Court dismisses securities class action in first-of-its-kind-decision

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In the Ontario Superior Court of Justice decision of *Wong v. Pretium Resources*, 2021 ONSC 54, Justice Belobaba dismissed the plaintiff's claim, finding that there had been no misrepresentation under the secondary market liability provisions of Part XXIII.I of the Ontario *Securities Act*. The merits decision is the first of its kind and serves as a reminder that even after succeeding on a motion for leave to proceed on a "reasonable possibility" standard, the "balance of probabilities" hurdle is more demanding and where the decision could be challenged.

What you need to know

The plaintiff, David Wong, brought a claim on behalf of himself and other similarly situated shareholders for losses allegedly sustained when they purchased shares in the defendant mining company, Pretium Resources Inc. (Pretium). The essence of the plaintiff's claim was that the share price of Pretium plummeted due to the company's failure to disclose the negative opinions of one of its mining consultants regarding the validity of mineral resources in the mine, amounting to an omission of a material fact. The plaintiff argued that this omission was actionable as a misrepresentation under Part XXIII.I of the Ontario *Securities Act* (OSA).

Pretium's position was that the defendant acted in the proper manner throughout the relevant time. The Pretium team decided there was no obligation to disclose the consultant's concerns because they were premature and unreliable, based only on sample data, and being unreliable, were not material. As it turned out, after more accurate and reliable mill testing, the validity of mineral resources was confirmed.

History of the case

In 2017, the plaintiff sought leave under s. 138.8 of OSA to commence an action under s. 138.3 of the OSA for secondary market misrepresentations. Justice Belobaba granted leave based on the "reasonable possibility" test, that is, that the plaintiff had established a reasonable possibility of success at trial.[1] The core of Justice Belobaba's conclusion was by any objective measure, reasonable investors would have considered it material

that two respected mining consultancies retained by Pretium fundamentally disagreed as to whether there were valid mineral resources in the mine at issue.

The action was subsequently certified on consent as a class proceeding.[2]

In December 2020, the parties brought cross-motions for summary judgment on the certified common issues. The two most important common issues were:

- whether Pretium released core documents between July 23 and October 9, 2013 that contained misrepresentations; and
- whether the defendants were relieved of liability under the reasonable investigation defence.

Pretium adduced additional evidence

Both parties along with Justice Belobaba agreed the certified common issues could be decided by way of summary judgment. The majority of the evidence was documentary in nature, and while there were affidavits and cross-examination transcripts, there were no credibility issues. Justice Belobaba found that there were no genuine issues requiring a trial.

In support of their motion, Pretium filed new affidavits from the individuals who were the senior Pretium executives at the relevant time as well as experienced geologists or geological engineers. The affiants restated and credibly expanded on what was said at the leave motion. This evidence was reinforced by additional evidence filed by three independent witnesses, who were involved in sampling the mines at issue.

The plaintiff led evidence from mining expert who was well credentialed, but who had no involvement in the relevant events. Justice Belobaba found that much of the evidence was less than compelling and should be given little weight.

Interestingly, the plaintiff did not provide an affidavit in support of the motion. The transcript from the plaintiff's examination revealed that he was not aware of any of the impugned documents containing the alleged misrepresentations; he did not rely on them and did not know he had a cause of action until he met with class counsel.

Summary judgment motions

The defendants' additional evidence on the summary judgment motion was sufficient to persuade the Court that the class action must be dismissed.

Justice Belobaba was obliged to consider all of the evidence using the "balance of probabilities" standard. His Honour found on a preponderance of the evidence that the consultant's "so-called concerns or opinions were not only unsolicited but inexpert, premature and unreliable."[3] Fundamentally, His Honour held: "[t]he key determinant is my finding on a balance of probabilities that there was no omission of any material fact – that the defendants were not obliged to disclose information that they reasonably and objectively believed was premature, unreliable and incorrect, indeed 'dead wrong'."[4]

In any event, the defendants had satisfied the "reasonable investigation" defence under s. 138.4(6) of the OSA, which provides that a person or company is not liable under s. 138.3 if that person or company shows:

- It conducted or caused to be conducted a reasonable investigation before the alleged misrepresentation was released; and
- At the time of the alleged misrepresentation's release, it had no reasonable grounds to believe that the document that was released to the public contained the misrepresentation.

The additional evidence introduced by the defendants confirmed that they had conducted a reasonable investigation into the reliability of the consultant's concerns, and added an important objective dimension to Pretium's subjective perspective of why the consultant's data was "inherently unreliable".

Key takeaways

Justice Belobaba's decision sets an important precedent as it highlights the gap between what is required for a plaintiff to obtain leave to proceed and actual success on the merits on a balance of probabilities. As Justice Belobaba said, the leave motion is merely a "speed bump, [and] is not the Matterhorn."

The Court's guidance on secondary market misrepresentations and what a court will consider to be a material fact when determining whether a misrepresentation has occurred is also a welcome addition to this area of law.

Finally, the decision serves as a stark reminder to class counsel that they should "put their best foot forward" on summary judgment motions, particularly when it comes to affidavit evidence. In this case, Justice Belobaba found that the plaintiff's evidence to be lacking and that actual evidence from the consultant's principals "may have resulted in a more balanced assessment of its expertise in mineral resource estimation… [h]owever, class counsel chose not to file such evidence and relied almost exclusively on one expert's report, whose contribution to the issues in play was of minimal value at best."[5]

[1] *Wong v Pretium Resources*, 2017 ONSC 3361.

[2] By order of the court dated January 23, 2019.

[3] *Wong v. Pretium Resources*, 2021 ONSC 54 at para. 23.

[4] *Ibid* at para. 5.

[5] *Ibid* at para. 84.

By

Veronica Sjolin

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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