

ON SECOND THOUGHT: ONTARIO COURT DISMISSES SECONDARY MARKET SECURITIES CLASS ACTION ON SUMMARY JUDGMENT

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Part XXIII.1 of Ontario's *Securities Act* (the "**Act**") creates a statutory cause of action for investors who suffer losses in the secondary market in connection with misrepresentations or omissions by a company, its management or certain other actors. This liability regime is designed to accommodate class actions for secondary market losses. Plaintiffs must obtain leave from the Court in order to bring such an action under the Act. The evidentiary threshold at the leave motion is low. Ontario courts have cautioned in the past that motion judges do not need to resolve significant credibility issues at the leave motion stage or engage in a mini-trial process where evidence is contentious. The recent decision in *Wong v Pretium Resources Inc.* [1] illustrates the differences between the evidentiary thresholds and legal tests that apply to leave and summary judgment motions, respectively, in secondary market securities class actions.

In *Wong*, the plaintiff brought a claim for misrepresentation under Part XXIII.1 of the Act. Justice Belobaba initially granted leave for the action to proceed. The action was later certified to proceed as a class action under Ontario's *Class Proceedings Act*. However, on a recent summary judgment motion, Justice Belobaba dismissed the plaintiff's claim on the basis that there had been no misrepresentation. In the alternative, he held that the defendant could rely on a 'reasonable investigation' defence provided for in the Act.

The Facts

The plaintiff in *Wong* alleged that Pretium Resources Inc. ("**Pretium**"), a mineral exploration company listed on the TSX, and Pretium's former CEO failed to disclose concerns raised in 2013 by one of its mining consultants, Strathcona Mineral Services Ltd. ("**Strathcona**"), regarding the validity of a resource estimate prepared by another consultant, Snowden Mining Industry Consultants Pty Ltd. ("**Snowden**"). Pretium reviewed Strathcona's concerns with its internal technical team as well as with Snowden. Pretium's board concluded that Strathcona's opinions were premature and unreliable and that it would be misleading to disclose them to the public. A few months later, Strathcona resigned from its engagement with Pretium. Shortly thereafter, Pretium publicly disclosed that the reason for Strathcona's resignation was Pretium's refusal to renounce

Snowden's resource estimates, which Strathcona believed to overestimate the amount of gold in the area of Pretium's prospective mine. The plaintiff alleged that Pretium's stock value fell as a result of this disclosure, which constituted a corrective disclosure of a material misrepresentation that gave rise to liability for investor losses. He claimed against Pretium for common law misrepresentation and statutory misrepresentation under Part XXIII.1 of the Act.

Pretium's bulk sample program ultimately validated Snowden's resource estimate. Since that time, Pretium's stock has more than doubled in value. The question before the Court in *Wong* was whether investors could recover damages for the temporary decline in Pretium's stock price that followed the disclosure of Strathcona's reasons for resigning.

Leave Motion

In 2017, Justice Belobaba granted the plaintiff leave to bring a secondary market misrepresentation action, concluding that there was a reasonable possibility he would prevail at trial. In his leave decision, Justice Belobaba accepted that Pretium believed Strathcona's concerns were unreliable, but held that "by any objective measure, reasonable investors would have considered it material that two respected mining consultancies retained by Pretium – Snowden and Strathcona – fundamentally disagreed"^[2] about the potential size of Pretium's gold deposit. Citing the low evidentiary threshold that applies on a leave motion, he found that there "exists a *reasonable possibility* that the plaintiff's submission – that Strathcona's concerns were material and should have been disclosed – will succeed at trial".^[3]

The Divisional Court refused leave to appeal the decision and the action was subsequently certified as a class proceeding on consent.

Summary Judgment Motion

Following document production, Pretium moved for summary judgment. The plaintiff responded with a cross-motion for summary judgment in his favour. The motions proceeded in December of 2020 before Justice Belobaba, who found that summary judgment was appropriate. Almost all the relevant evidence was documentary in nature, and there were no credibility issues, so there was no genuine issue requiring trial.

