 19, 2023, the Plaintiff and Tetra Tech, Ramírez-Rodríguez, and Johnson entered into the Settlement Agreement that contemplates a two-stage settlement implementation process. The present motion is the first stage; in the second stage, on a further motion to be brought, orders will be sought from the Court for, among other things, approval of the settlement, and dismissal of the action against Tetra Tech, Ramírez-Rodríguez, and Johnson, without costs and with prejudice.

[7] Tetra Tech consents to leave being granted under Part XXIII.1, section 138.8(1) of the OSA and discontinuance of the common law claims on a without costs basis. It also consents to certification of the action under the CPA for the purposes of settling the OSA claims against it, as set out in the Settlement Agreement.

[8] The Plaintiff and class members acquired Gatos shares after one or more of the documents containing the misrepresentations were released and before the misrepresentations were publicly corrected. The record establishes that the Plaintiff asserts the right of action under Part XXIII.1 of

the OSA in good faith, and that there is a reasonable possibility that the claim against Tetra Tech under Part XXIII.1 will be resolved in the Plaintiff's favour.

[9] The class certified for the purpose of settlement is defined as:

All persons and entities (other than Excluded Persons), wherever they may reside or be domiciled, who:

- (i) purchased Gatos Silver securities under the Impugned Prospectuses and in the distributions to which they related; and
- (ii) acquired Gatos Silver securities during the Class Period on any Canadian exchange (including, without limitation, the Toronto Stock Exchange) or any Canadian alternative trading system.

For the purposes of this class definition:

“Class Period” means the period from October 28, 2020 until January 25, 2022 at 6:52 p.m. Eastern Standard Time.

“Electrum Defendants” means The Electrum Group LLC, Electrum Silver US LLC, and Electrum Silver US II LLC.

“Excluded Persons” means Gatos Silver, Stephen Orr, Roger Johnson, Philip Pyle, the Tetra Tech Defendants, the Electrum Defendants and the Underwriter Defendants; the respective past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of Gatos Silver, Tetra Tech, the Electrum Defendants, and the Underwriter Defendants; and the immediate family members of Stephen Orr, Roger Johnson, Philip Pyle, Guillermo Dante Ramirez-Rodriguez and Kira Lyn Johnson.

“Impugned Prospectuses” means Gatos Silver's Base Prep Prospectus dated October 27, 2020 and Supplemented Prep Prospectus dated October 27, 2020, and Gatos Silver's Short Form Base Shelf Prospectus dated July 12, 2021 and Prospectus Supplement dated July 15, 2021.

“Underwriter Defendants” means BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp., and CIBC World Markets Inc.

[10] On the basis of the record before me, I conclude that the criteria set forth in section 5(1) of the CPA are satisfied:

- (a) the Plaintiff's Fresh as Amended Statement of Claim discloses causes of action against Tetra Tech for misrepresentation under Part XXIII, section 130 of the OSA, and Part XXIII.1, section 138.3(1) of the OSA;
- (b) there exists an identifiable settlement class, as defined at paragraph 9 above;

(c) the claims of the class members as against Tetra Tech raise a common issue, namely, the issue set out at paragraph 8 of the draft Order, as follows:

Did the Impugned Documents contain misrepresentations within the meaning of the OSA?

(d) a class proceeding is the preferable procedure for resolution of that common issue;

(e) the proposed representative Plaintiff will fairly and adequately represent the interests of the Class. Plaintiff's counsel have produced a plan, in the form of the Settlement Agreement and ancillary documents, that sets out a workable method for the advancement of the Action on behalf of the putative class, including provision of notice to class members. Furthermore there is no indication that the representative Plaintiff has any interest in conflict with the interests of the other Class Members.

[11] The Plaintiff proposes that the Short-Form Notice and Long-Form Notice be disseminated in accordance with the Notice Plan (attached as Schedules "2" to "4" to the form of Order attached as Schedule "A" to the Plaintiff's Notice of Motion herein).

[12] The Short-Form Notice directs readers to the Long-Form Notice. The Long-Form Notice advises Class Members of:

(a) the existence of the Settlement Agreement with Tetra Tech, and its key terms;

(b) the certification of the Action as a class proceeding, solely for settlement purposes, and Class Members' right, deadline and way to opt-out of the action;

(c) the date for the hearing of the motion for approval of the settlement, subject to the date being fixed;

(d) their right to attend the hearing of the motion for approval of the settlement, and to object to the terms of the Settlement Agreement; and

(e) their right to object to Plaintiff's counsel's proposed fee request.

[13] The Plaintiff also seeks an order pursuant to section 29(1) of the CPA approving the discontinuance of this action on a without-costs and without-prejudice basis as against the Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp. and CIBC World Markets Inc. (the "Underwriter Defendants").

[14] The Underwriter Defendants are financial institutions which served as underwriters in connection with the two prospectus offerings of Gatos. The Plaintiff and the Underwriter Defendants have entered into a Standstill and Tolling Agreement dated June 7, 2023 ("Standstill Agreement"), providing for, among other things, the discontinuance of the proceeding as against the Underwriter Defendants, subject to Court approval.

[15] In accordance with the Standstill Agreement, the Underwriter Defendants have produced to the Plaintiff certain documents outlining the aggregated purchaser residency breakdown for purchasers of Gatos securities in the two prospectus offerings.

[16] The Standstill Agreement proposed here follows the pattern set out by Justice Perell in *Tucci v. Smart Technologies Inc.*, 2012 ONSC 2091, at para. 7:

Because of the Standstill Agreement, the proposed discontinuance would not appear to prejudice the interests of the proposed class. Future claims against the Underwriter Defendants are not precluded. The discontinuance will reduce ongoing litigation expenses and reduce the size of the potential adverse costs award. The Underwriter Defendants would have crossclaims against the remaining defendants for indemnification, and letting the Underwriter Defendants out of the action may increase the pool of insurance proceeds available to the class members, and it will focus the action against the vendors of the shares and their personal defendants and officers, who may be the source of the alleged misrepresentations.

[17] The Standstill Agreement tolls all limitation periods as at the date of execution. It also provides the Plaintiff with rights to re-assert claims against the Underwriter Defendants in defined circumstances.

[18] Accordingly, there will be no prejudice to the proposed class resulting from the discontinuance of the action as against the Underwriter Defendants.

### **Disposition**

[19] Leave to proceed under section 138.8 of the OSA is granted as against Tetra Tech.

[20] Certification under section 5(1) of the CPA is granted as against Tetra Tech. The class is defined as in paragraph 9 above and the common issue is as set out in paragraph 10(c) above.

[21] The proposed short and long form notices referenced in paragraph 11 above are hereby approved.

[22] Plaintiff's counsel is appointed as class counsel.

[23] The common law claims against Tetra Tech are dismissed.

[24] Discontinuance of the action as against the Underwriter Defendants is approved.

[25] A Second Fresh as Amended Statement of Claim may be issued to delete the Underwriter Defendants as parties to the action. Notice of the discontinuance of the action against the Underwriter Defendants under sections 19 and 29(2) of the CPA shall be given by Class Counsel by posting a copy of the Court's discontinuance Order on their case webpages.

[26] The Plaintiff shall have orders to go as submitted.

[27] The settlement approval motion for this partial settlement will be heard on April 15, 2024. The motion for leave under the OSA and certification under the CPI for the balance of the claim against the remaining Defendants (assuming that the Settlement Agreement is ultimately approved) will be heard on April 16-19, 2024.

A handwritten signature in blue ink, appearing to read "Morgan J.", is centered on a light blue rectangular background.

**Date: January 5, 2024**

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**Morgan J.**