

Don't Leave It at Leave: Ontario Superior Court Weighs in on the Evidentiary Threshold for Leave and the Merits of Secondary Market Misrepresentation Claims

Lara Jackson, Christopher Horkins

March 25, 2021

In the much-anticipated decision in *Wong v Pretium Resources Inc.*, the Ontario Superior Court of Justice has weighed in for the first time on the merits of a class proceeding under the secondary market liability provisions of Part XXIII.1 of the Ontario *Securities Act* (OSA), demonstrating the difficulty plaintiffs may have in actually proving such claims after clearing the hurdle of being granted leave to proceed.¹ The Court dismissed the plaintiff's secondary market misrepresentation claim against Canadian mining company Pretium Resources Inc. (Pretium) on a motion for summary judgment after the same motion judge had previously granted leave to the plaintiff to proceed with the claim.

The decision in *Pretium* highlights the interplay and delta between the "reasonable possibility" standard applicable on the test for leave under section 138.8 of the OSA, and the more stringent "balance of probabilities" standard applicable to the ultimate adjudication of an action on the merits. It further provides much-needed guidance to litigants involved in class proceedings alleging secondary market misrepresentations under the OSA, as they decide whether to explore settlement after leave has been granted or continue defending the claim on the merits.

The Motion for Leave

The Court granted the plaintiff leave to proceed with an action for secondary market misrepresentation by omission against Pretium, for failing to disclose concerns raised by one of its external consultants regarding negative mineral sampling results at its Brucejack gold mining project located in north-western British Columbia. Pretium had retained Snowden Mining Industry Consultants (Snowden) to review the initial results of Pretium's mineral exploration program and to conduct a mineral resource estimate for the project. To confirm the accuracy of the mineral resource estimate, and given the unique mineralization in the Valley of the Kings section of the Brucejack project, Snowden recommended that Pretium conduct tests on a bulk sample of the site. Pretium retained Strathcona Mineral Services (Strathcona) to oversee the excavation of the sample and report on the test results. The bulk sample results would then be reviewed by Snowden, which would interpret the results and, if necessary, adjust the resource estimate.

Following the excavation and sampling process, Strathcona provided Pretium with an unfavorable and

Cassels

unsolicited opinion regarding the mineral resource estimates at Brucejack and urged immediate public disclosure to indicate that the mineral resource estimate was “materially inaccurate” and “unreliable.” Pretium concluded that Strathcona’s results were premature and not determinative, given the small sample size and potential for a high degree of variability. Pretium therefore concluded that Strathcona’s concerns were not material and no public disclosures were made.

Strathcona subsequently resigned from the project in protest. Pretium announced the resignation in a press release on October 9, 2013, and issued a further press release on October 22, 2013, summarizing the reasons for Strathcona’s resignation and affirming its own view that Strathcona’s concerns were unfounded. Over this 13-day period, the price of Pretium’s shares dropped by more than 50%.

The plaintiff, a Pretium shareholder, sought leave to commence a class action for secondary market misrepresentation under section 138.8 of the OSA, claiming that Pretium’s failure to disclose Strathcona’s concerns regarding the results of the bulk sample at the time they were discovered amounted to a material misrepresentation by omission. Pretium maintained that it was under no obligation to disclose Strathcona’s concerns, as Pretium had considered them internally, together with its consultant Snowden, and concluded that they were premature and unreliable. Pretium was ultimately correct in their evaluation of Strathcona’s opinion, as following an assessment of the entire bulk sample, the mill results confirmed the validity of the mineral resource estimate “with room to spare” and Pretium’s share price increased accordingly.

The Court granted leave to the plaintiff, finding that there was a reasonable possibility that the plaintiff would succeed at trial, reasoning that Pretium’s conclusion that Strathcona’s concerns were unreliable did not preclude the possibility of a trial court determining that they were a material fact that required disclosure. The Court further applied the “reasonable investor test,” concluding that a reasonable investor would have considered it material that two respected mining consultancies retained by Pretium had a fundamental disagreement as to whether the mineral resource estimate was valid, a question that “went to the heart of Pretium’s entire business model.”

The action was subsequently certified as a class proceeding on consent, and Pretium moved for summary judgment seeking to dismiss the claim.

Decision on The Merits

On summary judgment, the Court granted Pretium’s motion and dismissed the plaintiff’s claim, concluding that the evidence presented on the motion demonstrated that Strathcona’s concerns were not only unsolicited but “inexpert, premature and unreliable.” The Court found that objectively unreliable or erroneous opinions were not material facts requiring disclosure and that Pretium had acted properly in deciding to withhold disclosure. Given that Pretium was under no obligation to disclose bad and misleading information, there was no omission of material fact and, as such, no actionable misrepresentation pursuant

Cassels

to Part XXIII.1 of the OSA. To support this finding, the Court relied on the British Columbia Court of Appeal's reasoning in *Inmet Mining Corp. v Homestake Canada Inc.*, where the Court held that reliability was a necessary precondition to materiality.²

The Court further accepted Pretium's "reasonable investigation defence" under section 138.4(6) of the OSA, finding that Pretium had conducted a reasonable investigation into the reliability of Strathcona's concerns. In granting leave, the Court had found that although Pretium had a subjective belief that Strathcona's concerns were unfounded, this belief may not have been objectively reasonable. In considering the claim on the merits, the Court concluded that the additional evidence presented on the summary judgment motion added an "objective dimension" to Pretium's "subjective perspective" as to why Strathcona's conclusions were inherently unreliable, therefore meeting the second branch of the reasonable investigation defence.

Given these findings, the Court declined to consider the additional statutory defences raised by Pretium, including that Pretium reasonably relied on Snowden as an appropriately qualified expert under section 138.4(11) of the OSA, and that Pretium properly disclosed and disclaimed forward-looking information under 138.4(9) of the OSA.

Looking Ahead

Pretium provides much needed guidance regarding how courts will approach secondary market misrepresentation claims on the merits, especially as compared to on motions for leave to proceed under section 138.8 of the OSA. It also demonstrates that obtaining leave to proceed does not guarantee that a plaintiff will meet the more stringent evidentiary standard applicable at a hearing on the merits. *Pretium* further confirms that reliability of information is a necessary precondition to materiality, a key consideration for issuers moving forward as they consider their disclosure obligations.

Given the Court's decision in *Pretium*, plaintiffs may now be hesitant to take their claims to the merits stage for fear of having them dismissed at trial or summary judgment. The confirmation of the low threshold for leave and more difficult standard for proving secondary market misrepresentation claims on the merits may incentivize more defendants to seek the dismissal of such claims on the merits.

¹ 2021 ONSC 54, <<https://canlii.ca/t/jcxkw>> (*Pretium*).

² 2003 BCCA 610, <<https://canlii.ca/t/25t>>.