Justice Belobaba began by explaining that, while he granted leave on the basis of the "reasonable possibility" test, he was now obliged to consider all of the evidence on the "balance of probabilities" standard.^[4] With the benefit of additional evidence (including affidavits from Pretium's senior executives at the relevant time and three of Snowden's experts who were involved in the resource estimate), he concluded that there was no material misrepresentation. Moreover, he held that the 'reasonable investigation' defence provided under section 138.4(6) of the Act would apply in the alternative to relieve the company of liability.

No Omission of Any Material Fact

Justice Belobaba held that Pretium was under no obligation to disclose Strathcona's concerns. He found that the concerns were "inexpert, premature and unreliable" opinions that did not constitute material facts and would have been misleading to investors.^[5] In these circumstances, he found it proper for Pretium's board to withhold Strathcona's concerns and to advise in its public disclosures that the results of the bulk sample program would be disclosed once the entire sample was assessed.

Reasonable Investigation Defence

Even if Strathcona's concerns could be considered sufficiently reliable to require disclosure, Justice Belobaba was satisfied that Pretium could rely on a statutory defence to secondary securities market liability under the Act. Section 138.4(6) of the Act provides that an individual or company is not liable for a misrepresentation under section 138.3 of the Act if they (i) conducted or caused to be conducted a reasonable investigation before the document containing the misrepresentation was released, and (ii) at the time of the document's release, had no reasonable grounds to believe that the document contained the misrepresentation.^[6]

Justice Belobaba had previously found in the leave decision that "Pretium took Strathcona's concerns seriously and discussed them both internally and with Snowden",^[7] which satisfied the first part of the reasonable investigation defence. However, he granted leave for the action to proceed because he believed there was a reasonable possibility that Pretium had grounds to believe Strathcona's concern constituted "a material fact that a reasonable investor would find important and would reasonably want to know."^[8]

Justice Belobaba ultimately confirmed in his summary judgment decision that the reasonable investigation defence applied based on the additional evidence adduced on the summary judgment motions, particularly the objective evidence of Snowden's experts who were involved in the resource estimation.^[9]

Conclusion

Wong illustrates the different considerations involved in motions for leave to bring secondary market actions and the ultimate determination of a case's merits on a summary judgment motion, and their potentially differing results. In his leave decision, Justice Belobaba gave a strong indication that Pretium's withholding of the relevant information could be found to be objectively unreasonable. He reassessed these statements in the summary judgment decision, explaining that the fuller body of evidence before him gave objective support to Pretium's decision not to disclose Strathcona's concerns as they arose.

[1] 2021 ONSC 54.^[ps2id id='1' target='']

[2] *Wong v. Pretium Resources Inc.*, 2017 ONSC 3361 at para 37.^[ps2id id='2' target='']

[3] *Wong v. Pretium Resources Inc.*, 2017 ONSC 3361 at para 40 [emphasis added].^[ps2id id='3' target='']

[4] *Wong v. Pretium Resources Inc.*, 2021 ONSC 54 at paras 3, 23.[ps2id id='4' target='']

[5] *Wong v. Pretium Resources Inc.*, 2021 ONSC 54 at paras 14-15, 23-24, 59, 67.[ps2id id='5' target='']

[6] *Wong v. Pretium Resources Inc.*, 2021 ONSC 54 at para 70; *Ontario Securities Act*, RSO 1990, c S.5, s.138.4(6).[ps2id id='6' target='']

[7] *Wong v. Pretium Resources Inc.*, 2017 ONSC 3361 at para 44.[ps2id id='7' target='']

[8] *Wong v. Pretium Resources Inc.*, 2017 ONSC 3361 at para 45.[ps2id id='8' target='']

[9] *Wong v. Pretium Resources Inc.*, 2021 ONSC 54 at para 74.[ps2id id='9' target='']

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A Cautionary Note

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